

SOUTH AFRICA / JUDGMENT

Keyter v Kevvy and Others (1658/2006) [2017] ZAECHGC 41 (22 March 2017)

[2017] ZAECHGC 41**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem

CASE / FILE NUMBER

1658/2006

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****EASTERN CAPE DIVISION,****GRAHAMSTOWN****CASE NO. 1658/2006****In**

the matter between:

LEON

KEYTER

Plaintiff

and

NEVILLE

WILLIAM

KEEVY

First Defendant

ANDREW

STUART PATERSON

N.O

Second Defendant

IN

HIS CAPACITY AS EXECUTOR OF THE ESTATE

OF

THE LATE HAZEL AGNES KEEVY

MARIAN

ELAINE VAN DER MEULEN N.O

and

Third Defendants

FREDERICK

JOHANNES POTGIETER N.O

IN

THEIR CAPACITIES AS EXECUTORS OF THE
ESTATE
OF THE LATE JOHN MARTIN DENNIS
DANCKWERTS
KEEVY

JUDGMENT

Bloem J.

- [1] I am required to decide whether or not the plaintiff's claim against the third defendants[1] has become prescribed in terms of the provisions of section 11 (d) of the Prescription Act.[2]
- [2] The plaintiff sues in his capacity as executor of the estate of the late Eric William Danckwerts Keevy,[3] having been appointed as such by the Master of the High Court on 10 April 2006. The first defendant is Neville William Keevy.

When the action was instituted the second defendant was John Martin Dennis Danckwerts Keevy who was sued in his capacity as the executor of the estate of his late mother, Hazel Agnes Keevy. [4] Without disrespect to any of the personae involved and simply for the sake of convenience, I shall hereinafter refer to them by their first names only.

- [3] John died on 28 March 2008. By notice which was delivered on 1 April 2011 Andrew Stuart Paterson was substituted as the second defendant in the stead of John, in his capacity as the executor of the estate of the late Hazel. The third defendants are Marian Elaine van der Meulen and Frederick Johannes Potgieter who are sued in their respective capacities as executrix and executor of John's estate.

- [4] The first two paragraphs of Eric's will read as follows:

"1.

Subject to Clause 2 hereof, I direct that my wife, HAZEL AGNES KEEVY, born LOGIE, 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.

2.

I direct that the farms Keeviston, Tierkop, Clifton Annex and Portions 3 and 4 Kianghas Mond measuring 184,4292 hectares, together with livestock and implements shall be held in trust by my administrators who in conjunction with my wife, HAZEL AGNES KEEVY, born LOGIE, 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,

HAZEL AGNES KEEVY, born LOGIE, during her lifetime, and after her death to my son DAN LAWTON ROE JOHN DANCKWERTS KEEVY until his death, when the said properties, or the proceeds thereof, will

devolve upon my said son's children (or the child) of my said son nominated by him in his last Will. My administrators shall be entitled to let the aforesaid farms to my said son or to appoint him as manager thereof as they in their discretion may decide."

- [5] Eric's estate included 221 Dorper ewes with lambs, 5 Dorper rams, 46 maiden Dorper ewes, 52 Merino ewes, 2 Merino rams, 32 weaned lambs, 62 cows, 33 calves, 2 bulls and 1 heifer (the livestock). It is common cause that the livestock were not listed in the liquidation and distribution account of the estate of Eric signed by the then executors of his estate on 19 July 1990.
- [6] On Eric's death Hazel took possession of the livestock. On 13 September 1993 the administrators of Eric's estate, together with Hazel, in her capacity as usufructuary in Eric's estate, concluded a written lease agreement with the first defendant in respect of various farms, the livestock and farm implements. In terms of the lease agreement Hazel let the livestock to the first defendant until her death. The parties agreed in Clause 10 thereof that at the termination of the lease the first defendant "shall re-deliver to the Administrators in Estate Late E W D Kevy 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."
- [7] In terms of the lease agreement Hazel delivered the livestock to the first defendant. She died on 29 June 2003 with the result that both the lease and the usufruct terminated on that day. The plaintiff alleges that the value of the livestock as at 29 June 2003 was R400 000.00. After Hazel's death the first defendant was required to deliver the livestock, immovable properties and implements to the administrators of Eric's estate. Instead, John, in his capacity as executor of Hazel's

estate, took possession of the livestock. Before John's death on 28 March 2008 he denied that he was obliged to deliver the livestock to the plaintiff. On 11 November 2008 the second defendant was appointed as the executor of Hazel's estate.

