

SOUTH AFRICA / JUDGMENT

Du Toit and Others v Du Toit-Smuts & Partners and Another (4748/2021) [2023] ZAMPMBHC 22 (12 April 2023) [2023] ZAMPMBHC 22

COURT

Mbombela High Court, Mpumalanga

BEFORE

Mashile

CASE / FILE NUMBER

4748/2021

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Policy

FLYNOTES:

PROFESSION – Trust account – Money held –
Reservation deposit – Paid by prospective buyer
of property
– Sale falling through and buyer claiming deposit from
attorney – Nature of credit amount held
in trust discussed –
Claim should have been directly at seller and had also prescribed
– Attorneys were ethically
expected to advise their
principal to reimburse the funds because of the cancelled contract
– Legal Practice Act 28 of 2014, s 88.
REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
(MPUMALANGA DIVISION,
MBOMBELA)
CASE NO: 4748/2021
(1)
REPORTABLE: NO
(2)
OF INTEREST TO OTHER JUDGES: YES
(3)

REVISED: YES
DATE: 12/04/2023

In the matter between: PETRUS LODEWIEKUS DU
TOIT, in his
capacity as TRUSTEE of
the MNANDI TRUST,
TRUST

no: IT14[....]1(T)
First Applicant
SUSANNA DU TOIT, in
her capacity
as TRUSTEE of the
MNANDI TRUST
TRUST

no: IT14[....]1(T)
Second Applicant
JACOBUS NICOLAAS DU
TOIT, in his
TRUST

no: IT14[....]1(T)
Third Applicant
SAREL PETRUS FRANCOIS
DU TOIT,
in his capacity as
TRUSTEE of the MNANDI
TRUST,

TRUST no: IT14[....]1(T)
Fourth Applicant
ALEXANDER LAMBRECHTS,
in his
TRUST

no: IT14[....]1(T)
Fifth Applicant
and
DU
TOIT-SMUTS &
PARTNERS
First Respondent
BATELEUR
LAEVELD (PTY) LT
Second Respondent

JUDGMENT

MASHILE J:

INTRODUCTION

- [1] The Applicants, all trustees of the Mnandi Trust, seek relief against the First Respondent alternatively, Second Respondent. As against the First Respondent, they pleaded that the First Respondent be ordered to pay the Mnandi Trust the sum of R25 000.00 plus interest thereon at the Prescribed Legal Rate from 29 July 2021 to date of payment and costs on the scale as between attorney and client. The Applicants will henceforth be referred to as Mnandi Trust unless the context demands otherwise.
- [2] In the event that the First Respondent has paid the amount of R25 000.00 to the Second Respondent by the time that the Application is heard, Mnandi Trust's claim in the alternative against the Second

Respondent is that the Second Respondent be directed to repay the amount of R25 000.00 to Mnandi Trust together with interest thereon at the Prescribed Legal Rate from 29 July 2021 to date of payment. Furthermore, that the Second Respondent be directed to pay the Applicants' legal costs jointly and severally with the First Respondent on the scale as between attorney and client. Lastly, Mnandi Trust also seeks an order declaring the conduct of the First Respondent unlawful.

- [3] The Second Respondent does not oppose the claim but the First does. To that end, it has delivered a notice to oppose and thereafter, an answering affidavit wherein it sets out the basis of its opposition. The First Respondent contends that:

3.1 The claim of Mnandi Trust prescribed on 3 January 2021 in terms of Section 11(d) of the Prescription Act;

3.2 Similarly, the claim against Bateleur has become prescribed because the First Respondent received the amount of R25 000.00 as agent on behalf of Bateleur, the principal. As such, the claim of Mnandi Trust against Bateleur became prescribed 3 years after the debt became due thereby absolving the First Respondent;

3.3 The amount of R25 000.00 was paid by the First Applicant in his personal capacity. Mnandi Trust does not therefore have a claim against the First Respondent.

