

SOUTH AFRICA / JUDGMENT

De Jager N.O and Another v Van Onselen N.O and Another (CA248/2017) [2019] ZAECGHC 7 (5 February 2019) [2019] ZAECGHC 7

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J M Roberson, N G Beshe, G N Z Mjali

CASE / FILE NUMBER

CA248/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA248/2017

DATE HEARD: 03/12/2018

DATE DELIVERED:

05/02/2019

In

the matter between

WERNER

DE JAGER N.O.

1ST APPELLANT

SEAN

MARIO JOHNSON

N.O.

2ND APPELLANT

and

PFEIFER

VAN ONSELEN N.O.

1ST RESPONDENT

SUSARA

LOVINA VAN ONSELEN N.O.

2ND RESPONDENT

JUDGMENT

ROBERSON J:-

[1] This is an appeal against the judgment of the court a quo (Alkema J) upholding a plea of prescription. The appellants are the trustees in the insolvent estate of Andrew Michael Rose (Rose) whose estate was finally sequestrated on 23 February 2012.

[2] It was common cause that on 22 June 2006 Rose concluded an agreement of sale with the respondents, the trustees for the time being of Ozzies Besigheids Eiendoms Trust (the Trust), in terms of which Rose sold to the Trust certain immovable property, a farm known as Stellaland, as well as the equipment and crop on Stellaland. The purchase price was R3 million payable as follows:

“2.1 Die KOPER en die VERKOPER kom ooreen dat die KOPER die uitstaande bedrae verskuldig aan die KOPER se skuldeisers soos per aanhangsel A, direk aan die skuldeisers sal betaal na datum van ondertekening van hierdie ooreenkoms. Die bedrae verskuldig aan die twee verbandhouders, Landbank en ABSA, sal vereffen word op datum van registrasie van die transaksie

2.2 Die VERKOPER sal aan die KOPER ‘n lening verskaf vir die balans van die koopsom betaalbaar op terme en voorwaardes soos deur hulle ooreengekom sal word.”

[3] In his judgment Alkema J loosely translated this clause as follows:

“2.1 The purchaser and the seller agree that the purchaser shall pay directly to the seller’s creditors all outstanding amounts owed by the seller to his creditors as per annexure A, after date of signature of this agreement. The amounts owing to the bondholders, Landbank and ABSA, will be paid on date of registration of the transaction.

2.2 The seller will afford the purchaser a loan for the balance of the purchase price on terms and conditions as will be agreed upon by them.”

[4] It is common cause that annexure A to the agreement cannot be found. It was also agreed that a reconstructed list of creditors and payments to creditors was not accurate.

[5] The appellants instituted action against the respondents in which they claimed a full accounting of all payments made to the creditors of Rose, a debatement of such account, and payment of such sum which was the difference between the amounts paid to creditors of Rose and the purchase price of R3 million, together with interest thereon at the legal rate from 22 June 2006. A further claim for occupational interest was not pursued.

[6] In their particulars of claim the appellants alleged that it was an implied alternatively a tacit term of the agreement that the respondents undertook to render an accounting to Rose of payments made by them to Rose’s creditors. It was further alleged that the balance of the unpaid purchase price constituted a loan by Rose to the respondents, repayable on demand together with interest from date of registration of transfer.

- [7] In their special plea of prescription, the defendants pleaded that more than three years had passed since the conclusion of the sale agreement and the registration of transfer, and that summons was served on the defendants during February 2013. They accordingly pleaded that “any claim that Plaintiff might have had against the Defendants has therefore prescribed”.
- [8] In their plea over the defendants denied the implied/tacit term that they undertook to render an accounting and pleaded that Rose never requested proof of payment of the amounts contained in the lost annexure to the agreement. They further denied that there was any unpaid balance of the purchase price, and pleaded that Rose had never demanded payment of such balance.
- [9] In their replication the appellants pleaded that the claim for the unpaid balance of the purchase price had not prescribed because the loan was repayable on demand and prescription only began to run when the debt fell due on service of the summons. They pleaded further that only the respondents knew what amounts they had paid to Rose’s creditors and that by failing to provide an accounting they had prevented him from knowing in what amount they were indebted to him. In their rejoinder to the replication the defendants inter alia denied that that the loan would be repayable on demand

because clause 2.2 of the agreement provided that the loan would be payable on terms and conditions to be agreed.

- [10] The essential dispute was when prescription began to run. The appellants’ stance was that it started running with the service of summons, because demand was an essential element of their cause of action. The respondents bore no liability to repay the loan until the appellant’s cause of action was complete.[1] The respondents’ stance was that demand was not an essential element of the appellant’s cause of action and that

prescription started running at the time of registration of transfer, namely 5 July 2007.