On 4 May 2011 the executors of John's estate tendered to return the livestock to the present second defendant who accepted the tender on 12 May 2011. Notwithstanding the acceptance of the tender the livestock were not delivered by those executors to the second defendant. The plaintiff demanded the delivery of the livestock from the defendants. He now claims from the first defendant delivery of the livestock alternatively payment of R400 000.00 together with interest thereon, alternatively from the second alternatively third defendants delivery of the livestock, and from the first, second and third defendants the rendering and debatement of an account in respect of the progeny of the livestock and any profit accruing to either defendant therefrom, from 29 June 2003 to the present and the payment of any amount so established as

being due and payable to the plaintiff alternatively delivery of any progeny so established as being the plaintiff's property.

- [8] I shall deal with the first and second defendants' special pleas and plea over (plea) at a later stage. The third defendants also raised a special plea. The third defendants pleaded that the plaintiff's claim against them has become prescribed in terms of section 11 of the Prescription Act because their claim against the personal estate of John, represented by them, arose on 29 June 2003 when Hazel died. It was more than 3 years before they were joined in the action in their aforesaid representative capacities by order of this court on 19 July 2012.
- [9] In his replication to the third defendants' special plea the plaintiff denied that his claim against them became prescribed. He pleaded that by correspondence dated 30 July 2009 he submitted a claim to the third defendants against John's estate for the livestock and their progeny. The third defendants rejected the claim on 5 October 2009. As a result of the rejection of the claim the plaintiff lodged an objection with the Master of the High Court on 16 October 2009. The plaintiff pleaded further that the Master has not confirmed the final liquidation and distribution account in John's estate. The plaintiff's contention is that the period of prescription has not been completed because the debt is the object of a claim filed against John's estate. The plaintiff pleaded that the impediment referred to in section 13 (1) (g) of the Prescription Act which, on his contention, arose on either 30 July 2009 or 16 October 2009 has not ceased to exist.
- [10] In the alternative, the plaintiff pleaded that the first time that he acquired knowledge of the claim against John was on 10 May 2010 when an attorney, representing John's estate, confirmed by letter that John had disposed of the livestock. He pleaded that the joinder of the third defendants in the action in their aforesaid representative capacities on 19 July 2012 interrupted

prescription.

- [11] The parties are in agreement that the three year prescription period referred to in section 11 (d) of the Prescription Act applies to the facts of the present matter. It means that the plaintiff's claim against John or his estate became prescribed three years after the debt became due.[5] To determine whether the plaintiff's claim has become prescribed one needs to first ascertain the date when the debt became due. The third defendants' case is that the date upon which the debt became due was 29 June 2003, when Hazel died. On that day the lease agreement and Hazel's usufruct over the livestock terminated. The plaintiff, in his capacity as executor of Eric's estate, was accordingly from that date entitled to the re-delivery of the livestock, immovable property and implements. The period of three years elapsed at midnight on 28 March 2006.[6] If those are the only facts that must be considered then the defence of prescription must be upheld.

[12] The plaintiff contended that the running of prescription was interrupted. For that contention he relied on section 13 of the Prescription Act which deals with the delay of the completion of prescription in certain circumstances. The relevant part of section 13 (1) reads as follows:

“1) If-

- (a) ...
- (b) ...
- (c) ...
- (d) ...
- (e) ...
- (f) ...
- (g) the debt is the object of a claim filed against the estate of a debtor who is deceased or against the insolvent estate of the debtor or against a company in liquidation or against an applicant under the Agricultural Credit Act, 1966; or
- (h) ... ; and
- (i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist,

the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).”

[13] The plaintiff’s case is that the debt became the object of a claim against John’s estate on 30 July 2009 when he (the plaintiff) addressed a letter to Messrs du Preez, Potgieter and Trichardt, attorneys who assisted John during his lifetime to perform his duties as executor in Hazel’s estate. In that letter the plaintiff stated that “... I hereby lodge a claim against [John’s estate] in my capacity as executor and/or as agent of Mr Dan Keevy. The claim has been conservatively calculated at R1 324 339.90...”. In response to the plaintiff’s letter the aforesaid attorneys advised him that John’s estate did not accept the claim of Eric or Dan’s estate.

[14] The purported relevance of the filing of the claim is that the impediment contemplated in section 13 (1)(g) of the Prescription Act commences when a creditor’s claim is filed. That impediment ceases to exist once the Master confirms the final liquidation and distribution account.[7]

[15] In my view section 13 (1)(g) does not assist the plaintiff. His claim against John became due on 29 June 2003 when Hazel died. That much was accepted by Mr Dyke SC, counsel for the plaintiff. The plaintiff should accordingly have instituted action against John, in his personal

capacity, within three years from 29 June 2003. The period of three years elapsed at midnight on 28 June 2006. Although the summons was served on John on 2 June 2006, in other words before the three year period elapsed, he was sued in his representative capacity as executor of Hazel's estate. John, in his personal capacity, was at that stage not before court. His estate was sued only six years later when the third defendants were joined by order of court on 19 July 2012.

