

SOUTH AFRICA / JUDGMENT

Ndara and Another v Weir Investments (Pty) Ltd and Others (3180/2013) [2019] ZAECGHC 95 (1 October 2019) [2019] ZAECGHC 95

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J M Roberson

CASE / FILE NUMBER

3180/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE NO: 3180/2013

Date

heard: 06/09/2019

Date delivered: 01/10/2019

In

the matter between:

MZUKISI

LUBABALO NDARA

First Applicant/First Plaintiff

UNATHI

NDARA

Second Applicant/Second Plaintiff

and

WEIR

INVESTMENTS (PTY) LTD First

Respondent/First Defendant

FIRST

RAND BANK LTD T/A WESBANK Second

Respondent/Second Defendant

JEAN

VAN AART Third

Respondent/Third Defendant

JUDGMENT

ROBERSON J:

- [1] The applicants (plaintiffs in the court a quo) have applied for leave to appeal against a judgment of Revelas J, upholding the respondents' (defendants in the court a quo) plea of prescription and dismissing their claim with costs. In this judgment I shall refer to the parties as they were in the trial court.

Background

- [2] The circumstances leading to me hearing this application are somewhat unusual. Following Revelas J's judgment dismissing the plaintiffs' claim, the plaintiffs applied for leave to appeal. On 18 August 2015 Revelas J dismissed the application for leave to appeal in the absence of the plaintiffs. It is common cause she did so on the merits.
- [3] The plaintiffs subsequently applied to rescind Revelas J's order dismissing the application for leave to appeal. They did so in terms of rule 42 (1) (a), namely on the ground that the

judgment

had been erroneously sought or erroneously granted in the absence of the plaintiffs. On 14 August 2018 Majiki J set aside

Revelas J's order dismissing the application for leave to appeal and ordered the Registrar, *inter alia*, to ensure that the

matter was enrolled for the re-hearing of the application for leave to appeal.

- [4] The application for leave to appeal was duly enrolled before Revelas J. After hearing argument, she expressed the view that it was doubtful that the application should have been set down before her, because she was *functus officio*, having dismissed the first application on the merits. She further expressed the view that an application for rescission was not the correct procedure to have been followed, and that the plaintiffs should have petitioned the Supreme Court of Appeal for leave to appeal her judgment. She struck the application from the roll.
- [5] The parties were in agreement that another judge could hear the application for leave to appeal in terms of rule 49 (1) (e) which provides that where the judge who presided at the trial is not available, an application for leave to appeal can be heard by another judge of the division.

The pleadings

[6] The plaintiffs' claim was based on an alleged fraudulent misrepresentation which induced the first plaintiff to enter into a contract of sale. They claimed restitution of amounts paid in terms of the contract as well as delictual damages. According to the particulars of claim, on 25 November 2004 the first plaintiff,

who is married in community of property to the second plaintiff, entered into an oral contract of purchase and sale with the first

defendant represented by the third defendant. In terms of the agreement the first plaintiff purchased from the first defendant a demonstration Nissan X-Trail motor vehicle (the vehicle) for a cash price of R297 990.00. On the same date the first plaintiff entered into a written instalment sale agreement with the second defendant in terms of which the first plaintiff purchased the vehicle. Ownership was retained by the second defendant. The vehicle was delivered to the first plaintiff.

[7] At all material times the first plaintiff was employed by the Eastern Cape Department of Health as a Director and was eligible for a subsidy on new vehicles. The defendants were aware of these

facts. The defendants, acting with a common purpose, represented to the first plaintiff's employer and to the second

defendant's employees: that the vehicle was new; that the cash price was R297 990.00; that extras were agreed upon in the sum of R35 340.00; that the first plaintiff's trade-in vehicle would be sold to settle an account with Absa Bank without any debt being carried over to the instalment sale agreement; that the interest rate was 15.5% per annum; and that the first plaintiff was not entitled to the Wesbank Government car subsidy scheme of prime less 2%, which was 9% for all Directors. When the defendants made such representation they intended the plaintiffs to act thereon and to pay the various amounts, including interest and a high instalment, which were in excess of the value of the vehicle. The extras had not been agreed to and the defendants added an amount of R25 900.00 for insurance which was not due. The plaintiffs' vehicle (for the Absa account) was not sold at the price which was agreed. If the plaintiffs had known the true facts, they would not have purchased the vehicle. The true purchase price of the vehicle was R261 394.00. As a result of the defendants' fraudulent conduct, alternatively recklessness on the part of the second defendant, the plaintiffs cancelled the contract.

