

SOUTH AFRICA / JUDGMENT

Venter and Another v Steyn and Others (3368/2019) [2023] ZANWHC 107 (19 July 2023)

[2023] ZANWHC 107

COURT

North West High Court, Mafikeng

BEFORE

FMM Reid

CASE / FILE NUMBER

3368/2019

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IN THE HIGH COURT OF

SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

CASE NUMBER: 3368/2019

Reportable: YES/NO

Circulate to Judges:

YES/NO

Circulate to Magistrates:

YES/NO

Circulate to Regional

Magistrates: YES/NO

In the matter between:-

WERNICH

VENTER

First Plaintiff

HARTZER

EN STEYN BELEGGING CC

Second Plaintiff

and

OJ

STEYN

First Defendant

L

VAN DER MERWE

Second Defendant

MINISTER

OF MINERAL AND ENERGY

Third Defendant

RESOURCES

JUDGMENT

FMM REID, J:

Introduction:

[1] On 15 May 2023 this court ordered by agreement between the parties that the issues pertaining to a special plea of prescription as raised by the defendants, should be dealt with separately as a point

of law only and that an order be made on this point prior to any evidence being lead.

[2] This judgment deals with the issue of prescription as separated from the other issues in terms of Rule 33(4) of the Uniform Rules of the High Court. The onus to prove the date of inception of the

period of prescription, lies on the party that alleges prescription, in casu thus the defendants.

See: *Gericke v Sack* 1978

(1) SA 821 (A).

[3] At the heart of the question on prescription in casu is the legal question whether the nature of the entity of a Close Corporation provide for a juristic entity separate from the membership of the Close Corporation (such as in the case of a Company) or a juristic entity that of which membership forms part of the Close Corporation (such as in the case of a partnership).

[4] The third defendant is the Minister of Mineral and Energy Resources and is cited only in as far as the Minister may have any interest. The third defendant is not opposing the application, and when I refer to “defendants” it does not include the Minister of Mineral and Energy Resources.

[5] The plaintiffs identify the following issues to be determine by the court:

5.1.

Whether the plaintiffs’ claims have become prescribed;

5.2.

The costs of the separation application; and

5.3.

The costs of the adjudication of the special pleas.

Factual

background

- [6] The first plaintiff (Venter), the first defendant (Steyn) and the second defendant (van der Merwe neé Steyn) are the only three
- (3) members of the second plaintiff, which is Hartzter en Steyn Beleggings CC (the Close Corporation). Each of the members own approximately $\frac{1}{3}$ (one third) of the Close Corporation.
- [7] The plaintiffs instituted summons against the defendants which included three (3) separate claims.
- [8] Claim 1 relates to a farm that was previously owned by the Close Corporation. This farm was acquired in 1999 and was sold in 2009 for an amount of R4 million. The purchase price was paid to the second defendant and/or to her father, Mr Hartzter, on 9 March
2009. Claim 1 is on the basis that the purchase price was incorrectly paid to the second defendant or Mr Hartzter and should have been paid to the second plaintiff. It is argued on behalf of the defendants that Claim 1 arose on 9 March 2009. In the amended particular of claim the plaintiff pleads that “The debt commenced on 9 March 2009 when payments were made, and the proceeds appropriated.”
- [9] Claim 2 deals with the rental income that was generated from the farm that is the subject matter of claim 1. The rental income was received from the Abathali Boerdery CC, when the Close Corporation
- leased the farm to Abathali Boerdery CC. The plaintiffs claim that the rent was not paid to the Close Corporation but that its members and Mr Hartzter directly received the rent, or the benefit of the rent. The amounts claimed in respect of each year are specified in the particulars of claim to be from 2001 to 2008.
- [10] Claim 3 is on the basis of payments allegedly made by the first defendant and Mr Hartzter to themselves, which funds were originating from funds that belong to the Close Corporation. The claim is formulated with reference to a spreadsheet that is attached to the particulars of claim which lists the payments commencing on 14 January 2005, of which the last payment occurred on 30 May 2013.
- [11] On 3 June 2019 the majority members of the Close Corporation took a decision to not repay money advanced to the Close Corporation to the plaintiffs. It is disputed whether the money was a loan or another agreement. The plaintiffs inter alia rely on the fact that the amount of the sale of the property (as discussed later) were appropriated and reflected by the defendants in the financial records of the first plaintiff and the Close Corporations, as loans to the defendants.