[16] In the interim, on 30 July 2009 the plaintiff filed a claim against John's estate. At that stage the plaintiff's claim against John had already become prescribed in terms of section 11 (d) of the Prescription Act, because, before the filing of the plaintiff's claim against John's estate, there was nothing which interrupted the running of prescription against the plaintiff's claim against John (or, after his death, his estate). In my view, the filing of the plaintiff's claim, approximately six years after his claim against John or his estate became due, did not have the effect of undoing the prescription of his claim on 28 June 2006. John died on 28 March 2008. It means that the plaintiff's claim against him, in his personal capacity, had already become prescribed before his death. Section 13 (1)(g) of the Prescription Act accordingly has no application to the facts of this case and the plaintiff's reliance thereon is therefore misplaced.[8]

[17] The plaintiff's alternative contention is that, until he had knowledge of the whereabouts of the livestock, prescription could not run against his claim against John or his estate. For that submission Mr Dyke relied on the provisions of section 12

(3) of the Prescription Act which reads as follows:

"A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable

care."

[18] Mr de la Harpe, counsel for the third defendant, accepted that, because the third defendants raised prescription as a defence, they bear the onus of establishing, as a matter of probability, that prescription commenced to run and had expired before action was instituted against

them on 19 July 2012.[9] In this case the onus is accordingly on the third defendants to establish their special defence of prescription. Their defence can succeed only if they have proved both the date of the inception (commencement) and the date of the completion of the period of prescription.[10]

[19] The third defendants are required to prove that the plaintiff's claim had become prescribed by 19 July 2012 when they were joined as defendants herein. In order for them to prove that the plaintiff's claim had become prescribed, the third defendants must show that prescription began to run against the plaintiff's claim not later than 18 July 2009, as the applicable period of prescription in this case is three years. The third defendants must show

what the facts are that the plaintiff was required to know before prescription could commence running. They must also show that the plaintiff had knowledge of those facts on or before 18 July 2009.[11]

[20] In *Peter Taylor and Associates v Bell Estates (Pty) Ltd and another*[12] the Supreme Court of Appeal held that the service of an application for joinder will interrupt prescription against the party sought to be joined only if the application for joinder constitutes a “process whereby the creditor claims payment of the debt”.[13] The application for the joinder of the third defendants was not a process in which the plaintiff claimed payment of a debt.

Furthermore, the judgment in the application for joinder did not dispose of some elements of the plaintiff’s claim.[14] In the circumstances of this case, if the plaintiff’s claim against the third defendants had not become prescribed by 19 July 2012, prescription would have been interrupted on that day when the third defendants were joined.

[21] 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[15] and secondly, that John or his estate was in possession thereof when the action was instituted.[16] The administrators of Eric’s estate (and thereafter the plaintiff) knew since the death of Hazel that Eric’s estate is the owner of the livestock. The issue therefore is whether the plaintiff (and before him, his predecessor) knew that the livestock was in John’s possession. The plaintiff’s case is that he only became aware on 10 May 2010 that the livestock was in John’s possession until he had disposed of them. The third defendants’ case is that the plaintiff and his predecessor knew or should be deemed to have known at an early stage that the livestock was in John’s possession. The third defendants’ contention is that if it is found that the plaintiff in fact did not know the whereabouts of the livestock until 10 May 2010, he must be deemed to have had such knowledge at an earlier stage because he could have acquired such knowledge by the exercise of reasonable care.

[22] The third defendants did not lead any evidence at the trial. They relied on the pleadings and correspondence for the contention that the administrators of Eric’s estate and the plaintiff knew or should be deemed to have known where the livestock was. In paragraphs 12 and 13 of the first and second[17] defendants’ plea they admitted that on the death of Eric on 12 June 1989 Hazel took possession of the livestock as usufructuary.

On 13 September 1993 Hazel entered into the lease agreement with the first defendant in respect of the livestock. It was agreed that the lease agreement would terminate on Hazel’s death. Mr de la Harpe submitted that, in the light of the plea entered on behalf of John, the administrators of Eric’s estate knew, on receipt of the plea, that they were vested with a claim for the return of the livestock upon Hazel’s death and that the livestock was in John’s possession. I agree with the submission that the administrators of Eric’s estate knew upon Hazel’s death that they had a claim for the return of the livestock. Whether they knew the identity of the person in whose possession the livestock was (the debtor) is in dispute. The administrators of Eric’s estate and thereafter the plaintiff obviously had a right to claim the livestock wherever found, from whomsoever holding it.