[8] The plaintiffs went on to allege that as a result of the unlawful conduct of the defendants, the first plaintiff had suffered damages in the sum of R10 million for, inter alia, loss of creditworthiness,

diminished reputation, impairment of dignity, loss of quality of life, pain and suffering, emotional shock, and depression.

- [9] In their prayer the plaintiffs prayed for an order declaring the sale of the vehicle to be null and void and setting the sale aside, alternatively confirmation of the cancellation of the sale and instalment sale agreements; return of the vehicle to the defendants; a refund of all instalments and insurance paid to the second defendant in the sum of R166 934.44; R10 million damages; and interest and costs.
- [10] In their special plea of prescription the defendants pleaded that the claims were founded upon contractual and delictual causes of action which fell due and/or arose during 2004. Summons was served during September 2013, more than three years after the claims were alleged to have arisen.
- [11] The plaintiffs replicated and pleaded that the full facts constituting the cause of action became complete in August 2013 when the plaintiffs became aware that employees of the first and second defendants together with the third defendant had applied for finance for the sale of a new vehicle instead of a demonstration vehicle. They pleaded further that on 22 May 2013 the second defendant sent a notice in terms of s 129 of the National Credit Act 2005 to the first plaintiff, and accordingly the contract was still in existence. The second defendant was seeking to enforce a contract which was induced by a fraudulent misrepresentation and the plaintiffs reacted by instituting this action.

Incomplete record

- [12] The record of the trial proceedings is incomplete and it is common cause that it cannot be reconstructed. The trial proceeded only on the issue of prescription. The record consists of a portion of the first plaintiff's evidence in chief, counsels' argument, the parties' bundles of documents, and Revelas J's

judgment.

There were no other witnesses.

- [13] The merits of Revelas J's judgment were not addressed in the application before me. The plaintiffs' main submissions concentrated on the incomplete record. Reliance was placed on the principle that the right of appeal is part of an accused's fair trial rights. Reference was made to the judgment in *Schoombie and Another v S* 2017 (2) SACR 1 (CC) where the following was said at paragraph 19 (footnotes omitted):

"It is long established in our criminal jurisprudence that an accused's right to a fair trial encompasses the right to appeal. An adequate record of trial court proceedings is a key component of this right. When a record 'is inadequate for a proper consideration of an appeal, it will, as a rule, lead to the conviction and sentence being set aside'."

[14] This principle, so it was submitted, should be extended to civil proceedings so that a litigant could exercise his/her right of access to a court in terms of s 34 of the Constitution. A further ground of appeal was that the plaintiffs' claim for an order declaring the agreement null and void was effectively a claim for a declaration of rights. Such a claim was, so it was submitted, not a debt, and the Prescription Act 68 of 1969 did not apply.

[15] The first consideration is whether or not the incomplete record is adequate for a proper consideration of an appeal. It is not every incomplete record that prevents a proper consideration of the appeal. Inherent in the dictum from Schoombee (supra) is the notion that an incomplete record may still be adequate for a proper consideration of an appeal. In this regard it is helpful to refer to the judgment in *S v Chapedi* 2005 (1) SACR 415 (SCA) where Brand JA said at paragraphs 5 and 6:

"[5] On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record is impossible (see, eg, S v Collier 1976

(2) SA 378 (C) at 379A - D and *S v S* 1995

(2) SACR 420 (T) at 423b

- f).

[6] The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, inter alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal."

[16] I shall refer to those portions of the first plaintiff's evidence which I consider relevant to the question of prescription. After he was employed in a senior managerial position in 2004 he became aware that there was a motor vehicle scheme from which he could benefit and decided to upgrade to another vehicle. At the time he had purchased a vehicle which he wanted to trade in. Following various difficulties with selling his current vehicle, the third defendant offered him a special deal which involved selling him the vehicle and relieving him of the burden of his existing vehicle. He decided to purchase the vehicle which he was told was a demonstration vehicle. He only saw the offer to purchase in 2009. There was no discussion about the price. He applied for funding from the second defendant and began paying the instalments of R8 857.00 per month. During June 2005 he was told that he was paying too much for the vehicle. He approached the third defendant who told him he had been happy when he signed. He then approached the second defendant and an employee asked him why he had been charged the price of a new car. On further enquiry at Nissan in

East London he was told that the price he had been charged was that of a new Nissan X-Trail. The first plaintiff said “that is when I got a full picture of what possibly has happened”.