- [12] On 13 December 2019 the plaintiffs issued summons against the first and second defendant. The plaintiffs' claims consisted out of three (3) different causes of action. The first and second defendants (collectively referred to as the defendants) filed their plea in November 2020. Included in their plea is a special plea of prescription in respect of each of the three individual claims.

Legal context

- [13] One of the objectives of the term prescription is to create and ensure legal certainty. This is to ensure that unjust litigation does not arise as a result of too much time passing between the date that a cause of action arose, is deemed to have arisen, or the plaintiff is reasonably expected to have become aware of the claim. The purpose is plain: to ensure that litigation does not arise after too much time has passed between a cause of action arising and a claim being instituted by a plaintiff.
- [14] In the matter of *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Experts) Ltd* (2004) 1 All SA 129 (SCA) where the Supreme Court of Appeal found that:
- "There is no unfairness in this conclusion as the court a quo seems to think. Prescription penalises negligence and inactivity. Judged according to the legislative intention the respondent remained absent and inert for more than three years. Both shortcomings are ascribable to the failure to take reasonable precautions from the time of precautions from the time of preparing the summons to the belated awakening. The power of correction always lay with the respondent."*
- [15] In *Solomons v Multilateral Motor Vehicle Accident Fund* (1999) 3 All SA 552 (C) at 556C the purpose of prescription has been held to be that the setting of reasonable time periods prevents the debtor from having to marshal his defence to a claim long after the event. It can be elaborated on a principle of fairness, that the defendant should be placed in a position where it would be fair to it to defend the claim against it. In the absence of any principles of prescription being applicable, a situation may arise after a too long period of time, that a defendant would have reasonably disposed of evidentiary material that could, for example, prove to amount to a plausible defence to a possible claim. Another example is that witnesses may have passed away, or may not be able to recall the facts due to the long lapse of time.
- [16] A further rationale for prescription is of a more jurisprudential nature and proffers the promotion of certainty in legal affairs as an alternative and further explanation for its existence in the legal system of South Africa. Put differently, legal matters should be instituted and finalised in a reasonable time period to provide legal certainty in courts and in the community. See *Joubert*, LAWSA Vol 21 para 77 and *Mahomed v Yssel* 1963 (1) SA 866 (D) at 870G - 871A.
- [17] The rationale for extinctive prescription has been set out succinctly in *Mohlomi v Minister of Defence* [1996] ZACC 20; 1997 (1) SA 124 (CC) at paragraph [17] as follows:

"[11] Rules that limit the time during which may be launched are common in our legal system as well as many others. Inordinate delays in litigation damages the interest of justice. They protract the disputed over the rights and obligations sought to be enforced prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can be cogently be taken."

- [18] This approach to the underlying reasons for prescription was explained by the Constitutional Court in *Road Accident v Mdeyide* 2011 (2) SA (CC) at 31:

"This court has repeatedly emphasised the vital role time limit play in bringing certainty and stability to social and legal affairs, and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the potential to be drawn out for indefinite period of time, bringing about prolonged uncertainty to the parties to the dispute. The quality of adjudication by courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be available to testify, or their recollection of events may be faded the quality of adjudication is central to the rule of law. For the law to be respected, decisions of courts must be given as soon as possible after the events giving rise to the disputes, and must follow from sound reasoning, based on the best available evidence."

- [19] In *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd*

- (2017) 3 All SA 739 (SCA) the Supreme Court of Appeal seemed to combine the underlying reasons for prescription when it commented as follows at paragraph [13]:

"One of the principal reasons for extinctive prescription is to provide certainty to a debtor – after a period of time when the creditor has been inert, the debtor should have certainty as to whether or not a debt is still owed. The three-year period over which prescription runs is regard as being enough time for the creditor to enforce the obligation, and conversely, if it is not enforced within that time, the debtor was may be certain that the obligation has ended. The debtor is protected may be certain that the obligation has ended. The debtor is protected save where the reasons for the principles underlying prescription fall away and the protection of a creditor is justified."

- [20] The practical purpose of extinctive prescription was further explained by the Supreme Court of Appeal in *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 (1) SA 571 (A) at 578F – H to be:

"Although many philosophical explanations have been suggested for the principles of extinctive prescription ... its main purpose is to promote certainty in the ordinary affairs of people. Where a creditor lays claim to a debt which has been due for a long period, doubts may exist as to whether a valid debt even arose, or if it did, whether it has been discharged... The alleged debtor may have come to assume that no claim would be made, witnesses may have died, memories would have faded, documents or receipts may have been lost, etc. these sources of uncertainty are reduced by imposing a time limit on the existence of a debt, and the relevant time limits reflect, to some extent, the degree of

uncertainty to which a particular type of debt is ordinarily subject (section 11 of the Act)”.