BACKGROUND

- [4] The factual matrix is largely common cause. During September 2017, the First Applicant, acting on behalf of the Mnandi Trust, entered into a purchase agreement with the Second Respondent (“Bateleur”) for the sale of portion 93 of Erf 4[...], Nelspruit Extension 36. I have already mentioned that the First Respondent does not admit that the First Respondent made payment of the amount of R25 000.00 on behalf of Mnandi Trust instead, it avers that he made the payment in his personal capacity.
- [5] As part of the negotiations, Bateleur required a reservation deposit for the amount of R25,000.00 to reserve the property for Mnandi Trust pending the finalisation of the negotiations. During September 2017, a reservation agreement was duly entered into between the First Applicant acting on behalf of the Mnandi Trust and the First Respondent. The terms of the reservation agreement are, among others, that:
- 5.1 Mnandi Trust would pay an amount of R25 000.00, being the reservation costs into the trust bank account of the First Respondent. The R25 000.00 would be invested on behalf of Mnandi Trust by the First Respondent into an interest bearing trust bank account;
- 5.2 The abovementioned amount would serve as a deposit after the signing of the purchase and building agreement with Bateleur, the developer (“Bateleur”);
- 5.3 Should Mnandi Trust not sign the agreements within 14 days after being presented therewith, the reservation deposit would be forfeited and the reservation agreement will be cancelled;
- 5.4 The deposit was to be paid within 48 hours of the signing of the agreement, where after the reservation agreement lapses;
- 5.5 The agreement further provides that Mnandi Trust agrees that the agreements (purchase and building) would be provided to it no later than ____ (date left blank in the reserve agreement), if not, the reservation cost will be refunded to Mnandi Trust, unless otherwise agreed.
- [6] On 8 September 2017, the First Respondent received in trust, an amount of R25 000.00 deposited into ABSA bank with the reference “BAT 93-4[...] W du Toit”. Despite the above having taken place, the parties could not reach an agreement on the building plans. As a result, the sales agreement fell through. On 3 January 2018, the First Respondent received a letter addressed to them from the Attorneys of Mnandi Trust informing the First Respondent that the transaction failed because of the parties’ inability to reach agreement regarding the building costs. Additionally, the Attorneys for Mnandi Trust demanded payment of the R25 000.00.
- [7] On 29 January 2018, Bateleur answered this letter to Mnandi Trust and indicated that there were costs incurred by it pertaining to certain architect fees in the amount of R31 413.13 and proceeded to demand payment thereof from Mnandi Trust. The First Respondent, in an undated letter, also replied regarding the letter of 3 January 2018 indicating that the claim

for payment from the trust account has prescribed. On 29 July and 11 August 2021, the Attorneys for Mnandi Trust wrote letters to the First Respondent demanding payment of the amount of R25 000.00.

- [8] On 18 August 2021, the Attorneys of Mnandi Trust threatened to report the matter to the Legal Practice Council (“LPC”). On 19 August 2021, the Attorneys of Mnandi Trust, arguing that the claim has not prescribed, once again wrote a letter and demanded payment of the amount of R25 000.00. The First Respondent wrote back to the Attorneys of Mnandi Trust on 26 August 2021 stating that the amount of R25 000.00 would be paid over to Bateleur.
- [9] On 28 September 2021, Mr Smuts of the First Respondent wrote a personal email to the First Applicant explaining the legal position and the facts pertaining to the matter. Refuting that prescription has intervened, the Attorneys of Mnandi Trust wrote to Mr Smuts personally on 29 September 2021 asserting that the amount of R25 000.00 should be repaid. On 4 October 2021, the Attorneys of Mnandi Trust requested a copy of the trust ledger indicating the flow of trust funds to which the First Respondent never acceded.

ASSERTIONS ADVANCED BY THE PARTIES

- [10] The Respondent has strenuously contended that the claim against both the First Respondent and Bateleur has prescribed. The essence of the argument is that on 8 September 201, the First Respondent received into its trust bank account payment of an amount of R25 000.00 on behalf of the Second Respondent. Upon the deposit of the amount into the trust bank account, ownership of the money became vested in the Bank and the depositor acquired certain rights against the First Respondent.
- [11] On 3 January 2018, the reservation agreement was repudiated and the debt by the First Respondent to the depositor became due as a result of the cancellation alternatively, as a result of the demand for payment dated 3 January 2018 as envisaged in section 12(1) of the Prescription Act, 68 of 1969 (“the Prescription Act”). When 3 January 2021 came and passed without any claim being launched, the debt became prescribed in terms of section 11(d) of the Prescription Act such that any claim brought thereafter could be resisted with prescription.
- [12] In the second place, the First Respondent asserts that Mnandi Trust has no claim against it because the First Applicant concluded the agreement in his personal capacity and made payment on his own behalf. In this regard, the First Respondent points out that there is no indication on the agreement that the First Applicant was signing on behalf of Mnandi Trust. Furthermore, argues the First Respondent, even the payment of the amount of R25 000.00 was made by the First Applicant without any indication that it was paid on behalf of some other entity.
- [13] In the third place, the First Respondent has referred to the case of *Stopforth Swanepoel & Brewis Inc. v Royal Anthem Investments 129 (Pty) Ltd and others* [1] where the Court had to consider the law applicable to a purchaser of immovable property that was contractually