- [17] He resigned from his position in May 2013 because of the effect on him of the matter of the vehicle. At his attorney’s office in 2013 he learned that the case between him and the second defendant was going to trial on 5 June
2013. It was at this point when he realised that there was an action against him which involved a wrong done to him concerning the price of the vehicle. A document which the first plaintiff referred to as an E-Natis 164 Motor Vehicles All Owners Query, which contained his personal information and which he signed without reading, referred to the vehicle as new. (This document must relate to the allegation in the replication that he learned in August 2013 that the defendants had applied for finance for a new vehicle.)
- [18] The recorded evidence ended there.
- [19] In her judgment Revelas J summarised the first plaintiff’s evidence in some detail. She referred to the first plaintiff as the plaintiff. In addition to what I have summarised above, she said that following the information that he had paid the price of a new vehicle, the plaintiff received confirmation from the second defendant that the price he paid was for a new vehicle, and that the value of the vehicle he purchased was R261 394.00. The plaintiff wrote to the second defendant on 9 November 2005 alleging that he was induced into entering into the agreement in terms of which a demonstration vehicle was sold to him as new.
- [20] In December 2005 the plaintiff issued summons against the first defendant for payment of the amount of R71 490.00 being the difference between the purchase price paid and the market value of a demonstration model. (This summons was included in the defendants’ bundle.) Revelas J quoted three paragraphs of the particulars of claim as follows:
12. The defendant has failed dolo malo to disclose the true purchase price of the vehicle at the time of purchase, which failure was materially (sic).
 13. Alternatively to paragraph 12 supra, the defendant has intentionally, further alternatively negligently represented to plaintiff that the vehicle’s price is R297 990.00.
 14. If the plaintiff was aware of the true purchase price of the vehicle, the plaintiff would not have purchased the vehicle; alternatively the plaintiff would have offered a reduced purchase price in this instance.
- [21] The judgment went on to say that this claim was dismissed because of some procedural non-compliance. (In the plaintiffs’ bundle of documents there was an order dismissing the plaintiff’s claim because he had not complied with an earlier order.) Revelas J said that the significance of this action was that the plaintiff’s case was premised on essentially the same averments as those in the matter before her.

- [22] The judgment further states that on 12 January 2007 the plaintiff wrote another letter to the second defendant complaining, inter alia, that the third defendant misrepresented the facts and had brought him into the deal under false pretences. In that letter, the plaintiff referred to the action instituted in December 2005 and said:

“I took this matter up legally, but I left that process halfway, because the Attorney felt I must take the matter up with the institution and only take the legal route as a last route.”

- [23] Revelas J remarked that it was notable that the reason he left the process was not that he did not have sufficient evidence.
- [24] According to the judgment, in 2007 the plaintiff was advised by his attorney not to pay the instalments in terms of the agreement because it was a fraudulent agreement. In 2008 the second defendant issued summons against the plaintiff in the Magistrate’s Court for payment of the full amount outstanding.
- [25] Further, according to the judgment, the plaintiff contended that he became aware of the alleged fraudulent conduct of the defendants in August 2013 and found the document which had been completed four days after the sale, and which was to accompany the plaintiff’s application to the second defendant for finance. The person completing the form had to tick a box indicating whether the vehicle was new or used, and ticked the box indicating that it was new. According to Revelas J this form was the cornerstone of the plaintiff’s resistance to the defence of prescription.
- [26] Revelas J, after referring to the provisions of ss 12 (1), (2) and (3) of the Prescription Act, stated that the claim based on the allegations of fraud and the claims for cancellation or overpayment arising out of misrepresentations all arose at the time the contracts were concluded because by then the impugned price for the vehicle was fixed. The plaintiff knew the identities of the defendants. The form seen in August 2013 did not, according to Revelas J, contain any startling news. The plaintiff always knew that he had paid a new vehicle’s price for a used or demonstration vehicle. The form was merely proof of the plaintiff’s assertion that he paid too much for the vehicle. The plaintiff did not plead any material facts which he alleged he did not know, nor did he disclose why with reasonable care and diligence he could not immediately establish the facts upon which his claim was founded.
- [27] Revelas J referred to the following dictum of Cameron JA (as he then was) et Brand JA expressed in *Minister of Finance and Others v Gore* NO 2007 (1) SA 111 (SCA) at paragraph 17 (footnotes omitted):

“This Court has, in a series of decisions, emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case 'comfortably'.”

