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# Real Estate Law ALERT

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**Acquisitive prescription of property: Is it still applicable in cases where there has been illegality?**

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## Acquisitive prescription of property: Is it still applicable in cases where there has been illegality?

Dhanwanthie Gianchandi (the possessor), along with her late husband, purchased a house three houses away from the property in April 1990. The property was undeveloped and deserted and the possessor and her family made improvements to the property, transforming it into a functional nursery and community park. The possessor had been running the nursery and park at her own cost since 1990. At the time the possessor's application was brought, the improvements made to the property amounted to approximately R950,000 and the possessor also absorbed the park's running costs of R16,000 per month.

The possessor alleged that at the time that her application was brought, she had been in occupation of the property for a period of 31 years. She further asserted that she had exercised her possession openly and that she had possessed the property with the intention of possessing it and controlling it as if she was the owner.

Various neighbours of the possessor confirmed, by way of confirmatory affidavits, that she had been using and occupying the property openly. One of the neighbours confirmed that he had been residing in the area for longer than 31 years and that the possessor had been using the property as a nursery and a park for 31 years.

The respondents argued that the possessor had not been on the property for 30 years as she had failed to provide proof in her affidavit that evidenced the possession. The possessor's ownership was further disputed due to her illegal connection of electricity and water and the lack of applications for


legal water and lights connection. The respondents also argued that the property was used illegally as it was zoned for public open space and that the possessor did not make an application to the municipality to use the property as a nursery.

### Legal requirements for acquisitive prescription

In reaching its decision, the court considered the legal requirements to be met for a claim of acquisitive prescription to be granted.

Section 1 of the Prescription Act 68 of 1969 (Act) provides that:

*"Subject to the provisions of this Chapter and of Chapter IV, a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for an uninterrupted period of 30 years or for a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of 30 years."*



The graphic features a gold diagonal stripe across a light blue background. At the top left, it reads 'The LEGAL 500 EMEA'. Below this, the text 'Real Estate 2023 Rankings' is displayed in a bold, dark font. Underneath, it states 'Real Estate Law Practice is ranked in Tier 1.' followed by 'Leading Individuals: John Webber' and 'Recommended Lawyers: Simóne Franks | Fatima Gattoo | Muhammad Gattoo | Samantha Kelly'.

## Acquisitive prescription of property: Is it still applicable in cases where there has been illegality?

CONTINUED

A party claiming acquisitive prescription of an object must prove:

- civil possession (meaning that they possess the object with the intention to possess and control it as an owner);
- possession for an uninterrupted period of 30 years;
- that possession was exercised openly; and
- that they were the adverse user.

Section 4(1) of the Act further provides that the running of acquisitive prescription is interrupted by the service on the possessor of any process whereby any person claims ownership of the property in question.

Importantly, the court had to consider whether the requirement that the property be “*possessed openly and as if he were the owner thereof*” was met, as required by section 1 of the Act.

### Findings

The court held that the illegality of the water and electricity usage, the failure to apply for the requisite zoning, as well as the use of the nursery without the requisite authority could be separated from the issue of possession. The court reasoned that this was appropriate in relation to prescription matters.

Lastly, the court considered the extent of the possession due to the fact that the possessor only utilised certain parts of the property. The court applied the test of whether “*there was such use of a part or parts of the ground as amounts, for practical purposes, to possession of the whole*”.

The court applied the reasoning from *Markets Transport, in Morgenster 1711 (Pty) Ltd v De Kock NO and Others* [2012] JOL 28477 (WCC) in which

the court observed that “*the acts of use constituting the open possession need not have been exercised in relation to every part of the disputed area or with absolute continuity*”. In the current circumstances, the court was satisfied that even though the possessor used certain portions of the property infrequently, that fact did not detract from her open possession.

The court ultimately held that the possessor was the rightful owner of the property through acquisitive prescription, and it was ordered that the property be transferred into her name.

It should be noted that the courts were not condoning the illegal acts of the possessor, nor will they do so future.

[Mike Collins](#)

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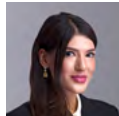
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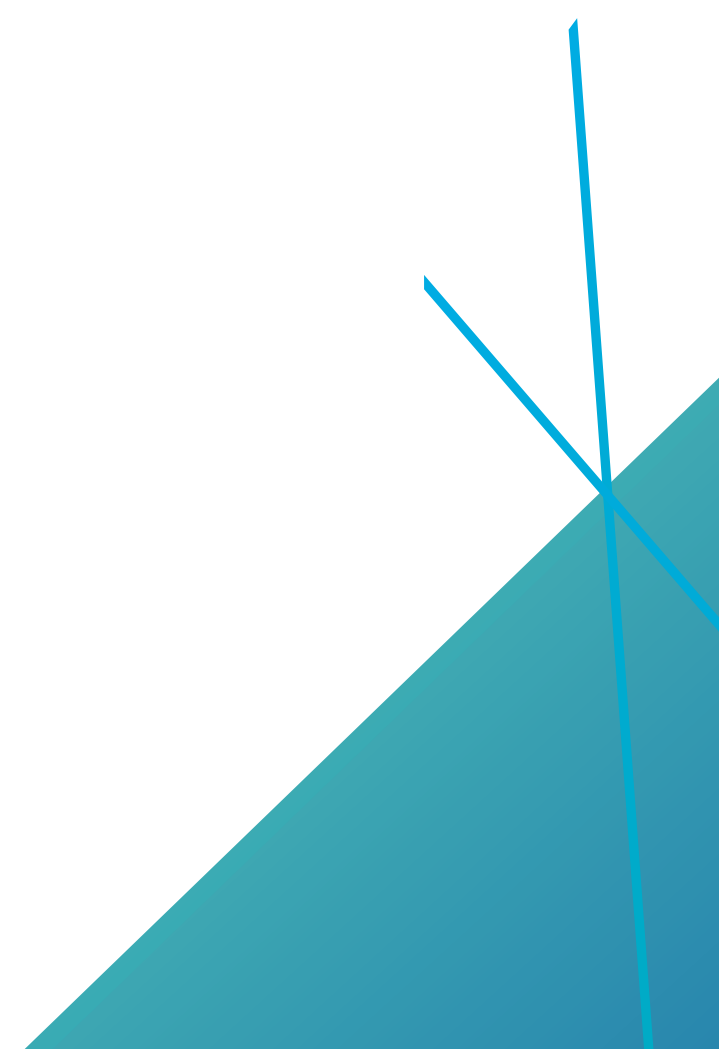
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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