

SOUTH AFRICA / JUDGMENT

Wilson v Du Toit Smuts and Partners Attorneys and Others (3985/2021) [2024] ZAMPMBHC 57 (27 August 2024) [2024] ZAMPMBHC 57

COURT

Mbombela High Court, Mpumalanga

BEFORE

TV Ratshibvumo

CASE / FILE NUMBER

3985/2021

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

Latest

amended version 3 September 2024.

FLYNOTES:

CIVIL PROCEDURE – Prescription – Money held in trust account
– Deposit
paid for property purchase – Alleged material non-disclosure
– Property sold to another buyer for lower price –
Difference retained and paid by attorney to close corporation that sold property – Prescription raised against claim by buyer
for balance of deposit – Attorney continued to hold funds for buyer and continued to charge him – Claim did not prescribe – Judgment granted in favour of buyer – Prescription Act 68 of 1969, s 12(3).
THE
HIGH COURT OF SOUTH AFRICA
MPUMALANGA
DIVISION, MBOMBELA MAIN SEAT
CASE
NO: 3985 / 2021
(1)
REPORTABLE: YES
(2)
OF INTEREST TO OTHER JUDGES: YES
(3)
REVISED.
DATE: 27 August

2024

SIGNATURE

In the matter between:

WAYNE

WILSON

APPLICANT

And

DU

TOIT SMUTS AND PARTNERS FIRST

RESPONDENT

ATTORNEYS

ADRIAAN

SMUTS PROPERTY SECOND

RESPONDENT

INVESTMENT

CC

ADRIAAN

PETRUS SMUTS

THIRD RESPONDENT

JUDGMENT

RATSHIBVUMO J:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 14H00 on 27 August 2024.

[1]

Introduction

Nemo judex in causa sua is a principle of natural justice, that forbids one to be a judge over a case in which he or she has an interest. One needs not be a judge for the principle to be applicable. It applies to every situation in which the relevant person is in a position of authority and to make a decision on issues before him/her. Even if one is determined to be impartial, perceptions cannot be overlooked. Justice should not only be done, but should also be seen being done. Facts of this case are a perfect example and reminder that failure to adhere to this principle can leave one caught in a web of conflict of interests. That call is even louder when one is in the legal profession.

[2] The Second Respondent is a close corporation that involved itself in the sale of immovable properties. Its sole member is the Third Respondent who is also an attorney. When the Applicant entered into an agreement to purchase a property from the Second Respondent (the contract), for an amount of R3 390 000.00, a deposit of R670 000.00 was paid into the interest bearing trust account of the attorneys and conveyancers chosen by the Second Respondent. The First Respondent is the firm of attorneys picked for that purpose and to

register the property into the names of the Applicant. The Third Respondent is a member and/or a consultant of the First Respondent.

- [3] This entailed that when there were demands or instructions given to the attorneys revolving around the contract or the deposit, the Second Respondent – the seller represented by the Third Respondent, found itself giving instructions or making demands to the First Respondent – the firm of attorneys represented by the same person – the Third Respondent. Sooner or later, it became unavoidable for the seller and the attorneys to have this kind of conversation. Practically, that meant the Third Respondent had to take instructions from himself or instructing himself to do something in respect of the dispute with the buyer – the Applicant.
- [4] In this application, the Applicant seeks an order that the First and the Second Respondent pay him the sum of R390 000.00, calculated at the prescribed rate from 31 March 2017 to date of payment, jointly and severally, the one paying, the other to be absolved. The claim is rooted on a contract referred to above. That contract was entered between the Applicant and the Second Respondent on 10 October 2016. The contract was subject to suspensive conditions which did not materialise. The application is opposed by all the Respondents, who authorised the Third Respondent to depose to an affidavit on their behalf. The main reason for opposition is that the claim has prescribed in terms of Prescription Act, no. 68 of 1969.
- [5] Whether the contract lapsed or it was cancelled, is the subject of dispute. It is however common cause that on 17 January 2017, the Applicant, through his legal representative, wrote a letter to the Second Respondent requesting that the contract be cancelled by agreement due to material non-disclosure by Second Respondent.[1] The Applicant received no response to his letter. The Second Respondent thereafter proceeded to sell the property to a third party

for R3 million, which was R390 000.00 less than the purchase price in the contract.