obliged to pay a deposit, and the nature of the transfer of funds which the purchaser had made to the seller's Attorney. The Constitutional Court considered the matter and concluded that the amount was not payment to the Attorney but payment to the seller, to be held for and on behalf of the seller in trust by the Attorney.

[14] Conversely, Mnandi Trust asserts that there exists no client-attorney relationship between the First Respondent and it. Instead, it argues, the relationship exists

between the First Respondent and Bateleur. To fortify their assertion, the Applicants point to the answering affidavit wherein

the deponent states that in terms of the Reservation agreement an amount of R25 000.00 was paid into the trust bank account of the First Respondent as agent for the Second Respondent and the First Respondent received the reservation fee as agent on behalf of Bateleur.

[15] The reservation deposit was paid into the trust bank account of the First Respondent at the request of Bateleur, the First Respondent's

principal, in terms of the reservation deposit agreement. The amount of R25 000.00 was to be kept in trust pending the finalisation of the negotiations. Therefore, no debt became due by the First Respondent to the Applicants and the funds must be returned. This is different from the case of *Ramdin v Pillay and Others* [2] where the funds were not deposited under instructions from a third party on whose behalf they were held in trust.

[16] Mnandi Trust further argues that if the argument of the First Respondent is to be entertained, and if one for the moment accepts that Mnandi Trust became the client of the First Respondent, which it denies, the First Respondent remains with a hurdle that it cannot pass. This is an Attorney's duty to account to its client. If Mnandi Trust was the client of the First Respondent, the latter had a duty, within a reasonable time after termination of its mandate, to account to the Applicants and to pay any amount due to its client, which it failed to do.

ISSUES

[17] The issues that require determination are the following:

17.1 Is the First Respondent the correct party to have been sued?

17.2 Has the claim of Mnandi Trust pertaining to the reimbursement of the R25,000.00 from the trust account of the Second Respondent prescribed? Alternatively, is the reservation cost a debt as provided for in section 12 of the Prescription Act 68 of 1969?

17.3 Are the unused funds in a client's trust account deemed to form part of the assets of the trust account practice? Alternatively, can the unused funds in a client's trust account be used to set off any legal fees owed to the firm concerned?

17.4 If the above is answered in the negative, does the conduct of an Attorney who uses any unused funds in a client's trust account amount to unlawful conduct?

LEGAL FRAMEWORK AND

ANALYSIS

[18] Prior to establishing whether or not the claim has prescribed, it would be sensible to make a determination on whether Mnandi Trust

had a claim and what type of right the claim afforded it. It appears from the facts traversed above that it is also the version of the First Respondent that Mnandi Trust is not its client. Furthermore, it was the Second Respondent who appointed the Conveyancers and provided them with the mandate.

[19] The trust account was therefore created on behalf of and for the interests of the Second Respondent. Additionally, it is the Second Respondent who instructed the First Respondent on how to use the funds in the trust. It is trite that when a third party deposits money into a trust, and such money is not utilised, the third party becomes a trust creditor.

[20] When interpreting statutes, the Constitutional Court in *Amabhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa*[3], held that:

“... One must start with the words, affording them their ordinary meaning, bearing in mind that statutory provisions should always be interpreted purposively, be properly contextualised and must be construed consistently with the Constitution. This is a unitary

exercise. The context maybe determined by considering other subsections, sections or the chapter in which the keyword, provision

or expression to be interpreted is located. Context may also be determined from the statutory instrument as a whole. A sensible

interpretation should be preferred to one that is absurd or leads to an unbusinesslike outcome.”

[21] The interpretation process entails that the document in issue must be interpreted in the light of the language used. The context in which the relevant provisions appear, their apparent purpose and the material known to those responsible for their production are also relevant considerations. See, *Natal Joint Municipal Pension Fund v Endumeni Municipality*[4]. Sections 86 to 88 of the Legal Practice Act 28 of 2014(“LPA”) deals with trust accounts and how they must be handled.

