

SOUTH AFRICA / JUDGMENT

Botha and Others v Scholtz and Another; In re: Botha and Others v Member of the executive Council: Local Government and Housing Free State Province and Others (3424/2016, R182/2007) [2017] ZAFSHC 51 (9 March 2017) [2017] ZAFSHC 51

COURT

Free State High Court, Bloemfontein

BEFORE

P.E. Molitssoane

CASE / FILE NUMBER

3424/2016, R182/2007

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION,

BLOEMFONTEIN

APPLICATION

NO: 3424/2016

In

the application between:

JOSEPH
FRANCOIS BOTHA
1st
Applicant
JAN
JOHANNES LUBBE
2nd Applicant
ADRIANA
CATHARINA PAUW
3rd Applicant
ANDREW
GEORGE MURRAY
4th
Applicant
HENNING
STABELBERG 5th
Applicant

ANNA
JACOBA CECILIA
BOBBERT 6th
Applicant
ANNALIEN
DIEDERICKS 7th
Applicant
BART
JOHANNES STEPHANUS
DIEDERICKS
8th Applicant
MARRIGJE
MARIANA
KOORTS
9th Applicant
RULHOF
(FIEF) VAN DER
MERWE 10th
Applicant
MATTHEUS
GERHARDUS
LOTTER 11th
Applicant
IZAK
JOHANNES JANSE VAN
VUUREN
12th Applicant
MICHAEL
NICOLUS GEORGIOU
N.O
13th Applicant
JOSEPH
REYNOLDS CHEMALLY
N.O 14th
Applicant
STAMATIOS
TSANGARAKIS
N.O 15th
Applicant
(In
their respective capacities as duly authorised
Trustees
of the Michael Family Trust)
and
ANDREW
GEORGE
SCHOLTZ
First Respondent
TAXING
MATTER, FREE STATE DIVISION OF
THE

HIGH COURT OF SOUTH AFRICA,
BLOEMFONTEIN
Second Respondent
In

re: Application
Number: R182/2007
In

the matter between: JOSEPH
FRANCOIS
BOTH A
1st Applicant
JAN
JOHANNES LUBBE
2nd
Applicant
ADRIANA
CATHARINA
PAUW 3rd
Applicant
ANDREW
GEORGE MURRAY
4th
Applicant
ANNA
JACOBA CECILIA
BOBBERT
6th Applicant
ANNAUEN
DIEDERICKS 7th
Applicant
BART
JOHANNES STEPHANUS
DIEDERICKS 8th
Applicant
MARRIGJE
MARIANA
KOORTS
9th Applicant
RULHOF
(FIEF) VAN DER
MERWE 10th
Applicant
MATTHEUS
GERHARDUS LOTTER
11th
Applicant
IZAK
JOHANNES JANSE VAN VUUREN
12th Applicant
MICHAEL

	NICOLAS GEORGIO N.O 13th Applicant JOSEPH REYNOLDS CHEMALLY N.O 14th Applicant STAMATIOS TSANGARAKI S N.O 15th Applicant THE
MEMBER OF THE EXECUTIVE COUNCIL:	LOCAL GOVERNMENT AND HOUSING FREE STATE PROVINCE 1st Respondent THE CHAIRMAN OF THE TOWNSHIP BOARD FREE STATE PROVINCE 2nd Respondent THE
TOWNSHIP BOARD:	CONSULTANTS 3rd Respondent CEBO ENVIRONMENTAL CONSULTANTS CC 4th Respondent ANDREW GEORGE SCHOLTZ 5th Respondent ANDREW GEORGE SCHOLTZ N.O 6th Respondent (In his capacities as duly authorized Trustees of the Jo-Ann Trust) MANGAUNG LOCAL MUNICIPALITY 7th Respondent

JUDGMENT

BY: MOLITSOANE, AJ

HEARD ON:

8 DECEMBER 2016

DELIVERED ON: 9 MARCH 2017

[1] This is an application in which the applicants seek a declaratory order that the first respondent's right to quantify and recover the costs pursuant to the cost order granted in his favour in civil case number R182/2007 of this court by means of presentation of a bill of costs for taxation and the taxation thereof has superannuated, alternatively, has prescribed.