- [6] This shortfall is the amount that was withheld by the First Respondent when refunding part of the deposit to the Applicant, as “liquidated damages” suffered by its client, the Second Respondent, as a result of the Applicant’s repudiation of the contract. This amount (plus interests) was later paid to the Second Respondent by the First Respondent. This is the same amount claimed by the Applicant in this application. The Applicant disputes that the claim has prescribed for reason that the deposit was being held in a trust account. He further submits that prescription could not have meant that the deposit becomes the First Respondent’s property to depose as he wished. The claim against the Second Respondent is based on undue enrichment.
- [7] Whether the claim had prescribed or not would require unpacking the facts, in order to tell if there was a repudiation of a contract by any of the parties. The contract clauses would also be visited to establish the motive for the deposit in the first place.

[8]

Background.

On 10 October 2016, the Second Respondent, represented by the Third Respondent, and the Applicant, entered into a written sale agreement in respect of Portion 368, White River 64, Registration Division JU, Mpumalanga (the property), for the value of R3 390 000.00. There were inter alia, three suspensive conditions to this agreement: sale of the Applicant's property at Summer Breeze Estate; successful purchase of four other portions of White River 64 being Portions 369, 370, 371 and 372; and the rezoning of all of these properties from

“agriculture” to “resort” by no later than 28 February 2017. If by this date, the suspensive conditions would not have been met, the agreement would lapse. However, the parties left the door open to extend the date further, at the Second Respondent's discretion.

[9] The parties also agreed that the Applicant shall pay R670 000.00 as a deposit towards the property, which he did on 19 October

2016. The deposit was paid to the First Respondent, a firm of legal practitioners appointed by the Second Respondent, as conveyancers, to oversee the transfer of the property. According to the contract, the First Respondent was to invest the amount in an interest bearing trust account in terms of section 78(2A) of the Attorneys Act no. 53 of 1979, as it applied back then. The money was to be kept in a trust account in the names of the Applicant and for his benefit.[2] The interests accumulated therein were to be paid to the Applicant. This money would be transferred to the Second Respondent as the deposit for the property upon transfer and registration thereof. In the event the agreement was to lapse, the deposit would be transferred back to the Applicant, unless there are claims against it as detailed hereunder.

[10] Clause 12 of the contract provided for the steps to be taken in case of breach of the contract by either party. The aggrieved party was to give notice to the defaulting party and allow him or her, seven days to remedy the breach. In case the party in default does not remedy the breach within that period, the aggrieved party would have an option to seek specific performance or to cancel the contract and claim for damages through the courts. The manner of service of the notice is also detailed in the clause. It is

common cause however, that no party served or received a notice in terms of this clause and that none of them approached the court to seek an order for specific performance or to claim the damages. The Respondents however allege in opposition of the application that the Second Respondent suffered damages as a result of the Applicant's repudiation of contract. They submit that the Second Respondent took the said repudiation as a cancellation of a contract which it accepted.

[11] What the Second Respondent refers to as repudiation of a contract is a letter it received from the Applicant's legal representative

dated, 17 January 2017.[3] The relevant paragraphs of the said letter read as follows,

“1.5 On 30 November 2017[4] our client learned that on 09 May 2016 an application by SANRAL for an environmental authorisation for a construction of bypass, known as P166, through White River had been refused by the Department of Environmental Affairs and that an alternative route, known as the White River North Alternative had been authorised.

1.6 The White River North Alternative for P166 will pass directly adjacent to the property, and just to its north.

1.7 The P166 will be a four lane highway. It will be noisy and unsightly and will alter the rural character of the property in a fundamental way. It is not compatible with the purpose for which our client wished to acquire the property.

1.8 SANRAL has noted an appeal against the decision but as we understand, a final decision could be many months away and the outcome is uncertain. Had our client known of this approval before the sale, he would not have entered into the agreement. The agent and the seller were aware of the approval but unfortunately it was not disclosed to our client.