[22] Section 86(1), provides that every legal practitioner referred to in section 84(1) of the LPA operate a trust account. Section 87(1) requires legal practitioners with trust accounts to keep proper accounting records. Section 88(1) provides that:

“88 Trust money and trust property of trust account practice:-

(1)

(a) Subject to paragraph (b), an amount standing to the credit of any trust account of any trust account practice-

(I) does not form part of the assets of the trust account practice or of any attorney, partner or member thereof or of any advocate referred to in section 34 (2) (b); and

(ii) may not be attached by the creditor of any such trust account practice, attorney, partner or member or advocate.

(b) Any excess remaining after all claims of persons whose money has, or should have been deposited or invested in a trust account referred to in paragraph (a), and all claims in respect of interest on money so invested, are deemed to form part of the assets of the trust account practice concerned.”

[23] If one uses the guidelines provided in Amabhungane supra when interpreting sections 88(1) (a) and (b) using its ordinary meaning and in considering the other sections, it follows that a credit amount in the trust does not form part of the assets of the trust account practice. Once all the outstanding claims have been paid out to the trust creditors the remaining residue left in the account will form part of the assets of the trust account practice. A fiduciary duty is created which constraints a practitioner and therefore The following must be kept in mind:

23.1 The practitioner must keep all trust money until payment to the persons entitled to it so that there are always sufficient funds in that account to cover all trust obligations. See, Incorporated Law Society, Transvaal v G

[5] and Rheeder v Ingelyfde Wetsgenootskap Van Die Oranje-Vrystaat[6].

23.2 In Incorporated Law Society, Transvaal v Visser and Others; Incorporated Law Society, Transvaal v Viljoen[7], the Court held that:

"When trust money is handed to a firm it is the duty of the firm to keep it in its possession and to use it for no other purpose than that of the trust. The position is, however, not the same in a case where a specific article is handed over which must subsequently be returned or accounted for. The firm fulfils its duty if it accounts for or returns an equivalent amount. It is inherent in such a trust that the firm should at all times have available liquid funds in an equivalent amount. The very essence of a trust is the absence of risk. I am in respectful agreement with HATHORN, J, where he states in the case of Incorporated Law Society v Stalker, 1932 N.P.D. 594 (at p.606), that it is imperative that trust moneys in the possession of an attorney should be available to his clients the instant they become payable and that they are generally payable before and not after demand. If a deficit existed in respect of trust moneys for which the respondents were not responsible but for which they were liable, they had no right to use moneys entrusted to them for a particular purpose, to satisfy trust creditors in respect of whose moneys the deficit existed. If they did use it in this manner they would be guilty of theft because they would then be using

moneys of their clients to satisfy their own obligations towards other clients."

23.3 An agreed sum paid to an attorney to cover fees and disbursements is trustfunds, as some part of that amount is held as the client's agent. See, Incorporated Law Society, Natal v Cornish[8].

23.4 All money that an Attorney holds and which he has not yet earned are held by him for or on account of any person'. Therefore, an Attorney must pay a composite amount for disbursements and part for fees into trust. The Attorney may withdraw the amount for fees only once he has done the work. See, Incorporated Law Society, Transvaal v U[9].

23.5 The money held in trust, in the sense of being "entrusted" and not merely where the Attorney's trust account or the Attorney is acting as a conduit for a payment to discharge a debt on behalf of a client or third party, is generally entrusted on behalf of the client as a consequence of the contractual relationship between the Attorney and a client. See, Roestoff v Cliffe Dekker Hofmeyr Inc[10].

23.6 In Nel v Van Schalkwyk NO and Others 2020] ZANHC 33, the Court heldthat:

"Although the relationship between an attorney or conveyancer and his client is of a very special character with certain peculiar aspects, the legal principles which apply in those relationships are generically those of the law of agency. It is so because the relationship of an attorney and his client is based on mandatum with some features which are peculiar to the particular kind of agency. see Goodrick v Auto Protection Insurance Coy 1968 (1) SA 717 (A) 722H. It therefore follows that the services which an attorney or conveyancer renders to his client are mainly, with the exception of advisory, consultative and similar functions, those which an agent renders to its principal."

