

SOUTH AFRICA / JUDGMENT

Keyter N.O. v Keevy and Others (CA311/2017) [2018] ZAECHGC 19 (8 March 2018)

[2018] ZAECHGC 19

COURT

Eastern Cape High Court, Grahamstown

BEFORE

JW Eksteen, FBA Dawood, TP Mageza

CASE / FILE NUMBER

CA311/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

Case

No.: CA311/2017

Date

Heard: 26 February 2018

Date Delivered: 8

March 2018

In

the matter between:

LEON

KEYTER NO

(in

his capacity as the Executor of the Estate Late

EWD

Keevy)

Appellant

NEVILLE

WILLIAM

KEEVYFirst Respondent

NEVILLE

WILLIAM

KEEVY

First Respondent

ANDREW

STUART PATERSON NO
(in
his capacity as Executor of the Estate Late
Hazell
Agnes
Keevy)
Second Respondent
MARIAN
ELAINE VAN DER MEULEN NO
FREDERICK
JOHANNES POTGIETER NO
(in
their capacities as Executors of the Estate
Late
JMDD
Keevy)
Third Respondents

JUDGMENT

EKSTEEN J:

[1]The appeal arises from a claim against the third respondents for the rendering and the debatement of an account and payment of such sums as are found to be due by the third respondents to the appellant. The third respondents raised a plea of prescription which was upheld in the courta quo.The appeal is directed against the order made in the courta quo.

The appeal arises from a claim against the third respondents for the rendering and the debatement of an account and payment of such sums as are found to be due by the third respondents to the appellant. The third respondents raised a plea of prescription which was upheld in the court

a quo.

The appeal is directed against the order made in the court

a quo

[2]At the heart of the dispute lies a “sheep lease” entered into in 1993, to which I shall revert in greater detail below. It is, however, necessary first to place the dispute in its historical context. I pause to record that the history of the dispute is complex and convoluted and I record herein only those events which are necessary for purposes of resolving the dispute in the appeal.

At the heart of the dispute lies a “sheep lease” entered into in 1993, to which I shall revert in greater detail below. It is, however, necessary first to place the dispute in its historical context. I pause to record that the history of the dispute is complex and convoluted and I record herein only those events which are necessary for purposes of resolving the dispute in the appeal.

[3]The appellant was appointed in 2006 as the executor in the estate of the late EWD Keevy (the testator) who died during 1989. The testator was survived,inter alia, by his spouse, Hazell Agnes Keevy, to whom I shall refer herein as “Hazell”. The material portions of clauses 1 and 2 of the testator’s last will and testament provided:

The appellant was appointed in 2006 as the executor in the estate of the late EWD Keevy (the testator) who died during 1989. The testator was survived,

inter alia

, by his spouse, Hazell Agnes Keevy, to whom I shall refer herein as “Hazell”. The material portions of clauses 1 and 2 of the testator’s last will and testament provided:

“Subject to Clause 2 hereof, I direct that my wife, HAZELL ..., shall have a right of usufruct until her death over all the bequests contained in this my last Will, except the bequests in terms of clause 4(b) and (c) of this my will.

Subject to Clause 2 hereof, I direct that my wife, HAZELL ..., shall have a right of usufruct until her death over all the bequests contained in this my last Will, except the bequests in terms of clause 4(b) and (c) of this my will.

I direct that the farm Keeviston, Tier Kop, Clifton annex and Portions 3 and 4 of Kianghas Mond measuring 185,4292 hectares, together with livestock and implements shall be held in trust by my administrators who in conjunction with my wife, HAZELL ..., will arrange for my farming operations to be carried on in the normal way, and to that end my administrators shall have the right to buy and sell livestock, produce, equipment, goods, vehicles and other effects as they may deem necessary for such farming and to incur all expenditure for improvements and renovations as they consider suitable and to employ such labour as they may consider necessary and to do all farming as effectually as I could or might have done. The nett income of the aforesaid farming operations shall be paid by my administrators to my wife, HAZELL ..., during her lifetime, and after her death to my son DAN LAWTON ROE JOHN DANCKWERTS until his death, when the said properties, or the proceeds thereof, will devolve upon my said son’s children ...”