2. As you will appreciate, in view of the approval, our client does not wish to proceed with the purchase.
3. Our client would like to cancel the contract by agreement between the parties concerned, but if that is not possible, will unilaterally void the contract and demand restitution on the basis that he was induced to enter into the contract by misrepresentation.

...

We remain hopeful that this matter can be resolved amicably and look forward to hearing from you.”

[12] The Applicant received no response to the request contained in this letter. It goes without saying that when a request is not acceded to, it means the status quo still applies as though the request was refused or there was no request made at all. Although no response was received by the Applicant, he did not proceed with what he had intimated, to wit, that he “will unilaterally void the contract and demand

restitution on the basis that he was induced to enter into the contract by misrepresentation.”

[13] On 02 March 2017, the Applicant’s legal representative wrote a letter to the First Respondent advising that the contract between the Applicant and the Second Respondent had lapsed without the fulfilment of suspensive conditions. The First Respondent was as such asked to refund the deposit being held in the trust account as described in paragraph 9 above. On the same day, the First Respondent replied as follows,

“We refer to the above and to our letter of the 2nd February 2017.[5]

We confirm that we have received an amount of R670 000.00 in trust from your client in respect of a deposit on the purchase of the above property.

Our client has now managed to sell the above property for a purchase consideration of R3 000 000.00. This is an amount of R390 000.00 less than the purchase consideration of the repudiated agreement of R3 390 000.00

The new purchaser has in the meantime delivered guarantees for the purchase price and we expect transfer soon.

Our client has consequently suffered liquidated damages in the amount of R390 000.00.

We have in terms of the agreement paid the amount of R390 000.00 from the deposit of R670 000.00 in full and final settlement to the seller in respect of the damages caused by your client's repudiation of the agreement.

We have not received any claims from the estate agent involved regarding possible damages suffered by them against the deposit held by us.

Kindly let us have your trust account details in order to refund the balance (R280 000.00) of the deposit paid by your client to you."

[14] The email sent to the Applicant's legal representative on 02 March 2017, contained two letters; the one dated 02 March 2017, and the other dated 02 February 2017. In the covering email, the First Respondent acknowledged that the letter dated 02 February may not have been received by the Applicant's legal representative as he could not locate the original sent email to which it would have been attached.

[15] The letter dated 02 February 2017 is a purported response to the letter from the Applicant's legal representative dated 17 January 2027. The relevant paragraphs of the said letter read,
"We refer to the above and to your letter of 17th January 2027.

We are not going to respond to all allegations contained in your letter under reply as we will do so in due course and in the appropriate forum should it become necessary. Our failure to deal with specific allegations should therefore not be construed as an admission thereof.

We have discussed the issue at length with the estate agent and are more than satisfied that the agent went out of her way and has inter alia:

1. Referred the purchasers to Mr. Ben Steyn, a senior manager at Mbombela Local Municipality head of Town Planning and Building Control department to discuss their intentions with the property and the suitability of the property for their envisaged use with him.

3. Disclosed and discussed the possible R40 bypass road to the north of the property with the purchasers. Your client even enquired about the possibility to gain access to the road and indicated to the agent that the road will be to their advantage as it will enhance the visibility of their envisaged water park, resort and bistro.

It is our client's contention that your client all along knew about the existence of a road that might pass to the north of the property but failed to do a proper investigation as to the exact lineation of the possible road further alternatively failed to do a proper investigation as to the specific attributes of the property and its surroundings before entering into agreement. Our client will proceed to market the property for the best possible price but will hold your client responsible for the possible shortfall should the property be sold for less than the initial amount."

- [16] The Applicant believes that letter dated 02 February 2017 was never sent to him or his legal representative by the First Respondent as alleged and that it was penned down as an after-thought, following receipt of the demand made on 02 March 2017. The fact that he did not receive the letter and the absence of a proof of sent email is cited as a reason for this. Although there are further reasons forming the basis of this suspicion, this aspect would not be crucial or relevant for the determination of this application. It suffices to state at this stage that on 28 June 2017, the Applicant, through his legal representative, laid a complaint with the Law Society of Northern Provinces (which was later replaced by the Legal Practice Council (LPC), Mpumalanga) against the Third

Respondent.