[24] Practitioners must realise that trust account obligations are a fundamental duty. Failure to observe them may constitute a breach of which may easily lead to removal from the roll. See, Incorporated Law Society, Transvaal v K and Others[11]. If the Court finds that the First Respondent held the trust money unlawfully the above cases are to be used in support of the finding. Having regard to the above, the next question would be what rights arise from the creation of a trust account and who holds claim to the funds in the trust account?

[25] Section 91 of the LPC illustrates the rights of the banks. The section provides that:

"... a bank at which a trust account practice keeps its trust account, or any separate account forming part of a trust account, does not, in respect of any liability of the trust account practice to that bank not being a liability arising out of, or in connection with, any such account, have or obtain any recourse or right, whether by way of set-off, counter-claim, charge or otherwise, against money standing to the credit of that account."

[26] In S v Kearney[12], the Court held that:

"It has long been judicially recognised in this country that the relationship between bank and customer is one of debtor and creditor."

When a customer deposits money it becomes that of the bank, subject to the bank's obligation to honour cheques validly drawn by the customer . . .”

[27] In *Van Wyk Van Heerden Attorneys v Gore N.O and Another*[13], the SCA explores the relationship between the Bank at an Attorney and an Attorney and the client in relation to a trust account. The Court held that:

“Under the banker-customer relationship, the bank is indebted to the customer. The bank owns the money but is obliged to comply with

instructions of the account holder concerning a positive balance in the account. Account holders thus have the power of disposal over the credit balance of funds held by the bank on their behalf.

This holds no less true of trust bank accounts held by attorneys. Money deposited into attorneys’ trust accounts gives rise to the same relationship with the bank as with any account holder. The bank owns the money, but becomes obliged to give effect to instructions by the attorney holding the account. It is indebted to the attorney and to no other party. No one else is entitled to instruct the bank on how to deal with it.

At the same time, the credit balance in trust accounts is held by the attorney on behalf of particular clients. A similar debtor-creditor

relationship obtains between the attorney and the client. The attorney is obliged to give effect to instructions of clients concerning the credit balance held for them. But vis-a-vis the bank, the attorney has the power of disposal over credit balances in the trust account. This is at least partly why our courts have held that, when attorneys deal with funds in a trust account, they generally do so as principals and not as agents.”

[28] The Court in this matter, through the use of a long line of cases and well-known banking and finance principles, came to the conclusion that when Attorneys operate a trust Bank account in accordance with their instructions, they function at two levels. On the one hand, as principals because only they have the right to dispose of funds to the credit in that account pursuant to a banker-customer relationship. On the other hand, as agents if they give effect to a mandate from a client in whose name the funds are held in trust. With the above mentioned and section 88(1)(b) of the LPC in mind, it is clear that it is the legal practitioner or in this case the conveyancer who instructs the Bank on how to handle the funds and the client cannot directly instruct the Bank. Therefore, the client only has a personal right to the funds. Similarly, a third party or trust creditor cannot instruct the Bank on what to do with the funds held in trust with the Bank, it is for the client of the conveyancer to instruct the conveyancer to make payment to the third party.

[29] Does Mnandi Trust have a real right to the money held in trust? Mnandi Trust avers that the Second Respondent has a personal right to the money in trust and that it (Mnandi Trust) has a real right to the money held in trust. In this regard, it is worth bearing in mind that a personal right stem from a relationship between two people, the one having an obligation for performance in favour of the other. On the other hand, a real right constitutes a

relationship between a person and a legal object over which he or she have a right. In *Van Der Merwe and Another v Taylor NO and Others*[14], the Constitutional Court held that:

“An action based on the rei vindicatio is available to an owner who has been deprived of his or her property without

consent and who wishes to recover it from the one who retains possession. In order to succeed with any vindicatory action, generally in addition to ownership, the applicant also has to prove that the property was in possession of the respondent at the beginning of the proceedings, that the property in question is still in existence and is clearly identifiable.”