[21] The Prescription Act 68 of 1969 (the Prescription Act) determines as follows in section 10 thereof:

“Subject to the provisions of this Chapter and Chapter IV, a debt shall 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.”

[22] The ordinary period of prescription prescribed by section 11(d) of the Prescription Act is a period of three years.

[23] The plaintiffs rely on sections 3(1)(b) and 13(1)(e) of the Prescription Act. Section 4(1)(b) reads as follows:

“3. Completion of prescription postponed in certain circumstances.

(1) If –

(a) ...

(b) The person in favour of whom the prescription is running is outside the Republic, or is married to the person against whom the prescription

is running, or is a member of the governing body of a juristic person against whom the prescription is running.

(c) The period of prescription would, but for the provisions of this subsections, be completed before or on, or within three years after,

the day on which the relevant impediment referred to in paragraph (a) or (b) has ceased to exist, the period of prescription shall not be completed before the expiration of a period of three years after the day referred to in paragraph (c).”

(own emphasis)

[24] It is argued on behalf of the defendants that the claims of the plaintiffs arose in 2009, and three years have lapsed between the cause of action in 2009 and the issuing of summons in December 2019.

[25] In addition thereto, section 13(1)(e) of the Prescription Act provides as follows:

“13. Completion of prescription delayed in certain circumstances.

...

(e) the creditor is a juristic person and the debtor is a member of the governing body of such juristic person;

or

- (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).”

[26] Since the first plaintiff and the first and second defendants are members of the second plaintiff Close Corporation, it is the argument on behalf of the defendant that the claim has become prescribed on the basis that summons was not issued within a year from the cause of action in 2009. In the alternative, the argument of the defendants is that the prescription was not delayed in terms of section 13(1)(e) of the Prescription Act.

33.2. As opposed to shareholders and/or directors of a company, the members of a Close Corporation do not have any distinction in relation to the

financial interest in a Close Corporation, and those permitted to take part in its operations decisions. An interest in a Close Corporation is regarded as movable property, though not tangible.

[34] It is argued on behalf of the defendants that the fiduciary duties of directors of a Company is akin to membership interest in a Close Corporation. The argument is that an interest in a Close Corporation is the equivalent of a share in a Company. See: Cassim et al, The Law of Business Structures (Juta) p 647 par 24.4.3. In terms of Section 30 of the Close Corporation Act an interest in the Close Corporation is regarded as movable

property. In Cassim et al, The Law of Business Structures (Juta) p 647 paragraph 24.4.3 it is stated that an interest in a Close Corporation is the equivalent of a share in a Company.

[35] Members of a Close Corporation are entitled, but not obliged, to take part in the carrying of the business. The defendant argues that the nature of a membership in a Close Corporation is akin to that of a partnership in that each member will be liable and able to individually and collectively bind the entity on the basis that it has no separate governing body.

[36] Section 54 of the Close Corporation Act determines the power of members of a Close Corporation to bind the Close Corporation in the following terms:

“54. Power of members to bind Corporation

- (1) Subject to the provisions of this section, any member of a Corporation shall in relation to a person who is not a member and is dealing with the Corporation, be an agent of the Corporation.
- (2) Any act of a member shall bind a Corporation, whether or not such act is performed for the carrying on of business of the Corporation unless the member so acting has in fact no power to act for the Corporation in the particular matter and the person with whom he deals has, or ought reasonably to have, knowledge of the fact that the member has no such power.”

[37] Section 50 of the Close Corporation Act determines the process to be followed when members of a Close Corporation intends to institute legal proceedings against another member of the Close Corporation and reads as follows:

“50. Proceedings against fellow members on behalf of Corporation

- (1) Where a member or a former member of a Corporation is liable to the Corporation –
 - (a) To make an initial contribution or any additional contribution contemplated in subsections (1) and (2)(a) respectively, of section

24; or

- (b) On account of –
 - (i) The breach of a duty arising from his fiduciary relationship to the Corporation in terms of section 42; or
 - (ii) Negligence in terms of section 43, any other member of the Corporation may institute proceedings in respect of any such liability on behalf of the Corporation against such member or former member after notifying all other members of the Corporation of his intention to do so.”

