

The Element of Possession in Acquisitive Prescription

By **Robert January** (Senior Associate),
and **Aleksandra Marek** (Candidate Attorney)

11 February 2026

WHAT IS ACQUISITIVE PRESCRIPTION?

In terms of section 1 of the Prescription Act 68 of 1969, acquisitive prescription allows for an individual who is openly in possession of movable or immovable property as its owner, for an uninterrupted period of 30 years or more, to be deemed to be the owner, irrespective of whether they were the original owner.

CASE LAW

The *Takis v Taylor and Others 2025 (5) SA 308 (WCC)* case involved the issue of acquisitive prescription over immovable property. The property in dispute was a cottage straddling on both Erven 222 and 223, in which 42 square meters was situated on Erf 223 and 17 square meters was situated on Erf 222. The First Respondent ("**David**") was in occupation of the cottage. The Respondents attempted to advertise the sale of the cottage. The Applicant, as the owner of Erf 223, in turn brought an urgent application to prohibit the sale pending the determination of ownership of the cottage.

THE BACKGROUND

David was previously permitted to occupy the cottage by his brother, being the former owner of Erf 222 ("**Frank**"), and the former owner of Erf 223 ("**Louw**"). They allowed him to make improvements to the cottage and to use it at his own pleasure. Upon Frank's death, he bequeathed Erf 222 in equal one-third shares and interest to David, the Second Respondent and the Third Respondent. No mention was made to the cottage in Frank's will. David claimed that although there was no formal agreement or lease in place between the parties, he and his family had exercised possession of the cottage openly for a period exceeding the required 30 years for acquisitive prescription, with the full knowledge of and with no objection from Louw.

In support of his contention, David raised that (i) he had repaired and renovated the cottage at his own expense; (ii) the cottage was utilised by him; and (iii) he was a partial owner of the cottage based on Frank's bequest of Erf 222.

David sought an order declaring the cottage as forming part of Erf 222 with the Respondents being its true owners. The Applicant argued that upon purchasing Erf 223, it was inclusive of the cottage, to the extent of 45 square meters, which formed part of his property.

THE JUDGMENT

The Court emphasised that civil possession, which is required for acquisitive prescription, requires both the mental element of possessing and actual physical control over the property.

In determining the physical element of possession, the Court determined that David had: (i) occupied the cottage fully for an extended portion of time; (ii) effected large-scale renovations and repairs over the years; and (iii) placed locks on the cottage doors, which provided him with exclusive access to the cottage.

The Court held that David had satisfied the element of physical control, which he had exercised consistently over the cottage until Frank's death and which continued thereafter, including when the Applicant purchased Erf 223.

The Court encountered difficulty in determining whether David had the intention to possess the cottage as the owner, in other words whether there was the mental element of possession.

The Court considered it common cause that David was not the owner of the cottage (specifically the portion positioned on Erf 223) as he had previously sought permission from Louw to use and make improvements to it. The Court held that this supported the Applicant's argument that David never viewed himself as the owner and only ever acted after receiving approval from Louw.

On this basis, the Court held that there was no justification to support the mental element of possession. David had possessed the property only after having sought the necessary permissions from Louw, as the true owner. Therefore, the Court ruled that David did not have civil possession required for acquisitive prescription.

CONCLUSION

In order for acquisitive prescription to apply, the individual must fully satisfy the mental and physical elements of possession. This requires an individual being physically in possession of the thing or property openly as owner, as well as mentally holding such possession as if they are the owner. Failure to establish both elements of possession may lead to a claim of acquisitive prescription failing.



Robert January
(Senior Associate)



Aleksandra Malek
(Candidate Attorney)