[18]

- [23] The first and second defendants pleaded in paragraph 19 of their plea that upon Hazel's death the first defendant made the livestock available to John who in turn made it available to the administrators of Eric's estate "as the entity who, in accordance with the lease, appeared to be the entity to deal therewith". They furthermore pleaded that the first defendant retained possession of the livestock in terms of an oral lease agreement with the administrators of Eric's estate and that in November 2004 some of the livestock was handed over by the administrators of Eric's estate to Dan.
- [24] The first and second defendants admitted in their plea that, upon Hazel's death, the first defendant was legally obliged to hand the livestock over to John, in his capacity as executor of Hazel's estate, that John had to hand the livestock over to the administrators of Eric's estate and that after November 2004 John took possession of the small stock which was regarded as an asset in Hazel's estate.
- [25] In the circumstances, when the first and second defendants' plea was delivered on 15 August 2006, the plaintiff was informed that upon Hazel's death on 29 June 2003, the first defendant retained the livestock but during November 2004 "the small stock" was in John's possession. When the plea was delivered the three year period[19] referred to in section 11 (d) of the Prescription Act had already expired. In my view and on the assumption that the plaintiff or his predecessor did not know the whereabouts of the livestock before 15 August 2006, the plaintiff was given sufficient information in the first and second defendants' plea to establish in whose possession the livestock was. On the basis of the plea the livestock was in the possession of either the first defendant or John or some in the possession of the first defendant and others in John's possession because, according to the plea, John held "the small stock" from November 2004.
- [26] Before I deal with the probabilities of whether the plaintiff must be held to have had knowledge of the whereabouts of the livestock shortly after the delivery of the plea, I need to deal with Mr Dyke's submission that, because John was at all times material hereto dealing with the livestock in his capacity as executor of Hazel's estate, it was impossible for the plaintiff to have established that John possessed and later disposed of the livestock in his personal capacity. Mr de la Harpe submitted that that submission is unsustainable because in a letter dated 21 September 2006 addressed to the first and second defendants' attorney the plaintiff's then attorney, Neville Borman who Mr Keyter described as an experienced attorney, called upon John "to return to the plaintiff (the Executor in Estate EWD Keevy) all progeny acquired in respect of not only cattle but sheep such as were held by the Second Defendant either in his personal capacity or qua Executor in Estate HA Keevy." When Mr Keyter was confronted with this letter in cross-examination, he described Mr Borman's reference to the return of the cattle and sheep by John in his personal capacity as an error or a shot in the dark. When it was put to him that Mr Borman appreciated the potential of a claim against John in his personal capacity, Mr Keyter's response was that he was unable to explain why Mr Borman made reference to John in his personal capacity because, according

to him, there was no indication that John was dealing with the livestock in his personal capacity.

- [27] Mr de la Harpe also referred to a letter dated 30 July 2009 that the plaintiff addressed to Messrs du Preez, Potgieter & Trichardt wherein he stated that the negligence of John “resulted in financial loss to the estate of the late [Eric] Keevy and the usufructuary. In the circumstances I hereby lodge a claim against his estate in my capacity as executor and/or as agent of Mr Dan Keevy.”
- [28] In my view it is incomprehensible that neither the plaintiff’s predecessors nor the plaintiff could not establish the whereabouts of the livestock soon after Hazel’s death. At the time of her death the livestock was in possession of the first defendant. In terms of the lease agreement, which was entered into by and between the administrators of Eric’s estate as well as Hazel, collectively referred to as the lessor and the first defendant, as the lessee, the first defendant had to redeliver the livestock to the administrators of Eric’s estate at the termination of the lease agreement. In other words, the administrators knew that, at the termination of the lease agreement, they could claim the livestock from the first defendant if he did not deliver it. That did not happen. Instead John, in his capacity as the executor of Hazel’s estate, entered into a month-to-month lease agreement with the first defendant. There is no evidence why the administrators did not at that stage take possession of the livestock from the first defendant. They obviously could do so because Eric’s estate, which they were required to administer, was the owner of the livestock.
- [29] Secondly, a reasonable person in the position of the plaintiff would have been more active in the search for the livestock after the delivery of the first and second defendants’ plea. As pointed out above, at that stage the livestock was either in the possession of the first defendant or John. The latter had no right to the possession of the livestock because Hazel enjoyed only a usufruct over the livestock which terminated at her death. That much is clear from Eric’s will and the lease agreement. The exercise of reasonable care in the circumstances of this case includes the appointment of agents with the necessary expertise to look for and identify the livestock. Had the plaintiff exercised such care he would have established who was in possession of the livestock. The plaintiff elected to address letters to John’s attorneys who, in his words, were unhelpful. The lack of assistance from those attorneys should have motivated the plaintiff to employ other ways of establishing the whereabouts of the livestock.
- [30] Thirdly, Mr Borman was, in my view, proactive. He appreciated the real possibility that John was dealing with the livestock in his personal capacity. That is so because John could not have dealt with the livestock in his capacity as executor of Hazel’s estate since she did not own the livestock during her lifetime. She accordingly only had the right to use and enjoy the livestock until her death. She did not acquire ownership of the livestock. Nothing prevented the plaintiff from citing John also in his personal capacity when he issued summons against the first defendant and John (in his representative capacity as executor of Hazel’s estate) during May 2006 or to have joined him in his personal capacity during