- [17] It became clear in a response by the Third Respondent that at that stage, no money had been paid to the Second Respondent as claimed in the First Respondent's letter dated 02 March 2017. That payment was only made on 17 December 2019. The allegation to the effect that a payment was already made was a deliberate untruth by the First Respondent, the purpose of which has not been advanced. Furthermore, the Applicant only realised, on 21 September 2021, when he demanded full bank records in respect of the trust account into which the deposit money was invested, that the trust account was closed on 13 December 2019 and that at the time, the balance was R433 672.94.[6]
- [18] The First Respondent claims that the Applicant's claim prescribed the date on which he terminated his mandate to the Town Planner to rezone the property, being 13 December 2016. The First Respondent claims that such termination was an act of repudiation making the suspensive condition impossible to fulfil. In the alternative, the First Respondent alleges that the debt became due on the date the Applicant demanded the refund of the deposit, which was 02 March 2017. By the time the application was served on the Respondents, in October 2021, the claim had prescribed, calculated from any of the two dates.

- [19] Issues for determination.

The court is to determine the legal basis of a claim made by the Applicant against the Respondents. It also has to determine if the claim against them had prescribed and in particular, whether the claim for the release of funds held in trust account can prescribe, while the funds remain in the account. The court shall in the process have to determine if the contract between the Applicant and the Second Respondent was still in force as of 02 March 2017 when he demanded the release of funds, and/or if it was cancelled or repudiated.

[20] Trust Account

According to clause 2.1 of the contract, the deposit money was to be invested in an interest bearing trust account opened in terms of section 78(2A) of the Attorneys Act no. 53 of 1979. Sections 2 & 7 of the said Act provided,

“(2)

- (a) Any practitioner may invest in a separate trust savings or other interest-bearing account opened by him with any banking institution

or building society any money deposited in his trust banking account which is not immediately required for any particular purpose.

- (b) Any trust savings or other interest-bearing account referred to in paragraph (a) shall contain a reference to this subsection.

(2A) Any separate trust savings or other interest-bearing account-

- (a) which is opened by a practitioner for the purpose of investing therein, on the instructions of any person, any money deposited in his trust banking account; and
- (b) over which the practitioner exercises exclusive control as trustee, agent or stakeholder or in any other fiduciary capacity, shall contain a reference to this subsection.
- (3) The interest, if any, on money deposited in terms of subsection (1) and the interest on money invested in terms of subsection
- (2) shall be paid over to the fund by the practitioner concerned at the prescribed time and in the manner prescribed.
- (7) No amount standing to the credit of any practitioner's trust account shall be regarded as forming part of the assets of the practitioner, or may be attached on behalf of any creditor of such practitioner: Provided that any excess remaining after payment of all claims of persons whose money has, or should have, been deposited or invested in such trust account, and all claims in respect of interest on money so invested, shall be deemed to form part of the assets of such practitioner.

[21] The above provisions in the Attorneys Act have since been replaced by sections 86 and 88 of the Legal Practice Act, no. 28 of 2014. Section 86(4) and 86(5) provide,

“4. A trust account practice may, on the instructions of any person, open a separate trust savings account or other interest-bearing account for the purpose of investing therein any money deposited in the trust account of that practice, on behalf of such person over which the practice exercises exclusive control as trustee, agent or stakeholder or in any other fiduciary capacity.

5. Interest accrued on money deposited in terms of this section must, in the case of money deposited in terms of-

(a)...

- (b) subsection (4), be paid over to the person referred to in that subsection: Provided that 5% of the interest accrued on money in terms of this paragraph must be paid over to the Fund and vests in the Fund.”

- [22] In *Incorporated Law Society, Transvaal v Visse and Others (1)*; *Incorporated Law Society, Transvaal v Viljoen (2)*, [7] the court held,

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

- [23] Discussion.