The trust provided for in paragraph 2 of the last will and testament was duly established and the administrators, who were nominated in clause 6 of the will, were duly appointed by the Master of the High Court to act as trustees in the EWD Keevy Testamentary Trust (the trust) on 7 September 1993. The letters of authority issued by the Master are contained in the pleadings.

[4]On 13 September 1993 the administrators in the estate of the testator (the trustees in the trust) and Hazell, on the one hand, entered into a written agreement of lease with the first respondent, on the other hand, in terms of which the farms, implements and livestock were leased to the first respondent. The written deed of lease acknowledged that Hazell held the stock as usufructuary and it recorded that the lease would terminate upon the death of Hazell.

On 13 September 1993 the administrators in the estate of the testator (the trustees in the trust) and Hazell, on the one hand, entered into a written agreement of lease with the first respondent, on the other hand, in terms of which the farms, implements and livestock were leased to the first respondent. The written deed of lease acknowledged that Hazell held the stock as usufructuary and it recorded that the lease would terminate upon the death of Hazell.

[5]In respect of the livestock it is common cause that there were at the time of the conclusion of the lease 221 Dorper ewes with lambs, 5 Dorper rams, 48 maiden Dorper ewes, 52 Merino ewes, 2 Merino rams and 32 weened lambs which were delivered to the first respondent in terms of the lease. Clause 10 of the written deed of lease provided that:

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“At the termination of this Lease, the Lessee shall re-deliver to the Administrators in the Estate Late EWD Keevy livestock of equal number and value as received at the commencement of this Lease together with the aforesaid immovable properties and implements which shall be in the same condition in which he received it, reasonable wear and tear excepted.”

At the termination of this Lease, the Lessee shall re-deliver to the Administrators in the Estate Late EWD Keevy livestock of equal number and value as received at the commencement of this Lease together with the aforesaid immovable properties and implements which shall be in the same condition in which he received it, reasonable wear and tear excepted.”

[6]On 29 June 2003 Hazell died thus bringing the lease to an end. The first respondent was accordingly obliged then to re-deliver sheep of equal number and value as he had received at the commencement of the lease (the stock) to the administrators of the estate of the testator (the trustees of the trust). This he did not do. Instead, one JMDD Keevy (“John”) who had been duly appointed as the executor in the deceased estate of Hazell, took possession of the stock and declined to deliver all or any of them to the trustees.

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[7]The appellant, as recorded earlier, was only appointed as an executor in the estate of the testator in 2006. Upon his appointment he demanded delivery of the stock to him. After demanding delivery of the stock he proceeded to issue summons against the first respondent and John (who was then cited as second respondent) for the return of the stock and for the delivery and debatement of an account in respect of the progeny which had accrued after the termination of the lease.

The appellant, as recorded earlier, was only appointed as an executor in the estate of the testator in 2006. Upon his appointment he demanded delivery of the stock to him. After demanding delivery of the stock he proceeded to issue summons against the first respondent and John (who was then cited as second respondent) for the return of the stock and for the delivery and debatement of an account in respect of the progeny which had accrued after the termination of the lease.

[8]In 2008, prior to the resolution of the said litigation, John too died. The second respondent was then appointed in his stead as the executor of the estate of Hazell. The third respondents were in turn appointed as executors in the personal estate of John. The livestock which John had taken possession of upon the death of Hazell then vested, de facto, under the control of the third respondents. In these circumstances and in July 2009 the appellant submitted a claim to the third respondents as the executors in the estate of John for the delivery of the stock. In October 2009 the third respondents

rejected the claim and the appellant lodged an objection with the Master of the High Court. In November 2011 the appellant

brought an application to join the third respondents in the action and he was granted leave on 19 July 2012 to join the third respondents as respondents. The particulars of claim were accordingly amended on 8 July 2013 so as to introduce the claim

against the third respondents. As against the third respondents the appellant claimed the delivery of the stock and proceeded to allege that subsequent to the termination of the lease upon the death of Hazell in June 2003 the third respondents have enjoyed the fruits of the stock to which they were not entitled. Accordingly, the appellant sought as against the third respondents an order that they render an account in respect of the progeny of the stock and any profit accruing to their benefit therefrom since the death of Hazell to the date of debatement of the account and payment of an amount so established as being due and payable to the appellant.