- [30] Under the rei vindicatio, once a claimant establishes ownership in the thing in issue, where the Respondent is in possession at the commencement of the action, the thing shall be immediately returnable, unless the Respondent can show cause why the property shall not revert to the owner. See, *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd*[15]. Ownership potentially confers upon the owner the most complete or comprehensive right in or control over a thing.
- [31] The question here is whether or not the money held in a trust is identifiable. In *Trustees of the Insolvent Estate of Whitehead v Dumas and Another*[16], it was held that once money was transferred into a Bank account of another person, the transferor’s personal right to the credit in the account was terminated. Instead, the money became the property of the Bank by the operation of the commixtio rule, regardless of whom made the deposit and the circumstances in which has been made.
- [32] The Court continued to state that with money, for example, the money transferred into an account with other money loses its separate identity, and commixtio is one of the modes of acquiring property in goods. A new personal right is subsequently created only in favour of the holder of the account into which the money has been transferred. This would effectively mean, as the Court observed that the Bank becomes accountable to its customer and not a third party, the holder of the account in which the money was transferred. The transferor, the Respondent, therefore had no claim to the money as a personal right to the money that had been transferred to the Appellant.
- [33] Mnandi Trust does not hold a real right over the money deposited into the trust account of the First Respondent. This has to be the case because Mnandi Trust was not deprived of the money without its consent and the principles highlighted above regarding commixtio. As highlighted in the *Gore*, *Leathern* and *Whitehead* cases, the Bank is the owner of the funds held in trust and the client, in this case *Bateleur*, has a personal right to the money. Mnandi Trust merely have a claim afforded to them as trust creditors.

[34] As the mandate between the First Respondent and Bateleur is concluded, the First Respondent as a principle has a right to withdraw the funds from the Bank without instruction and pay Mnandi Trust. However, it may not use the funds to set off its debts. Doing so, would offend the provisions of section 88(1)(b) of the LPC, which only allows the First Respondent to keep excess funds once all the creditors of the trust have been paid off.

[35] The deposit is not defined as excess. If there was interest gained on the deposit that would be considered excess, it is rather regarded as a principle amount. Although there exists an ethical duty on the First Respondent to return the money, section 88(1)(b) does not place a legal obligation to do so. As such, the obligation lies on Mnandi Trust to ensure the money is returned to it. Therefore, the unused funds in a client's trust account cannot be used to set off any legal fees owed to the firm concerned.

[36] The next question is, has the claim prescribed? In *Jugwanth v Mobile Telephone Networks (Pty) Ltd*[17], the Court held that:

"It is settled law that a person invoking prescription bears a full onus to prove it. In Gericke v Sack, Diemont JA explained:

'[It] was the respondent, not the appellant, who raised the question of prescription. It was the respondent who challenged the appellant on the issue that the claim for damages was prescribed this he did by way of a special plea five months after the plea on the merits had been filed. The onus was clearly on the respondent to establish this defence.

In *Macleod v Kweyiya*, this Court endorsed that principle in ringing tones:

'This court has repeatedly stated that a defendant bears the full evidentiary burden to prove a plea of prescription, including the

date on which a plaintiff obtained actual or constructive knowledge of the debt. The burden shifts to the plaintiff only if the defendant has established a prima facie case.'

[37] It is clear from the above that the burden of proving prescription would have rested on Bateleur if it was opposing the matter. Section 10(1)(a) of the Prescription Act provides that a debt will be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt. In the case of other debt not provided for in section 11, the prescription for debt is three years. Section 12(1) of the Prescription Act states that prescription will commence to run as soon as the debt is due.

[38] The question arises whether or not the deposit is a debt. In *Drennan Maud & Partners v Town Board of the Township Pennington*[18], the Court describes a debt as:

"In short, the word "debt" does not refer to the "cause of action", but more generally to the claim. In deciding

whether a 'debt' has become prescribed, one has to identify the "debt", or, put differently, what the "claim" was in the broad sense of the meaning of that word.'