[2] In brief, the background facts to this case are as follows:

The applicants, as listed in the above heading, brought an application under case cover number R182/2007 to have a decision of the Township Board, to grant leave to developers to develop the Preller Walk, in Preller Plain, Dan Pienaar, Bloemfontein reviewed and set aside.

[3] The Applicants' review application was eventually dismissed with costs on the 20th August 2009.

[4] It would appear that an application for leave to appeal was initially filed against the dismissal of the review application, but was abandoned.

[5] About 3 years and three months later a bill of costs was presented for taxation on the 15th November 2012. The bill of costs was objected to and it was removed from the roll. A further 3 months later during February 2013, the same bill of costs was served on the applicants' attorney. This bill was again objected to and was again removed from the roll.

[6] During 2015 a bill of costs was again presented for taxation but same was objected to after which it was again removed from the roll.

[7] On the 30th March 2016, a new date was allocated for the taxation of the bill of costs which objected to again on the basis that the right to quantify the costs and tax the same by the respondent had superannuated, alternatively had prescribed. This objection is the basis for these proceedings.

[8] In argument before me counsel for the Applicants argued that a litigant does not and cannot enjoy an unlimited period to quantify

and recover their costs. The argument was that an untenable situation would arise, if the applicants were kept in suspense indefinitely

before costs were taxed.

- [9] On the other hand, it was argued on behalf of the first respondent that the rule dealing with superannuation scrapped and the applicants could not aver that the costs order had superannuated.
- [10] The crisp question for determination is whether the first respondent's right to quantity and recover his costs and to present a bill of costs for taxation was superannuated, alternatively, had prescribed, in view of the fact that the bill of the costs granted on the 20th August 2009 was only presented for taxation on the 30th March 2016, more than six years after the order was granted.
- [11] The question of superannuation was previously governed by the Uniform Rule 66 of this court which was couched differently from the present rule bearing the same number. In terms of the said rule before it was amended, the executability of a judgment debt lapsed after a certain period with the result that once a judgment debt was superannuated, execution thereon could not be carried out unless the judgment was first revived.
- [12] In *Segal and Another v Segil* 1992 (3) SA 136(CPD) Howie J, on rationale explaining the rationale for superannuation said:

"The ratio for the superannuation rule was explained thus by Van Zyl: *The Judicial Practice of South Africa* 2nd ed. (1902) at 308:

"The object in requiring a revival of the sentence is to prevent a judgment debtor being taken by surprise by the plaintiff suddenly enforcing execution. The rule was thus introduced for the benefit of a debtor, who, however, may either directly, or by his conduct, waive it!....."

- [13] The full bench in the case of *Segal and Another v Segil* (supra) questioned the reason for the existence of Rule 66 as it then was and the Rules Board has since seen it fit to amend it. Rule 66 has since been substituted by Notice R214 of 28 March 2014 and it currently provides thus:

"Duration of Writs of Execution. Writs of Execution of a judgment once issued remain in force, and may, subject to the provisions of subparagraph (ii) of paragraph (a) of section 11 of the Prescription Act, 1969 at any time be executed without being renewed until judgment has been satisfied in full"

- [14] Rule 66 as it currently stands has done away with the aspect of superannuation. On the other hand section 11(a) (ii) of the Prescription Act 68 of 1969 provides that the period of prescription of any judgment debt shall be 30 years. Further section 12(1) of the Act provides that "subject to the provisions of subsections (2) and (3), prescription shall 'commence to run as soon as the debt is due."
- [15] The court in the *Master v I L Back and Co Ltd and Others* 1983 (1) 986 at 1004 said the following when it commented on the words "debt is due" in section 12 (1) of the Act,

"The word 'debt is due' in the section must be given their ordinary meaning. It seems clear that this means that there must be a liquidated money obligation presently claimable by the creditor for which an action could presently be brought against the debtor, stated another way, the debt must be one in respect of which the debtor is under an obligation to pay immediately."