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[9]The third respondents, as recorded earlier, entered a plea of prescription to this claim alleging that the appellant's claims as against the third respondents have become prescribed in terms of the provisions of section 11 of the Prescription Act, 68 of 1969 (thePrescriptionAct). Tothis the appellant replicated denying that his claim had become prescribed and proceeded to plead:

The third respondents, as recorded earlier, entered a plea of prescription to this claim alleging that the appellant's claims as against the third respondents have become prescribed in terms of the provisions of section 11 of the Prescription Act, 68 of 1969 (thePrescriptionAct). Tothis the appellant replicated denying that his claim had become prescribed and proceeded to plead:

Prescription

Act). To

'In amplification of the aforesaid denial, Plaintiff pleads as follows hereunder:

In amplification of the aforesaid denial, Plaintiff pleads as follows hereunder:

2.2 JMDD Keevy died on 22 March 2008.

2.3 Plaintiff submitted a claim to Third Defendants for the livestock and their progeny by way of correspondence dated 30 July 2009 and which claim was rejected by Third Defendants on 5 October 2009.

The Plaintiff, due to the rejection of the claim, lodged an objection with the Master on the 16thOctober 2009.

The Plaintiff, due to the rejection of the claim, lodged an objection with the Master on the 16 October 2009.

2.4 Accordingly, Plaintiff's claim is subject to an impediment envisaged in section 13(1)(g) of the Prescription Act 68 of 1969 (hereinafter referred to as "the Act").

2.5 The Master of this Honourable Court has not yet made any decision on the objection nor has he approved the final liquidation and distribution account in the estate late JMDD KEEVY of which Third Defendants are the Executors.

2.6 Accordingly, the impediment referred to in section 13(1)(g) of the Act, which arose on 30 July 2009, alternatively on 16 October 2009 has not ceased to exist.

2.7 Accordingly, Plaintiff's claim against Third Defendants has not prescribed in terms of the provisions of section 11 of the Act or at all.

Alternatively Plaintiff pleads as follows:

2.8 Plaintiff acquired knowledge, actual and constructive, of the claim against JMDD KEEVY on or about 10 May 2010 when Mr Meyer, attorney representing the Estate Late JMDD KEEVY by letter of that date, confirmed that the said JMDD KEEVY had disposed of the sheep.

2.9 The Third Defendants in their capacities as Executor/Executrix of the Estate Late JMDD KEEVY were joined by order of court on 19 July 2012 which interrupted prescription.'

[10]In the interim, the second respondent, acting on behalf of the estate of Hazell, also demanded the delivery of the stock from the third respondents to him. In May 2011 the third respondents acknowledged their liability to deliver the stock to the second

respondent in his capacity as executor of the estate of Hazell and tendered delivery thereof. The second respondent accepted the tender, however, delivery was not forthcoming. In these circumstances the second respondent ceded the rights of Hazell's

estate to claim the delivery of the stock to the appellant. The appellant in turn proceeded to deliver an application against the third respondents in this court for the delivery of the stock relying upon the cession by the second respondent and the acknowledgment of liability by the third respondents to the second respondent. On 6 May 2014 Plasket J ordered the third respondents to deliver the stock to the appellant. The dispute relating to the delivery of the stock accordingly became moot. The appellant, however, persisted in his claim against the third respondents relating to the delivery of the account and the debatement thereof. It was agreed to separate the third respondents' special plea from the remaining issues in the litigation and the matter proceeded to trial only in respect of the third respondents' plea of prescription and the appellant's replication thereto.

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The court a quo

[11]As recorded earlier the court a quo upheld the plea of prescription. In the course of the judgment in the court a quo the presiding judge recorded:

As recorded earlier the court a

upheld the plea of prescription. In the course of the judgment in the court a quo the presiding judge recorded:

"Since the plaintiff's claim is vindicatory in nature, to be successful against the third defendants, he is required to allege and prove firstly, that Eric's estate is the owner of the livestock and secondly, that John or his estate was in possession thereof when the action was instituted."