- [39] The deposit ought to be considered a debt because the obligation to pay the money to Mnandi Trust rested on Bateleur as a principle of the First respondent, which is the holder of the trust account with the Bank. Two approaches may be considered regarding when prescription began to run. The first is when the debt is due. In this case 3 January 2018, when the Applicants sent the letter demanding payment. The second is where no time is stipulated on when the obligation is to be completed. In that event, prescription commences to run from the date of conclusion of the contract.
- [40] In *List v Jungers*[19], the Court stated that there is a difference between when a debt comes into existence on the one hand and when it becomes recoverable on the other, although these dates may coincide. A debt is due when “...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.” See, *Truter & another v Deysel*.[20]
- [41] The reservation agreement contains two suspensive conditions. The first is that if the First Applicant failed to sign the agreement within 14 days, the amount would be forfeited. The agreement does not state the party to whom the money will be forfeited. The second provides that if the agreements are not provided to the Applicants, the amount will be refunded to the purchaser. There is no mention of the date on which this obligation needed to be fulfilled. It is common cause that no agreements were submitted to the Applicants.
- [42] The Court in *Frieslaar NO and Others v Ackerman and Another* [21]held that:
- “An obligation to do something undertaken in terms of a contract, when the contract is silent as to the time of performance, is a debt which becomes immediately claimable or exigible at the instance of the creditor. Thus prescription commences to run from the date on which the contract was concluded....”*
- [43] The claim has prescribed. Prescription is not interrupted when the letter of demand is served. It is only through the issuing of a petition, a notice of motion, a rule nisi, a pleading in reconvention, a third party notice referred to in any rule of Court and any document whereby legal proceedings are commenced that it begins. Whatever the circumstances and assuming that the First Respondent was the correct party to be sued in this matter, the claim against it has prescribed it being irrelevant whether one considers the date of delivery of the letter of demand, 3 January 2018, or the date of the conclusion of the agreement.
- [44] There is no doubt that my conclusion will leave a very unpalatable taste in the mouth of the Applicants. There are numerous examples why this outcome on prescription in these circumstances may prove absurd but I deliberately went into details to demonstrate that that whichever way one looks at it, the claim has prescribed. I am mindful that in light of the case of *Stopforth Swanepoel supra*, where it was held that the deposit should be regarded as payment to the Second Respondent, at whose instance the Applicants deposited the funds, the exercise was academic. In other words, the claim against the First Respondent is misguided as it should have been aimed at the Second Respondent.

[45] In consequence of the view that I have taken in this judgment, it will be superfluous and in vain to proceed to consider whether or not the First Applicant concluded the agreement in his personal capacity and paid the R25 000.00 on his own behalf. In the result, I find as follows:

45.1 Assuming that the First Respondent was the party against whom the claim was launched, the claim of Mnandi Trust would have prescribed;

45.2 Assuming further that the Second Respondent had opposed the matter and raised prescription, a claim against it would similarly have prescribed;

45.3 In terms of Stopforth Swanepoel case supra, the money deposited into the trust account belongs to the Second Respondent. The claim should as such, have been directed at the Second Respondent as a party that can lawfully give instructions to the Bank;

45.4 Acknowledging that the First Respondent was incorrectly sued because it only received the money into trust on behalf of Bateleur, I hold the view that it was ethically expected to advise its principal to reimburse the funds to Mnandi Trust as a result of the cancelled contract. The question of ethics is not the province of this Court but I will direct that the Legal Practice Council should investigate the actions of the First Respondent.

CONCLUSION

[46] The above considered, I am constrained to make the following order:

1. The application is dismissed with costs; AND
2. The attention of the Legal Practice Council must be drawn to this judgment by the parties to enable it to execute the direction contained in Paragraph 4.5 above.

B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 12 April 2023 at 10:00.

APPEARANCES:

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[1] 2014

(3) SA 626 (CC) at paragraph 31

[2] 2008

(3) SA 19 (D)

[3] [2022] ZACC 31 at para 36

[4] [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18

[5] 1953

(4) SA 150 (T)

[6]1972

(3) SA 502 (A)

[7] 1958

(4) SA 115 (T) at 118F-H

[8] 1961

(1) SA 24 (N)

[9] 1964

(2) SA 243 (T)

[10] 2013

(1) SA 12 (GNP) at para 71

[11] 1959

(2) SA 386 (T)

[12] 1964

(2) SA 495 (A) at 502H-503A

[13] [2022] ZASCA 128; [2022] 4 All SA 649 (SCA) at paras 14-16

[14] 2008

(1) SA 1 (CC) at para 22

[15] 1999

(2) SA 986 (T)

[16] 2013 (3) SA 331 (SCA) at para 23

[17][2021] 4 All SA 346 (SCA)

[18]

[1998] ZASCA 29; 1998

(3) SA 200 (SCA) at para 212F-J

[19] 1979

(3) SA 106 (A) at 121C-D

[20] [2006] ZASCA 16; 2006 (4) SA 168 (SCA) at para 15

[21] [2018] ZASCA 3 at para 31

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