I have been referred to a number of authorities in particular by the First Respondent, which although I agree with them, I hold a view that they are all distinguishable from the facts of this case. To the extent that it may be argued that they do find application in this case, it appears to me it would be on narrow technicalities that do not promote the interests of justice, fairness and equality before the law, but borders on encouraging theft, fraud and bullying members of the public through taking the law into one's own hands or treating their assets as *res nullius*. I now proceed to unpack the factual matrix that make me reach the conclusion above.

- [24] Everything seemed to be flowing well in respect of the contract between the Applicant and the Second Respondent, until the Applicant's discovery of a fact that until then, was unknown to him, to wit, a road that had been approved to be constructed adjacent to the property he was due to purchase, in the contract. This was not disclosed to him. In fact, he believed it was concealed from him. Although the Second Respondent attaches little weight

to this aspect, the National Road Agency regarded it to be of great value to the owners of the properties adjacent to where the road would pass, to the extent that they decided to inform them.

- [25] The Second Respondent does not dispute that he was aware of this fact when he entered into a contract with the Applicant. He however avers that the Applicant was verbally informed of this, something that the Applicant denies. It is common cause though that such a fact appears nowhere in writing, be it in the contract or email conversations between the parties. I therefore accept the Applicant's version in this regard. Moreover, this aspect is immaterial on issues to be decided by the court pertaining to the contract so much that even with a dispute on whether there was any disclosure, it would not alter the court's finding.[8]
- [26] The reason I hold a view that this dispute is immaterial is that what remains important and relevant is what the Applicant did as a result of his discovery. It is his conduct that would answer if he repudiated the contract. Even if the Applicant had been informed of the road in writing, hypothetically speaking, the letter he wrote to the seller through his legal representative falls short of repudiation. In the letter, he makes it clear that he was requesting that they should agree to terminate the contract amicably.

He further indicated that he was looking forward to hearing from the seller over this request. He also intimated in the same letter as to what he intended to do in case they do not reach the agreement he sought.

- [27] No response was forthcoming from the Second Respondent regarding this request. This prompted the Applicant to revert back to the terms of the contract which remained intact as the request to terminate it amicably was not acceded to. The belated response which did not even reach the Applicant on the date it was allegedly penned down (02 February 2017) does not help the situation as it does not respond to Applicant's request: to accept the amicable cancellation of the contract or to decline. What the response does is to dispute having concealed the information about the road. It also raises issues of possible damages rather in a bizarre manner that is not founded in the contract.
- [28] The issue of damages is raised by the Second Respondent when it hints on a possibility to sell the property at a value less than the amount agreed to with the Applicant and that if that happens, it would claim damages from him as he repudiated the contract. The strangeness of this letter is rooted on the fact that the contract it alleges was repudiated by the Applicant did not provide for the damages as a result of sale at a lesser value than the one agreed therein. The contract could not have provided for this because, clause 11.3 allowed the Second Respondent to keep the property in the market, for as long as all the suspensive conditions under clause 11.1 and 20 were not yet met.[9] Clearly, clause 11.3 was meant to prevent any possible damages resulting from keeping the property exclusively for purchase the Applicant, thereby missing out on other possible lucrative offers.

[29] In refusing to pay the deposit money back to the Applicant, the Second Respondent alleges that the repudiation emanates from the Applicant's conduct in making the fulfilment of the suspensive condition impossible. The contract however had a clause on what should happen in case of a party thereto, breaching it by not performing what is expected of him. Clause 12 is the only bridge through which one can claim damages or specific performance. Before the aggrieved party can claim damages, it has to put the defaulting party in mora by giving it a seven-days' notice which can only be served in a particular manner and at a specific address; within which to rectify the breach.

[30] The contract does not specify the type of a breach nor is there any mention on how the aggrieved party would have learned of it. There is however no doubt that failure to attend to the rezoning of the property (or withdrawal of the mandate to do so from the Town Planner) would also be the breach of contract, if the Applicant had a duty to attend to it. The Second Respondent not only

failed to give the Applicant the seven days' notice, but also failed to send a notice of its election to accept the repudiation of the contract to the Applicant. I say this mindful of the fact that the contract made no provision of acceptance of repudiation in any manner other than within the ambit of clause 12. This clause also makes it clear that any option to be exercised to cancel the contract and claim for damages would be done through court proceedings. To this end, the contract makes provision for the scale on what costs shall be applicable in case of that option.