- [11] I did not understand the respondents to take issue with the appellants’ contention that the claim for an accounting and debatement and the claim for payment were inextricably linked and that there was effectively one cause of action. The amount claimed for payment could only be quantified once accounting and debatement had taken place.
- [12] Rose testified about the circumstances surrounding the sale of Stellaland. During 2006 the first respondent (Van Onselen) approached him and asked him if he would consider joining the Trust’s farming business. At that time Rose’s son was engaged to Van Onselen’s daughter (they subsequently married) and Rose’s son would, through the marriage, join the Trust’s business. It was agreed that Rose would sell Stellaland to the Trust because of the pending marriage and because Rose’s son was basically the heir to Stellaland. The sale would also have the result that Rose would participate in the Trust’s business. At the time of testifying Rose was employed by the Trust and worked on Stellaland.

- [13] The creditor which applied for the sequestration of Rose's estate was the Humansdorp-Kooperasie (the Co-op). This was, according to Rose, one of the creditors the respondents were obliged to pay. Rose was aware that Absa and the Landbank had been paid but otherwise he did not know what had been paid to creditors by the respondents.
- [14] Rose agreed that during 2006 he had a problem with creditors seeking payment and that this was not the first time he was in this situation, given the vagaries of farming. He denied that the reason for the sale was his financial situation. He agreed that he was aware that he was entitled to payment of the balance of the purchase price. When asked if it was his case that the balance would be payable on demand or request, he said that was not the agreement with the respondents. He agreed that he had never requested payment of the balance.
- [15] The first appellant (De Jager) testified. He made attempts to obtain details from the respondents of what was paid to Rose's creditors and what balance of the purchase price owing to Rose remained. He was provided with some of the Trust's bank statements but could not trace any payments to Rose's creditors. The Trust's financial statements for the period 2007 to February 2011 did not reflect Stellaland as an asset. Overall De Jager received no information which was of assistance. Despite issuing subpoenas, exchanging correspondence with the respondents' attorneys, and the respondents appearing before the Master of the High Court, he has been unable to determine the outstanding balance of the purchase price. He did not request the information from the creditors themselves (other than those whom he established had been paid).
- [16] De Jager was aware of an affidavit by Van Onselen in the insolvency proceedings in which he stated that he was prepared to pay the Co-op provided that it provided proof of delivery. He was also aware that Rose had initially disputed what was owed to the Co-op but that Rose was to the best of his knowledge satisfied that he owed money to the Co-op.
- [17] De Jager referred to a letter from the respondents' attorneys dated 9 May 2012 in which they stated that no loan agreement to date had been concluded with Rose because no amount in respect of the loan account ("leningsrekening") could be determined, and no documentation existed in this respect.
- [18] The respondents closed their case without leading any evidence.
- [19] The court a quo found that demand was an essential element of the appellants' cause of action and stated that there was no liability on the respondents to repay the loan until demand was made. The common cause fact that the parties failed to reach agreement on the terms and conditions of the loan agreement had, so it was stated, the consequence that it was an implied tacit term of the agreement that in the absence of agreement on the terms and conditions of the loan, the outstanding capital and interest of the loan became payable on demand.

[20] The court a quo went on to consider the reliance by counsel for the respondents on the policy consideration that a creditor should not be able to rely on his own failure to perform in order to delay the running of prescription. It referred with approval to what was said by Satchwell J in *Phasha v Southern Metropolitan Local Council of the Greater Johannesburg Metropolitan Council* 2000 (2) SA 455 (W) at 474F-G (footnote omitted):

“I am with respect in agreement that ‘if creditors are allowed by their deliberate or negligent acts to delay the pursuit of their claims without incurring the consequences of prescription’ the purposes of the Prescription Act would indeed be subverted.”

[21] The court a quo further referred to the judgment in *Munnikhuis v Melamed* NO 1998 (3) SA 873 (W) at 887E where it was said:

“A right to claim performance under a contract ordinarily becomes due according to its terms or, if nothing is said, within a reasonable

time, which, in appropriate circumstances, can be immediately.”

[22] The court a quo considered that a reasonable time for Rose to have performed, namely to have demanded an accounting, debatement and payment, was 12 months from the date of registration of transfer. That date was 5 July 2008. The claim had therefore prescribed by 5 July 2011.

[23] Despite the court a quo’s finding that demand was an essential element of the appellants’ cause of action, it was submitted on appeal on behalf of the respondents that this was not the position and that it could not be said that the parties intended demand to be a condition precedent for the debt to be due. Reference was made to the judgment in *De Bruyn v Du Toit* [2015] ZAWCHC 20 at paragraph [6] where the following was said:

“..... in keeping with the principle that a creditor cannot delay the commencement of prescription by failing to take a step within his

power, it has been held on a number of occasions that a loan repayable on demand is immediately due for purposes of prescription.