Since the plaintiff's claim is vindicatory in nature, to be successful against the third defendants, he is required to allege and prove firstly, that Eric's estate is the owner of the livestock and secondly, that John or his estate was in possession thereof when the action was instituted."

These remarks were made in the course of the enquiry relating to the appellant's case as pleaded in paragraph 2.8 of his replication

and are obiter.

[12]A lengthy application for leave to appeal was initially filed raising numerous grounds of appeal. Subsequently, however, prompted, no doubt, by the said finding of the court a quo, an amended notice of application for leave to appeal was delivered introducing a new ground of appeal. In the amended notice of the application for leave to appeal the appellant alleged that the court a quo erred in the conclusion to which it came in respect of prescription as the appellant's

claim is one under *therei vindicatio*, and accordingly not a “debt” in terms of Chapter 3 of the Prescription Act, 58 of 1969, and therefore could not prescribe.

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Prescription Act, 58 of 1969

[13] It was this latter ground of appeal that moved the judge *quo* to grant leave to appeal. He recorded in his judgment on the application for leave to appeal:

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to grant leave to appeal. He recorded in his judgment on the application for leave to appeal:

“In the light of my finding that the plaintiff’s claim is vindicatory in nature, a finding which came under attack by Mr de la Harpe, counsel for the third defendants, ..., I am of the opinion that there are reasonable prospects of success on appeal.”

In the light of my finding that the plaintiff’s claim is vindicatory in nature, a finding which came under attack by Mr de la Harpe, counsel for the third defendants, ..., I am of the opinion that there are reasonable prospects of success on appeal.”

The appeal

[14] At the hearing of the appeal the appellant confined his argument exclusively to this latter ground of appeal. Mr Beyleveld SC, who appeared on behalf of the appellant acknowledged that in the event of our finding that the appellant’s claim is not one under *therei vindicatio* then the claim has in fact become prescribed. In the event, however, of our holding that the appellant’s claim is indeed

one under *therei vindicatio* then it was argued that the remaining claim for an order that the third respondents render and debate an account is ancillary to the claim under *therei vindicatio* and is similarly founded upon the alleged ownership of the appellant in the progeny of the stock.

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and is similarly founded upon the alleged ownership of the appellant in the progeny of the stock.

[15] On behalf of the appellant it is argued that the action instituted was a rei vindicatio founded upon the appellant's ownership of the stock and that it was therefore not a "debt" as envisaged in Chapter 3 of the Prescription Act. The latter contention is founded in the decision of Absa Bank Limited v Keet 2015 (4) SA 474 (SCA). In that matter Absa Bank brought an action in the High Court seeking confirmation of its cancellation of an instalment sale agreement and the recovery of a vehicle when Keet had defaulted upon payments. Keet's special plea of prescription was upheld in the High Court on the basis that the appellant's claim for repossession of the

vehicle was a "debt" as contemplated in section 10 of the Prescription Act and had thus prescribed after the lapse of three years. The main issue in the appeal was whether a claim under the rei vindicatio became prescribed after three years by virtue of section 10. The Supreme Court of Appeal, after reviewing various authorities, held that this view was contrary to the scheme of the Prescription Act. It was held accordingly that a claim under the rei vindicatio was not a debt as envisaged in the Prescription Act.

On behalf of the appellant it is argued that the action instituted was a

founded upon the appellant's ownership of the stock and that it was therefore not a "debt" as envisaged in Chapter 3 of the Prescription Act. The latter contention is founded in the decision of

Prescription Act. The

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The facts of the present matter are clearly distinguishable from the issues which served before the Supreme Court of Appeal. In terms of the will Hazell's usufruct in respect of all bequests made was subject to the provisions of paragraph 2 of the will. In paragraph 2 the testator created a Testamentary Trust which required of his administrators (the trustees in the trust), together with Hazell, to carry on the farming activities as he had done. They were expressly authorised to buy and to sell stock, as they may deem appropriate, in doing so.