[31] The option to approach the court is appropriate in the circumstances of this case wherein the Third Respondent turned out to be the referee and the player at the same time. Whenever the First Respondent wrote that it received instructions from the Second Respondent, the said letter was signed by Mr. A Smuts, and the instructions he would be referring to, would be coming from Mr. A Smuts, as the sole member / owner of the Second Respondent. When the letter from the conveyancing attorneys says, "I have paid my client the liquidated damages," it would be Mr. A Smuts, having deposited money to himself or to the close corporation

he owns. Consultation between the First Respondent (attorneys) and the Second Respondent (seller), can practically and literally take place with Mr. A Smuts seated alone, and it appears this is what happened in this case. As indicated, no party sent or received a breach notice, and the courts were not approached for an appropriate remedy by anyone who may have felt aggrieved. This was the case until the contract lapsed, and it was not renewed.

[32] With the above in mind, I now proceed to deal with the question of prescription. The need for Prescription Act, no. 68 of 1969 must have been informed by the desire to have finality in litigations and claims. A debt cannot remain open indefinitely. A creditor against whom a debt is due needs to institute a claim within a particular period, or else it would prescribe. Judging by a number of authorities the First Respondent came up with, one can tell that this is the terrain it must be familiar with. For example, in *Du Toit and Others v Du Toit Smuts and Partners and Another*[10], the first respondent who coincidentally is the First

Respondent in this case, found itself embroiled in the same issue involving prescription of a claim over money paid as a deposit for the sale of property.

[33] In that matter, Mashile J dismissed the claim against the first respondent holding that it had prescribed. The court referred the judgment to the LPC for investigations over what it considered an ethical obligation on the part of a law firm to inform the aggrieved party about the looming prescription. What makes the difference between that case and the one at hand is that the seller in that case was not the same person or members of the conveyancing attorneys. Moreover, the person who paid the cash deposit for the property, was not the applicant (trustees), making the link between the depositor and the claimants to be non-existent.

[34] In casu, the Applicant submitted that the payment of the deposit money to the Second Respondent, by the First Respondent was unlawful as the Applicant, for whose benefit the money was held, had not given consent for the payment. The Applicant's claim against the Second Respondent was therefore based on undue enrichment. The First Respondent relied on *De Villiers NO v Kaplan*[11] in submitting that the only right that the trust creditors have is a right to payment by the attorney of whatever is due to them and it is to that extent that they are the attorney's creditors, just as it was held that "money paid to attorney by a client to be held and dealt with for the client clearly becomes the attorney's property even although it might be paid into a trust account."

[35] In *Van Wyk Van Heerden Attorneys v Gore and Another NNO*,[12] the SCA distinguished *Kaplan* when it held,

"It is clear that attorneys operate on their trust accounts as principals and not as agents. This is because they, and only they, can instruct a bank to dispose of amounts to the credit in that bank account since clients have no legal relationship with the bank concerning that account. When attorneys operate on a trust bank account in accordance with their instructions, however, they may function at two levels. In the first place, because only they have the right to dispose of funds to the credit in that account pursuant to the banker – customer relationship, they do so as principal. In the second place, however, if they give effect to a mandate from the client in whose name the moneys are held in trust, they do so as agent. What is relevant for present purposes, however, is that the power to operate a trust account does not determine whether a deposit into that account amounts to a disposition to the attorney. The contention of the liquidators to this effect must therefore be rejected."