It is only where the giving of notice is a condition precedent for a claim, and thus a necessary ingredient of the creditor’s cause of action, that the running of prescription is deferred until the giving of notice. See *Loubser Exinctive Prescription* 1996 at 53-63, where the authorities are reviewed. The learned author concludes his discussion thus (at 63):

‘On account of the policy consideration that a creditor should not be able to rely on his own failure to demand performance from the debtor in order to delay the running of prescription the courts will require clear indication that the parties intended demand to be a condition precedent for the debt to become due, in which case prescription will only begin to run from the date of demand.’”

[24] In *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC) Cameron J, in the majority judgment, stated as follows at paragraph [124] (footnotes omitted):

“Ultimately, it is a question of fact whether the parties intended demand to be a condition precedent for the debt to be 'due'. Loubser postulates the vivid example of a family trust. Say you make a loan to a close relative, your daughter, or your father. The daughter is studying. Or the parent is hard up. The circumstances show that the loan is on the never-never. The debt won't be due, in any sense, legal, technical or practical, until you say, 'Please won't you pay back.' In that case, it is clear that the parties intend demand to be a condition precedent to repayment. The parties do not intend the debt to be 'due' until demand is made. This contrasts strongly with any ordinary commercial loan agreement. For the parties to delay prescription is simple. They just have to say so. But they must say so. If they don't, the featurelessness of their agreement — as here — means that prescription starts to run immediately once the money is paid over.”

[25] Cameron J referred to *Stockdale and Another v Stockdale* 2004

(1) SA 68 (C), saying it was a good example of parties clearly intending demand to be made before prescription would run.

[26] In *Stockdale* the defendant was married to the son of the plaintiffs. After the son left his employment on 15 September 1990 he lost entitlement to certain benefits relating to the bond registered over the immovable property in which he and the defendant lived and which was registered in the defendant's name. The son and the defendant could not afford a bond from another financial institution and the plaintiffs lent the son and the defendant money to settle the existing bond over the property. On 1 February 1991 the defendant signed two acknowledgments of debt in favour of each of the plaintiffs who each lent half of the money required to settle the bond. After he left his former employment, the son was employed by the plaintiffs' company.

[27] In the acknowledgments of debt the defendant undertook to repay the capital amount outstanding and interest within 30 days from the date notice was given by the plaintiffs. A further term was that she was at any time entitled to repay the balance outstanding, together with interest thereon, in one amount without being obliged to give prior notice to the plaintiffs of such repayment.

[28] It was common cause that neither the son nor the defendant could afford to repay the loan immediately or within 30 days of an immediate demand. Notice was given to the defendant by letter dated 24 October 2000.

[29] The plaintiffs instituted action in the Magistrate's Court against the defendant based on the acknowledgment of debts. The defendant pleaded prescription. The son testified at the trial and said that there was an understanding that while he lived in the house or worked for the plaintiffs or was married, the money was available.

[30] Traverso AJP said the following at paragraph [6] of the judgment:

“In my view the only reasonable inference to be drawn from the evidence is that nobody regarded the loan as immediately repayable.

Repayment would only become due if certain changes in the living arrangements, marriage status, or employment situation occurred.

Notice to repay the loan would then have to be made before recovery could take place.”

[31] The son and the defendant were divorced in 2001 and as part of the divorce settlement the son indemnified the defendant in respect of one half of the plaintiff’s claim, and when the house was sold, the proceeds of the sale were divided equally between the son and the defendant. In Traverso AJP’s view these events corroborated the son’s evidence.

[32] The learned judge went on to say at paragraphs [17] to [19]:

“[17] It is evident that considerations of policy require that a creditor is not by his or her own conduct able to postpone the commencement of prescription (Benson and Another v Walters and Others 1981

(4) SA 42 (C) at 49G). This is expanded upon by the Court in Uitenhage Municipality v Molloy (supra at 742I - 743A). Mahomed CJ stated that one of the main purposes of the Act is to protect a debtor from old claims against which it cannot effectively defend itself because of loss of old 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.'

In this instance it is difficult to see how the lapse of time could in any way hinder the defendant in the manner described. Nor would

it be appropriate to classify the plaintiffs' delay in requesting payment as a 'deliberate or negligent act'. The parties entered an arrangement based on a certain set of circumstances. For as long as those circumstances prevailed, it was understood that notice would not be given. These circumstances changed with the defendant's divorce from the plaintiffs' son, and the consequent sale of the property for which the loan was originally extended. In other words:

'(W)hat may and should be considered a reasonable time for performance . . . can only be decided by reference to the nature of the contract entered into between the parties and the interrelationship of the obligations undertaken by both of them.'