[16 In the case of *List v Jungers* 1979 (3) SA 106 (A) the court further said that "the date on which the debt arises usually coincides with the date on which it becomes due, but that is not always the case. The difference relates to the coming into existence of the debt on the one hand and the recoverability thereof on the other hand."

[16] Relying on the decision in *Santam v Ethwar* 1999(2) SA 244 SCA it was argued on behalf of the applicants that litigants do not enjoy an "unlimited period to quantify their costs". Admittedly the rationale to quantify and tax the bill of costs was explained as follows in *Uitenhage Municipality V Molloy*

[1997] ZASCA 112; 1998 (2) SA 735 T

742 H-1:

"One of the main purposes of the Prescription Act is to protect a debtor from old claims against which it cannot effectively defend itself because of loss of records or witnesses caused by the lapse of time. If creditors are allowed by their deliberate or negligent acts to delay the pursuit of their claims without incurring the consequences of prescription, that purpose would be subverted."

[17] This case should, however, be distinguished from the case of *Santam v Ethwar* (supra). In that case plaintiff (respondent on appeal) had instituted an action for compensation. Defendant made an offer to the plaintiff in terms of rule 34 for payment of damages and also agreed to pay the costs of the plaintiff as agreed or taxed. The offer was accepted by the plaintiff and payment of the offered damages was made subsequently. The plaintiff, however, did not tax his costs within three years and when he presented his bill of costs after three years, an objection was raised on the basis that the plaintiff's claim for costs had prescribed. The court held that the issue depended on whether the debt was due on the day of the settlement. As there was no agreement or taxation on costs which was what the parties intended should occur to render them payable, the court held that prescription could not have commenced to run. In that case, that settlement was never made an order of the court as the plaintiff, subsequent to the objection to tax the bill of costs, applied for default judgment in terms of Rule 31(5), which judgment was granted and a warrant of execution issued, although it was later on stayed. Contrary to that case where the offer and acceptance were not made an order of the court, in the instant case the first respondent was granted costs by the court.

[18] In terms of section 11(a)(ii) of the Act where judgment has been granted for costs, a claim for such costs would only prescribe after thirty years. - See *Jordaan and Co td v Bulsara* 1992 (4) SA 457 (E) at 460. It should be noted that when the rule dealing with superannuation was

still in existence its effect was only to force the creditor to revive the judgment after every three years when he wanted to execute on it until the thirty year period envisaged in section 11(a)(ii) of the Act had expired. It was never intended to extinguish the debt by way of extinctive prescription. It could, therefore, not have been the intention that where judgment costs have been granted, which order prescribed in thirty years, the right to have them taxed should prescribe while, an order for such costs had not prescribed. In view of the fact that the rule dealing with superannuation was scrapped, the applicants cannot aver that the costs order granted herein was superannuated or prescribed. In my view the first respondent does not enjoy an unlimited right to enforce his claim for costs insofar as he can only quantify his costs and present a bill for taxation as long as the judgment from which his right derives has not prescribed.

[24] I accordingly find that that the first respondent's right to quantify and to recover the costs pursuant to the Court order granted in his favour in case number R182/2007 was not superannuated or prescribed;

ORDER

The application is dismissed with costs.

P.E. MOLITSOANE, AJ

For the Applicants: Adv.N Snellenburg SC

Instructed by: Rosendorff Reitz Barry

6 Third Street

BLOEMFONTEIN

For the 1st Respondent: Adv. MJD Steenkamp

Instructed by:

CM DU PLOOY

49 Parfitt Ave

PARK WEST

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Prepared on 9 October 2026 · Esheria