[36] The contract between the Applicant and the Second Respondent forms the basis of the payment of the deposit money. It also provided that the deposit shall be kept in a separate interest bearing trust account for the benefit of the Applicant. The only circumstances under which the deposit could be paid to the Second Respondent is upon transfer of the property or what is covered under clause 12; all of which did not take place until the contract lapsed. Trust property which is registered in the name of a trust account practice, or jointly in the name of an attorney or trust account practice and any other person in a capacity as administrator, trustee, curator or agent, does not form part of the assets of that

attorney or trust account practice or other person.[13]

- [37] Had the First Respondent been telling the truth when he claimed that the balance of the deposit was paid to the Second Respondent, debt would in my view have become due there and then as the deposit in the trust account would have become a debt and payable. But this was untrue as the deposit remained in the trust account until 13 December 2019. For all this period, the money was still being held for the Applicant and for his benefit irrespective of his request that the funds be released to him. The funds were still being held for him and would not accrue to anyone without his consent or at least through a claim sanctioned by a court. Once a payment was made to the Second Respondent, clearly it was no longer being held for him and for his benefit. I have also noted that the payment was made to the Second Respondent without any claim being lodged by it against the deposit. This payment could not have been lawful. There is no justification or even an explanation for it, other than that the First Respondent was conflicted.
- [38] In as far as *Ramdin v Pillay and Others*[14] was decided to conclude that once a claim is made by a creditor or trustee of the money held in the trust account, prescription would start running, I respectfully cannot agree. In circumstances of this case where the money was kept in the trust account of a legal practitioner, who deliberately waited for prescription in his calculations in order to do as he pleased with substantial amount of money which does not belong to him and to which he had no legal right or authorisation; to allow prescription would promote theft and fraud in that legal practitioners would then be authorised to do what they could not lawfully do, but for the prescription. If this was to be allowed, what would then happen to the funds still held in the trust account? Would they become *res nullius* for anyone to pick and own? Prescription does not change the character and ownership of money being held in the trust account.
- [39] The other reason I find it difficult to accede to the notion that the debt could have become due and payable from the date the Applicant requested the funds to be released is that in this case, the First Respondent continued to deduct or charge a monthly administration fee from the interests accumulating in the account, without failure. Although the Applicant submitted that these charges should be seen as interruption of prescription- through debt acknowledgement, I think this argument stretches it too far. While acknowledgement of debt interrupts prescription, it is the unequivocal acceptance of liability which is regarded as acknowledgement of debt, not a simple charging of a handling fee, that can interrupt prescription. The charging of a fee however is in my view another reason that the First Respondent was conscious that it continued to hold the funds for the Applicant and for his benefits and continued to charge him for that even during that period. This makes it impossible for the Applicant's claim to prescribe.
- [40] Having found as above, it follows therefore that the payment made by the First Respondent to the Second Respondent of the balance of the deposit money, was unlawful and it unduly enriched it (Second Respondent). I have taken note of the Applicant's averment that he delayed in issuing the application in this matter because the LPC would not have agreed to

hear his complaint, for as long as there was pending litigation in courts. The court was informed that the complaint resulted in a disciplinary hearing, the outcome of which was delivered in 2020 and that the Third Respondent has since noted an internal appeal. The said appeal has been pending since 2020. The snail pace at which the complaint has progressed so far is disconcerting.

[41] Calculation of interest.

If the debt only became due on the date on which money was paid from the trust account to the Second Respondent, as the Applicant argues, there is no basis for the interest in the amount to be calculated from March 2017. The interest should be calculated from the date the debt became due which is December 2019. The amount owed though, had been accumulating interest as it was kept in the interest bearing trust account. As of 13 December 2019, the total amount in the trust account was R433 672.94.

[42] Costs.

For the Applicant to have to resort to court to get what is rightfully his, is deplorable. It has been eight years now since the deposit was made towards the purchase of the property. At some point, the Applicant approached the First Respondent requesting an undertaking that they will not raise prescription as he was still pursuing a complaint with the LPC. He required some sort of an undertaking in the form of interruption of the running of prescription. That letter went unanswered. The manner in which the Applicant, a natural person for that, was literally pushed from pillar to post, ignored and treated with disrespect over his own money, deserves a show of disapproval by the court.

[43] Although the Third Respondent's conduct in the disciplinary hearing before the LPC should have no bearing in the outcome of this application, I could not help but notice that there was (and still is) no sense of urgency on his part. If the Third Respondent had it his way, the hearing would not have even proceeded beyond calling for his response today. This I say because in his response to the LPC, he gave an explanation whose purpose was for the LPC to close the file and that if he they were not closing it, he would need further particulars from the complainant before responding. The hearing proceeded in his absence as he needed a postponement on the date scheduled for hearing.