(Phasha v Southern Metropolitan Local Council of the Greater Johannesburg Metropolitan Council 2000

(2) SA 455 (W) at 466B - C.)

[18] This was certainly not a situation where the day on which the debt became due could be unilaterally determined by the creditor (ie plaintiffs). The personal factors relevant to the plaintiffs' failure to enforce their right in what may be considered a timeous

manner and the clear intention of the parties as manifested in the acknowledgements of debt must be taken into account. In the words of Pothier, which were referred to in the case of *Fluxman v Brittain* (supra at 294), when dealing with a loan in which no term is mentioned for repayment:

'(T)he lender ought to grant a time more or less long according to the circumstances.'

[19] To adopt a different approach would in my view turn prescription into a 'blunt instrument for achieving finality in the relationship

between parties to an obligation.' (M M Loubser 'Towards a theory of extinctive prescription' (1988) 105 SALJ 34 at 53.) The peculiar circumstances of this matter are such that notice was in fact necessary for the running of prescription to commence; this was made only by way of letter dated 24 October 2000."

[33] The precise circumstances in the present matter differ from those in *Stockdale* or the examples mentioned to by Cameron J in *Trinity* (supra). However I am of the view that the principles inherent in *Stockdale* and Cameron J's examples can be applied to the present matter. The agreement was concluded in a family context with Stellaland not being entirely divorced from Rose. On the contrary the evidence of Rose that his son was marrying into the Trust's business and that he would inherit Stellaland was not controverted. Clause 2.2 of the sale agreement provided that the terms and conditions of the loan were still to be agreed. They were never agreed. This in my view indicates an intention not only that demand was an essential element of the cause of action but that in the specific circumstances of the conclusion of the sale, no demand would be made while the current circumstances prevailed, and payment was not expected any time in the near future. In my view, far from it being deliberate or negligent conduct on Rose's part in not demanding an accounting and payment, his inaction supports the inference that demand would not be made while the particular circumstances prevailed. He clearly did not follow up payment by the respondents to his creditors or try to find out what balance of the purchase price remained. Circumstances changed with the sequestration of his estate. Rose was divested of his estate, which now vested in the appellants, who had to act in the interests of Rose's creditors.

[34] I am of the view, as was Traverso AJP in *Stockdale*, that it is difficult to see how the lapse of time could hinder the respondents if it was understood that notice would not be given in such circumstances as prevailed.

[35] The respondents relied on Rose's evidence in cross-examination to the effect that it was not the agreement that the loan would be repayable on demand or request. Firstly I think that this was to an extent a legal question answered by a layman. Secondly I think that the answer is also consistent with the intention of the parties that demand would not be made while the current circumstances prevailed.

[36] It was further submitted that because interest was claimed on the loan from 22 June 2006, which was the date of signature of the sale agreement, it could not have been the parties' intention that demand was an essential element of the cause of action. I do not think that this factor affects an interpretation of the agreement to the effect that it was a tacit term that demand was necessary to complete the appellants' cause of action. As pointed out by the appellant's counsel, the debt arose when the loan was advanced but was not due until the cause of action was complete.

[37] It follows that whereas I am in agreement with the court a quo's finding that demand was an essential element of the appellants' cause of action, I disagree that a period of 12 months was a reasonable time within which Rose should have made demand. As was submitted on behalf of the appellants, the reasoning in Stockdale should have been applied (see paragraph [32] above).

[38] In the result the following order is made:

[38.1] The appeal succeeds with costs.

[38.2] The order of the court a quo upholding the plea of prescription and dismissing the appellants' claims with costs is set aside and replaced with the following order:

"The special plea of prescription is dismissed with costs."

J M ROBERSON

JUDGE OF THE HIGH COURT

BESHE J:-

I agree

N G BESHE

MJALI J:-

G N Z MJALI

Appearances;

For the Appellants: Adv D de la Harpe, instructed by Huxtable Attorneys, Grahamstown

For the Respondents: Adv T Zietsman, instructed by Whitesides Attorneys, Grahamstown

[1] Section 12 (1) of the Prescription Act 68 of 1969 provides: “Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due.”
In Truter and Another v Deysel

[2006] ZASCA 16; 2006 (4) SA 168 (SCA) the following was said at paragraph [16] (footnote omitted): “For the purposes of the [Prescription] Act, the term ‘debt due’ means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of

facts

which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when

everything has happened which would entitle the creditor to institute action and to pursue his or her claim.”

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