REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2020/31138

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

29 June 2022 .....
DATE
SIGNATURE

In the matter between:

JOHANNES PHILLIPPUS DE BRUYN	Applicant
And	
JARKIE-TRUST ADMINISTRATORS (PTY) LTD	First Respondent
(in its capacity as trustee of the Mon Elmie Trust, represented by Johannes Antonie Roets N.O.)	
WILLEM JOHANNES STEYN N.O.	Second Respondent
(in his capacity as trustee of the Mon Elmie Trust)	
ALMINDA SOPHIA KRUGER N.O.	Third Respondent
(in her capacity as trustee of the Mon Elmie Trust)	

(This judgment is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 29 June 2022.)

JUDGMENT

MIA, J

[1] This is an application for the payment of the amount of R1 158 104,42 which the applicant, Mr Johannes Phillippus De Bruyn sought as repayment for settlement after cancelling a Life Right Sale Agreement concluded with the respondents. The amount claimed was the amount reflected in the "Life Right- Resale Settlement Account" dated 4 June 2019. The applicant also sought interest on the amount as well as attorney and client costs. The applicants replying affidavit was filed late and the applicant filed an application for the condonation of the late filing of the replying affidavit. Both applications were opposed by the respondents.

[2] The applicant is an 84-year retired male, residing at Feather Brooke Retirement Village. The respondents are cited as the *nominee officio* trustees of the Mon Elmie Trust (the Trust) registered with the Master of the High Court, Pretoria. The first respondent is the Jarkie Trust Administrators (Pty) Ltd, a private company with limited liability incorporated in terms of the company laws of South Africa. The second respondent is Mr Willem Johannes Steyn NO, in his *nomine officio* capacity of the Trust. The third respondent is Ms Alminda Sophia Kruger in *her nomine officio* capacity of the Trust.

BACKGROUND

[3] The background to the dispute is as follows. The applicant and his wife, Mrs De Bruyn, who is now deceased entered into an agreement, governed by the Housing Development Scheme for Retired Persons Act, 65 of 1988 (the Act), with the Trust. In terms of the agreement, they acquired certain occupation rights in the village developed by the

Trust. They occupied a unit in Victoria Park commencing on 1 October 2011. In exchange for the occupation of the property they occupied, they advanced a loan to the Trust in the amount of R 1100 000. Upon the applicant's wife's passing, all her rights and obligations in terms of the agreement would transfer and vest in her surviving spouse which was the applicant at the time[1].

[4] The applicant and his wife were entitled to terminate the agreement with the Trust which would entitle the Trust to market and allocate the unit to new occupiers[2]. The applicant and his wife would be liable for rates, taxes, and utilities until the unit was allocated to a new occupier. Once the Trust allocated the unit to a new owner who paid in full the new loan amount, the Trust would repay the loan amount with interest to the applicant and his wife (as the previous occupiers) after deducting a commission and any outstanding costs[3].

[5] The applicant and his wife paid the amount of R1100 000 on 5 May 2011 and took occupation in September 2011. The applicant's wife passed on, on 12 November 2012 and he became the sole occupier of the unit. He then moved to Feather Brooke Hills Estate to live closer to his surviving family. He informed the Trust about his decision to terminate his right of occupation in April 2017. The Trust allocated a new occupier in 2018. The unit was vacated after 16 June 2017 after all outstanding accounts were settled. The applicant also ascertained that a new occupier signed for the remote access on 28 April 2018 and would only access the unit after having paid for the unit.

ISSUES FOR DETERMINATION

[1] Clause 12.2 of Agreement: applicants founding affidavit, Caselines 002-6
[2] Clause 14.2 of Agreement: applicants founding affidavit, Caselines 002-6 & 7
[3] Clause 14.2.1 of Agreement, applicants founding affidavit, Caselines 002-7

[6] 6.1 Whether the applicant has authority or *locus standi* to launch the application?

6.2 Whether the applicant's claim has prescribed in terms of the Prescription Act, 68 of 1969 (the Prescription Act)?

6.3 Whether the Trust can deny liability to the applicant in view of its previous acknowledgment of indebtedness?

CONDONATION

[7] The issue of condonation for the late filing of the replying affidavit should be resolved first. The Supreme Court of Appeal in *Dengetenge Holdings (Pty) Ltd vs Southern Sphere Mining and Development Company and Others*[4] specified various factors which are relevant in determining whether an application for condonation should be granted as follows:

> "Factors which usually weigh with this Court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this Court and the avoidance of unnecessary delay in the administration of justice (*per* Holmes JA in *Federated Employers Fire & General Insurance Company Limited and another v McKenzie* 1969 (3) SA 360 (A) at 362F-G [also reported at [1969] 3 All SA 424 (A) - Ed]). I shall assume in Dengetenge's favour that the matter is of substantial importance to it. I also accept that there has been no or minimal inconvenience to the court. I, however, cannot be as charitable to the appellant in respect of the remaining factors."