- [28] Revelas J concluded that all the information and facts upon which the plaintiff premised his claim were available to the plaintiff in 2004, and at the very latest in 2007 when he was advised by his attorney that the agreement was fraudulently concluded.

Discussion

- [29] Before even getting to the question of whether or not the fair trial principle referred to above applies to civil matters, I need to decide whether or not the incomplete record is nevertheless adequate for the purpose of considering the prospects of success of an appeal. If it is adequate, the right to appeal, if it does apply in civil matters, is not thwarted.

- [30] Bearing in mind what was said in Chapedi (*supra*), the nature of the issue sought to be decided on appeal is a narrow one: when did prescription begin to run? The first

plaintiff's evidence, Revelas J's judgment in which she dealt in detail with the evidence, and other documents, include and cover: the background to the agreement; the agreement itself; when the first plaintiff learned that he had paid too high a price (in 2005); the summons he issued alleging the misrepresentation and claiming the difference between a new and a demonstration price; the letters written by the first plaintiff in 2005 and 2007 alleging a misrepresentation; and the document upon which he relied for knowledge of the alleged fraud, which Revelas J said was the cornerstone of his resistance to prescription. In my view all of this is sufficiently adequate to consider the prospects of success of an appeal. Other than submitting that a substantial and crucial part of the evidence was not available, neither of the plaintiffs pointed to specific deficiencies which would prevent a proper consideration of the appeal. The first plaintiff was the only witness and effectively the issue of prescription was decided on his evidence alone, together with documents which spoke for themselves. His transcribed evidence and Revelas J's references to his evidence revealed that the allegations in the particulars of claim and the replication were covered. It follows that I am in a position to consider the prospects of success of an appeal.

Prospects of success of an appeal

- [31] The plaintiffs' claim, as described above, is for a setting aside of the agreement, or confirmation of cancellation of the agreement, because the first plaintiff was induced to pay a higher price for the vehicle than should have been paid; a refund of payments made; and delictual damages.
- [32] In *Truter and Another v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) the following was said at paragraph [16] (footnote omitted):

"For the purposes of the [Prescription] Act, the term 'debt due' means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim."

In my view, at the very best for the plaintiffs, prescription began to run when in 2005 the first plaintiff received confirmation that the price he had paid was for a new vehicle and learned the lesser price which he should have paid. At that stage the contract had already been concluded, he knew the identity of the defendants, and he knew that he had paid a higher price for the vehicle than he should have, thereby suffering a loss. He thus knew that a misrepresentation had been made to him which the defendants knew to be false, with the intention that he act thereon. He further knew that he had been induced by the misrepresentation to believe that the price he agreed to was the correct price for a demonstration vehicle and had thereby entered into the contract.

[33] I am in respectful agreement with Revelas J's view that the reference to a new vehicle in the document he saw in August 2013 was merely proof of his assertion that he had paid too much for the vehicle. It was never his case that the vehicle was fraudulently represented to him as new. He knew that he was buying a demonstration vehicle. The alleged fraud related to the inflated purchase price, causing him loss.

[34] Lastly, with regard to the submission that a declaration of rights is not a debt for the purpose of the Prescription Act, the plaintiffs' claim was not in substance for a declaration of rights. Even though the first prayer in the summons was worded as a declaration that the agreement was null and void, that prayer could not be viewed in isolation. In substance the plaintiffs were exercising or claiming their right to resile from the agreement and claim consequential relief. In *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA) at paragraph 14 Lews JA said:

"The effect of fraud that induces a contract is, in general, that the contract is regarded as voidable: the aggrieved party may elect

whether to abide by the contract and claim damages (if it can prove loss) or to resile – to regard the contract as void from

inception, and to demand restitution of any performance it may have made, tendering return of the fraudulent party's performance."

The Prescription Act therefore applied to the claim. (See *Desai NO v Desai NNO and Others* 1996

(1) SA 141 (A) at 146H-J.)

[36] It follows that I am of the view that there is no reasonable prospect of a successful appeal.

[37] The plaintiffs' application for leave to appeal is dismissed with costs.

J M ROBERSON

JUDGE OF THE HIGH COURT

Appearances:

1st Applicant: Mr A Basson, Mbece Tlilana Inc, Makhanda.

2nd Applicant : Mr M Talapile , Babe & Talapile Inc, Mthatha.

Respondents: Adv D de la Harpe, instructed by Wheeldon Rushmere & Cole Inc, Makhanda.

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