[44] In this hearing, the court was informed that the sanction imposed (to suspend him as a legal practitioner) cannot be put into operation because it was suspended when he lodged an appeal. This is the fourth year since the appeal was lodged with the LPC, and the closure appears to be still distant, while the complainant, a member of the public awaits the outcome. This delay cannot be condoned.

[45] For the aforesaid reasons, I make the following order.

[45.1] The First and the Second Respondents are ordered to pay R390 000.00 (the capital amount) plus interest accumulated as of 13 December 2019 (R43 672.94), totalling R433 672.94 plus interest calculated at the prescribed rate from 17 December 2019, to the date of payment.

[45.2] The First and the Second Respondents are ordered to pay the costs of this application on attorney and client scale, jointly and severally, the one paying, the other to be absolved.

[45.3] The Chief Registrar of this Division is directed to bring this judgment to the attention of the LPC – Mpumalanga.

TV RATSHIBVUMO

ACTING DEPUTY JUDGE PRESIDENT

MPUMALANGA

FOR THE APPLICANT; ADV. C BESTER INSTRUCTED BY: RICHARD SPOOR INC C/O: CHRISTO SMITH INC MBOMBELA FOR THE RESPONDENT: ADV. R DU PLESSIS SC INSTRUCTED BY: DU TOIT SMUTS & PARTNERS INC MBOMBELA DATE HEARD: 23 JULY 2024

JUDGMENT

DELIVERED: 27 AUGUST 2024

- [1] See Annexure WW3 on p. 34 of the paginated bundle.
- [2] See clause 2.1 of the Deed of sale agreement (WWR1) on p. 199 of the paginated bundle.
- [3] See WW3 on p. 34 of the paginated bundle.
- [4] This was clearly a typo as October 2017 was still in the future. The author must have meant, 2016.
- [5] For more on this letter, see paragraphs 14 & 15 below.
- [6] This information is contained in a supplementary affidavit filed by the Applicant after the initial opposition to its filing by the Respondents, in an interlocutory application.
- [7] 1958
- (4) SA 115 (T) at 118F-H.
- [8] See National Director of Public Prosecution v Zuma
- [2009] ZASCA 1; 2009 (2) SA 277 (SCA) at para 26, where it was held, “[M]otion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts

alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.”

[9] Clause 11.3 provides, “Pending fulfilment of 11.1 [the suspensive condition of sale of the purchaser’s house at R4 500 000.00]

and 20 the seller shall be entitled to continue to market the property, and should prior to the fulfilment of this condition, a bona fide offer (herein referred to as “the competing offer”) for the property be received, which but for this agreement the seller wishes to accept, the seller may do so subject to the following 11.3.1 a copy of the competing offer shall be delivered to the purchaser, who shall be given 72 hours from delivery, to waive the condition mentioned in Clause 11.1...”

[9] Clause 11.3 provides, “Pending fulfilment of 11.1 [the suspensive condition of sale of the purchaser’s house at R4 500 000.00]

and 20 the seller shall be entitled to continue to market the property, and should prior to the fulfilment of this condition, a bona fide offer (herein referred to as “the competing offer”) for the property be received, which but for this agreement the seller wishes to accept, the seller may do so subject to the following

11.3.1 a copy of the competing offer shall be delivered to the purchaser, who shall be given 72 hours from delivery, to waive the condition mentioned in Clause 11.1...”

[10] (4748/2021)

[2023] ZAMPMBHC 22 (12 April 2023).

[11] 1960

(4) SA 476 (C) at 477E-F.

[12] 2023

(1) SA 80 (SCA) at para 23.

[13] See section 88(2) of the Legal Practice Act.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAMPMBHC/2024/57.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/wilson-v-du-toit-smuts-and-partners-attorneys-and-others-unknown-topic-ampmbhc-2024>

Prepared on 13 October 2026 · Esheria