[17] The will was signed in 1986 in accordance with the then Administration of Estates Act of 1965. Section 1, read with section 59 of the Administration of Estates Act defined the word "administrator" as a person who by the will of the deceased has been given the control of the property of the deceased with the direction to administer it for the benefit of some other person. Both the definition and section 59 were repealed by section 26(1) of the Trust Property Control Act 57 of 1988, which also replaced "administrator" by "trustee" in section 40 of the Administration of Estates Act, and employs "trustee" in relation to both testamentary and inter vivos trusts. At the time of the testator's death the Trust Property Control Act was in force. One De Beer and one Were were accordingly appointed by the Master of the High Court to serve as trustees in the trust, being the trust envisaged in paragraph 2 of the will. In the circumstances the reference in the will to the administrators is a reference to the trustees in the trust.

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Both the definition and section 59 were repealed by section 26(1) of the Trust Property Control Act 57 of 1988, which also replaced “administrator” by “trustee” in section 40 of the Administration of Estates Act, and employs “trustee” in relation to both testamentary and inter vivos trusts. At the time of the testator’s death the Trust Property Control Act was in force. One De Beer and one [redacted] were accordingly appointed by the Master of the High Court to serve as trustees in the trust, being the trust envisaged in paragraph 2 of the will. In the circumstances the reference in the will to the administrators is a reference to the trustees in the trust.

Administration of

Estates Act of 1965

Section 1

section 59

Administration of Estates Act defined

section 40

Estates Act, and

[18] As set out earlier clause 2 of the will created a Testamentary Trust. Upon the establishment of the trust the dominium in the trust assets, including the livestock, vested in the trustees. (See for example *Estate Kemp and Others v McDonald’s Trustee* 1915 AD 491 at 504.) This is borne out by the power entrusted to them to buy or sell livestock as they may deem necessary. Significantly, nowhere in the particulars of claim did the appellant allege that he was owner of the stock or their progeny.

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1915 AD 491 at 504.) This is borne out by the power entrusted to them to buy or sell livestock as they may deem necessary. Significantly, nowhere in the particulars of claim did the appellant allege that he was owner of the stock or their progeny.

1915 AD 491

[19] The trustees in whom the dominium over the stock vested, together with Hazell, the usufructuary, entered into the agreement of lease with the first respondent. They, as owners of the stock, were party to the agreement as reflected in the written deed of lease. Neither the authority of the trustees and Hazell to enter into the agreement nor the validity of the agreement is challenged. Indeed the appellant relies upon the agreement for his claim for the delivery of the stock.

The trustees in whom the dominium over the stock vested, together with Hazell, the usufructuary, entered into the agreement of lease with the first respondent. They, as owners of the stock, were party to the agreement as reflected in the written deed of lease. Neither the authority of the trustees and Hazell to enter into the agreement nor the validity of the agreement is challenged. Indeed the appellant relies upon the agreement for his claim for the delivery of the stock.

[20]The agreement in question, although commonly referred to as “a lease” is in fact no contract of lease at all, but rather a loan for consumption. An essential feature of a contract of lease is that the lessee is required at the termination of the contract to return the property which had been delivered to him at the commencement of the lease. A “lease” of livestock (commonly referred to as “sheep lease”), however, is an agreement, as stipulated in clause 10 of the written

deed of lease, which is set out earlier, in terms of which the lessee is required to return livestock of equal number and value at the conclusion of the agreement. What he must return is therefore not the same animals which he received. Under an agreement of this nature ownership does not vest in the lessor but in the lessee or the possessor. The risk in respect of the livestock is that of the lessee and he or she is under an obligation to return to the lessor the same quantity and quality of animals at the end of the period of lease as he received at the commencement.

(See *Jagger & Co. v Du Toit* (1908) 25 SC 30; *Van Druten v Cloete* (1885) 3 HCG 276; *Thesen & Co. v Robertson* 1914 CPD 760 at 763; *The Law of South Africa* (2nd ed: Replacement volume 2014) vol 22 Part 1 para 565; *Wille’s Principles of South African Law* (9th ed) p. 948-949; *Grotius* 3.10.5 and *Voet* 12.1.4.) What the lessor retains is a personal right to claim the delivery of livestock of equal number and value to that which had been delivered to the lessee at the commencement of the lease.

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The Law of South Africa

ed: Replacement volume 2014) vol 22 Part 1 para 565;

Wille's Principles of South African Law

e) p. 948-949;

Grotius

3.10.5 and

12.1.4.) What the lessor retains is a personal right to claim the delivery of livestock of equal number and value to that which had been delivered to the lessee at the commencement of the lease.