[38] In my view, the above quoted section prescribes that a member of the Close Corporation may institute legal proceedings on behalf of the Close Corporation. This indicates to me that the legal persona of the Close Corporation, is a different entity than that of the individual members of the Close Corporation.

[39] On this basis I find that the legal nature of a Close Corporation is similar to that of a Company, and not that of a partnership.

[40] The plaintiffs argue that the date of the cause of action is the date that the majority members took the decision to reject the plaintiff’s claims to repay the loans, which date is 3 June 2019. On this date, so the plaintiff argues, the amount for the sale of the property was appropriated and reflected by the defendants in the financial records of the Close Corporation as loans to the defendants.

Application of facts and law

[41] In summation, the plaintiffs’ case is that the money paid for the sale of the farm, were indicated in the financial records of the Close Company, as loans to the plaintiffs.

[42] The plaintiffs claim that the majority members of the Close Corporation took a decision on 3 June 2019 to reject the previous decision of the defendants to repay certain loans to the plaintiffs. This is pleaded as follows in the particulars of claim:

“

11.

On or about 3 June 2019, following a meeting between the members of the Corporation wherein the First Plaintiff tabled a motion in terms whereof First and Second Defendants must repay the payments, the First and Second Defendants acting together as majority members:

11.1 resolved that the amounts as paid over and appropriated must not be repaid to the Corporations (“resolution”); and

11.2 further plainly and unambiguously indicated that the amounts are not repayable at all.”

[43] In answer to this, the defendants pleaded as follows:

“AD PARAGRAPH 11:

31.1 The content of this paragraph are admitted.

31.2 This resolution confirmed the agreement set out above,
i.e. that the purported “loans” were never repayable.”

[44] The above quoted pleadings indicate that:

44.1. It is common cause that there was a meeting of members of the Close Corporation on 3 June 2019;

44.2. It is common cause that it was decided by the majority members that the money as advanced is not repayable;

44.3. The nature and terms of the agreement in terms of which the money was advanced, as described by the plaintiffs as a “loan” is disputed.

44.4. The plaintiffs’ claim that the money advanced to the Close Corporation was a loan, where the defendants claim the money was advanced in terms of an agreement but not a loan.

[45] The nature and terms of the money advanced to the Close Corporation, is thus a factual dispute to be determined by oral evidence during the hearing of the matter.

[46] On the pleadings it is common cause that, whatever the nature was of the initial agreement to advance money to the Close Corporation, a meeting was held on 3 June 2019 in which the majority members decided that the money advanced is not repayable to the plaintiffs.

[47] In my view the common cause facts support the argument of the plaintiffs that the cause of action arose on 3 June 2019. To hold otherwise, would result in an absurdity to the effect that a disputed agreement to loan money or not, would constitute the cause of action. A party can only be held liable for a debt, once that debt has been admitted by the other party or the other party has been placed under demand.

[48] The pleadings reflect that, prior to 3 June 2019, the plaintiffs were under the impression that the money advanced as done so in terms of a loan. It is only on 3 June 2019 that the nature of the loan is pertinently disputed, resulting therein that the cause of action came into being on 3 June 2019.

[49] On this basis I find that the claims against the defendants have not become prescribed.

[50] The special pleas of prescription are therefore to be dismissed.

Cost

[51] Both parties agreed that the issue of prescription is extinctive by nature and would be best suited to be heard separate from the hearing. This is not an unreasonable submission to be made in relation to the general applications of the principles of prescription.

[52] The normal rule is that the successful party is entitled to its costs. I find no reason why the normal rule should not be applicable.

Order:

[53] In the premise I make the following order:

i) The special pleas of prescription is dismissed.

ii) The cost of the special pleas, including the cost of the separation

of the special pleas, are to be paid by the defendants individually and severally, the one paying the other to be absolved.

FMM REID

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION MAHIKENG

DATE OF HEARING:

16 MAY 2023

DATE OF JUDGMENT: 19 JULY 2023

APPEARANCES:

FOR PLAINTIFFS: ADV AJ LE GRANGE INSTRUCTED BY: DOUW STEENKAMP ATTORNEY C/O SMIT STANTON 018 – 381 0180 FOR 1st and 2nd DEFENDANTS: ADV J VORSTER AND ADV D HEWITT INSTRUCTED BY: DE VILLIERS ATTORNEYS C/O VAN ROOYEN THLAPI WESSELS 018 381 0804

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Prepared on 9 October 2026 · Esheria