September 2006 when his attorney realised the possibility that John was dealing with the livestock in his personal capacity. A creditor who fails to exercise the reasonable care prescribed by section 12 (3) of the Prescription Act must pay the penalty for he is deemed to have acquired the knowledge necessary for the debt to become due and for prescription to begin to run.[20]

- [31] It is clear from the plaintiff's letter dated 30 July 2009 that he knew at that stage that he, in his capacity as executor of Eric's estate, had a claim against John's estate. If John was dealing with the livestock in his capacity as executor of Hazel's estate, he would have lodged a claim against Hazel's estate. In the aforesaid letter he made it clear that he lodged the "claim against [John's] estate in my capacity as executor and/or as agent of Mr Dan Kevy." That he lodged a claim against John's estate means that he knew at that stage that John held the livestock in his personal capacity. The plaintiff did not explain why the third defendants were not joined in these proceedings at that stage.
- [32] In all the circumstances, had the plaintiff and his predecessors exercised reasonable care, they would have acquired knowledge that John was in possession of the livestock in his personal capacity. They are accordingly deemed to have had such information at the latest before July 2009. It therefore means that the third defendants' special plea of prescription against the plaintiff's claim must be upheld, with costs.
- [33] In the result, the third defendants' special plea of prescription against the plaintiff's claim is upheld, with costs.

G H BLOEM

Judge of the High Court

For the plaintiff:

Adv B C Dyke SC, instructed by Leon Keyter Attorneys, Grahamstown

For the third defendants:

Adv D H de la Harpe, instructed by Whitesides Attorneys, Grahamstown

Date heard:

9 December 2016

Date of delivery of the judgment: 22 March 2017

- [1] For an unexplained reason two persons have been cited as "the third defendants" in their respective capacities as executrix and executor of an estate.
- [2] Prescription Act, 1969 (Act No. 68 of 1969).
- [3] Eric William Danckwerts Kevy died on 12 June 1989.

- [4] Hazel Agnes Keevy (Hazel) was married to Eric. She died on 29 June 2003.
- [5] Section 12 (1) of the Prescription Act provides that, subject to subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due.
- [6] For the calculation of the three year period see *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) at 627D-F.
- [7] *Nedcor Bank Ltd v Rundle* 2008 (1) SA 415 (SCA) at 418E-F.
- [8] See *Absa Bank Bpk v de Villiers* 2001 (1) SA 481 (SCA) at 487H.
- [9] *van Zijl v Hoogenhout* 2005
- (2) SA 93 (SCA) at 107G-H.
- [10] *Gericke v Sack* 1978
- (1) SA 821 (A) at 827H – 828B.
- [11] *Links v Department of Health, Northern Province* 2016 (4) SA 414 (CC) at 423C-E.
- [12] *Peter Taylor and Associates v Bell Estates (Pty) Ltd and another* 2014
- (2) SA 312 (SCA).
- [13] Section 15 (5) of the Prescription Act and *Peter Taylor and Associates* (supra) at 319B-D.
- [14] *Compare Waverley Blankets Ltd v Shoprite Checkers (Pty) Ltd and another* 2002
- (4) SA 166 (C) which was held in *Peter Taylor and Associates v Bell Estates (Pty) Ltd and another* (supra) at 319E-F to have been wrongly decided.
- [15] *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd*
- [1992] ZASCA 208; 1993 (1) SA 77 (A) at 82A.
- [16] *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20C-D.
- [17] John was the second defendant when the plea was delivered on 15 August 2006. He subsequently died on 28 March 2008.
- [18] *Chetty v Naidoo* (supra) at 20B.
- [19] Calculated from the date of Hazel's death on 29 June 2003.
- [20] *Gericke v Sack* (supra) at 832C-D.

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