[21] In these circumstances the first respondent became the owner of the stock in terms of the agreement of lease. The appellant was accordingly not the owner of the stock; his claim does not proceed on the basis of ownership; the claim is not *rei vindicatio*; and the claim for delivery of the stock is a "debt" as envisaged in Chapter 3 of the Prescription Act. The judgment in *Absa Bank Limited v Keet*, *supra*, does therefore not assist the appellant. For this reason the appeal must fail.

In these circumstances the first respondent became the owner of the stock in terms of the agreement of lease. The appellant was accordingly not the owner of the stock; his claim does not proceed on the basis of ownership; the claim is not a

; and the claim for delivery of the stock is a "debt" as envisaged in Chapter 3 of the Prescription Act. The judgment in

, does therefore not assist the appellant. For this reason the appeal must fail.

[22] In any event, even if I err in the conclusion to which I have come the appellant's argument that the court erred in failing to find that the claim in the action does not constitute a "debt" as envisaged in the Prescription Act cannot succeed. I have set out earlier herein the foundation of the plea of prescription and the appellant's replication thereto. The replication proceeds on an acceptance that the claim in the action constitutes a "debt" in terms of the Prescription Act. It was the appellant's contention that the period of prescription laid down in the Prescription Act had not been completed because the debt is the subject of a claim filed against John's estate. He accordingly pleaded that the impediment referred to in section 13(1)(g) of the Prescription Act for which he contended has not ceased to exist.

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erred in failing to find that the claim in the action does not constitute a "debt" as envisaged in the Prescription Act cannot succeed. I have set out earlier herein the foundation of the plea of prescription and the appellant's replication thereto. The replication proceeds on an acceptance that the claim in the action constitutes a "debt" in terms of the Prescription Act. It was the appellant's contention that the period of prescription laid down in the Prescription Act had not been completed because the debt is the subject of a claim filed against John's estate. He accordingly pleaded that the impediment referred to in section 13(1)(g) of the Prescription Act for which he contended has not ceased to exist.

Prescription Act

cannot

Prescription Act. It

Prescription Act had

section 13(1)(g)

[23] In granting leave to appeal the court a quo recorded:

In granting leave to appeal the court

recorded:

"At the trial the issue that I was called upon to decide was whether the three year period referred to in section 11(d) of the Prescription Act had expired alternatively whether the plaintiff should be deemed to have acquired knowledge of the identity of the person in whose possession the livestock was. The parties had agreed at the trial that the period of prescription relevant to this case was the aforesaid three year period. Counsel made submissions against the above background."

At the trial the issue that I was called upon to decide was whether the three year period referred to in section 11(d) of the Prescription Act had expired alternatively whether the plaintiff should be deemed to have acquired knowledge of the identity of the person in whose possession the livestock was. The parties had agreed at the trial that the period of prescription relevant to this case was the aforesaid three year period. Counsel made submissions against the above background."

section 11(d)

Act had

[24]In my view therefore, it is clear from the pleadings and the issues separated by agreement between the parties that the question as to whether the claim instituted by the appellant constituted a “debt” as envisaged in the Prescription Act was not an issue which the court was called upon to decide. It was not before the court. For this reason too the appeal must fail.

In my view therefore, it is clear from the pleadings and the issues separated by agreement between the parties that the question as to whether the claim instituted by the appellant constituted a “debt” as envisaged in the Prescription Act was not an issue which the court

Prescription Act was

was called upon to decide. It was not before the court

. For this reason too the appeal must fail.

[25]In the result, I would dismiss the appeal with costs.

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J W EKSTEEN

JUDGE OF THE HIGH COURT

DAWOOD J:

I agree. The appeal is dismissed with costs.

FBA DAWOOD

MAGEZA AJ

TP MAGEZA

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Appellant:

Adv A Beyleveld SC instructed by Leon Keyter Attorneys, Grahamstown

For 1st & 3rd Respondents: Adv D de la Harpe instructed by Whitesides, Grahamstown

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Prepared on 11 October 2026 · Esheria