



How the Latin Phrase Nec Vi, Nec Clam, Nec Precario Affected a Recent Property Dispute Case

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In essence, the phrase nec vi, nec clam, nec precario translates to “without force, without secrecy, and without permission”. According to the Prescription Act, a person can become the owner of property through prescription if they have possessed it openly as the owner for an uninterrupted period of 30 years, or for a period that, when combined with the possession periods of their predecessors in title, totals 30 uninterrupted years.

In a recent court case in the Western Cape, the City of Cape Town, serving as the respondent in the appeal proceedings, was the registered owner of a farm near Melkbosstrand. The property in question is known as Baas Ariesfontein Outspan. The Crown Grant by which the property was transferred to the predecessor in title of the City provided that the property shall not be used otherwise than for purposes of an outspan. The property was, however, occupied by the appellants, who conducted farming operations on the property. Relying on the rei vindication, the City launched proceedings in the Western Cape Division of the High Court for the eviction of the appellants from the property.

The appellants contended that the fifth appellant had acquired ownership of the property by way of acquisitive prescription in terms of s 2 of the Prescription Act 18 of 1943 and counterclaimed for a declaratory order to that effect. The High Court found that the appellants did not prove the acquisition of the property by prescription. It consequently dismissed the counterclaim and granted the eviction order sought by the City. The appellants appealed to the Supreme Court of Appeal (SCA).

In order to show that such possession resulted in the fifth appellant acquiring the ownership of the property, they had to bring their case within the requirements of s 2 of the 1943 Act. That section provided: ‘Acquisitive prescription is the acquisition of ownership by the possession of another person’s movable or immovable property or the use of a servitude in respect of immovable property, continuously for thirty years nec vi, nec clam, nec precario. As soon as the period of thirty years has elapsed such possessor or user shall ipso jure become the owner of the property or the servitude as the case may be.’

The continuous possession required by this section is the common law civilis possessio, that is, the

physical detention of the thing (corpus) with the intention of an owner (animus domini). In addition that possession must be nec vi, nec clam, nec precario. Nec vi means peaceably. Nec precario postulates the absence of a grant at the request of the possessor. Nec clam means openly, particularly 'so patent that the owner, with the exercise of reasonable care, would have observed it'. To establish a prescriptive title, the occupation must be adverse to the true owner, meaning it cannot arise from any contractual or legal relationship that acknowledges another's ownership, such as a lease or usufruct. The burden of proof falls on the party claiming acquisitive prescription. Furthermore, the required continuous possession period can include the time during which the property was held by that party's predecessors in title.

Having been designated as a public outspan, the property was subject to what is known as public servitude. Public servitudes are created for the benefit of the public. A public servitude allows the public to use the land in a specified manner without the permission of the landowner.

By a lack of evidence, the SCA dismissed the appeal with costs. It confirmed the order of the High Court on the basis that the appellants did not show the requirement of possession of the property with the intention of an owner for a continuous period of 30 years.

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