[8] In the present matter, the applicant sought condonation for the late filing of the replying affidavit. In their opposition, the respondents indicated they had been compelled to file heads of argument in the

[4] *Dengetenge Holdings (Pty) Ltd vs Southern Sphere Mining and Development Company and Others* [2013] 2 All SA 251 SCA para 11.

matter. It is common cause that the applicant filed their replying affidavit on 18 January 2021, three days after the closing of the pleadings and one week after the third court term had just commenced. This was evidently well before the matter was set down. Accordingly, the inconvenience to the court was minimal if any. The opposition to the application for condonation was unreasonable. The application was thus granted.

THE APPLICANT'S AUTHORITY TO LAUNCH PROCEEDINGS AND TO PROCEED BY WAY OF AN APPLICATION: LOCUS STANDI

[9] The first defence raised by the respondents was the lack of authority or *locus standi*. The applicant in reply indicated that Mrs De Bruyn's estate was in fact reported to the Master of the High Court, the administration of the estate was duly finalised and the applicant inherited the entire estate.[5] The parties were married in community of property and had a joint will. In addition, the liquidation and distribution account provided for the housing interest /life right in Victoria Park.[6] Counsel for the respondents submitted that there was no extrinsic evidence relating to the liquidation and distribution account provided by the applicant. In relation to the issue of *locus standi,* clause 12.2 of the agreement signed by the parties makes provision for the transfer of Mrs De Bruyn's rights in the event of her death[7]. Where there was a pursuit of the rights in terms of the agreement the applicant would thus be in a position to pursue same. In view of the aforementioned it is evident that the applicant had the authority to launch the proceedings and the respondents defence in respect of l*ocus standi* must fail.

[10] The issue which remains is whether the applicant ought to have proceeded by way of application or whether the applicant ought to have

[5] Replying Affidavit, para 11, Caselines 010-4 and at 010-22
[6] As above, para 12, Caselines 010-4 & 5 and 010-26
[7] Clause 12.2, Caselines 003-35

issued a summons. This turns on whether there were factual disputes on the papers and whether the applicant ought to have foreseen this eventuality. I will turn to this issue upon addressing the remaining issues raised.

HAS THE APPLICANT'S CLAIM PRESCRIBED IN TERMS OF THE PRESCRIPTION 68, 1969

[11] Section 12 of the Prescription Act provides that prescription begins to run when the debt is due. Subsection 2 and 3 provide:

> "(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
>
> (3) 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."

[12] The Trust acknowledged that the relevant sections of the Prescription Act applied to the present matter. They however calculated the date the debt became due as the date of the passing on of Mrs De Bruyn which occurred on 12 November 2012. There was no explanation for this as the applicant continued living on the property and the agreement still endured. The applicant calculated the due date of the debt from the date on which he terminated the agreement. He indicated he terminated the agreement in April 2017 and resided in the unit until June 2017. The latter date is the date he proffered as the date from which prescription ought to have commenced. Having regard to the agreement however, it was argued that prescription commenced running only 30 days after the new loan amount was received by the Trust. The Trust received the new loan amount from the new purchaser in March or April 2018.

[13] The respondents admitted the express terms of annexure "FA3" attached to the founding affidavit which includes clause 12.2. This clause provides for the rights in terms of the agreement to be transferred to the surviving spouse. Clause 14.2 makes provision for the termination of the agreement. Upon termination of the agreement, the occupiers remain liable for certain utilities. The payment of the loan amount was due thirty days after the new occupier paid the loan to the developer.[8]

[14] The applicant relies on the contract which he placed before this court. The respondents admit the express terms of the agreement. There was no dispute relating to those express terms. There could be no other interpretation of clause 12.2 relating to the applicant having the rights as the surviving spouse. Neither was there any other interpretation of clause 14.2 by the respondents as they failed to pay the loan amount due to the applicant earlier.

[15] The defence of prescription raised by the respondents ignores the agreement which they admitted and specifically clause 14.2. On the respondents' version the applicant vacated the unit after his wife's passing to reside closer to his family. The respondents indicate they did not accept the termination in 2012. If they did not accept the termination in 2012 and the Trust admits the express terms of the agreement, then they could not have refused the applicant's termination in 2017. They would not have commenced to pursue a new occupier for the unit as provided by the agreement and to allow occupation of the unit. The applicant was liable for certain expenses related to the unit until a new occupier had paid and taken occupation. In any event the debt did not become due until the new occupier had paid for the unit. The respondents do not dispute that they informed the

[8] Clause 14.2 Caselines 003-40

applicant that they would repay the loan amount. They merely dispute the attachment of the annexure attached to the papers. They do not dispute having a new occupier or any other term of the agreement.

[16] In any event, the respondents' reliance on the date of Mrs de Bruyn's death in view of the agreement signed is misplaced. Section 12(3) of the Prescription Act provides:

> "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."

In this matter, prescription had not commenced upon the date of the applicant's wife passing.

[17] On the question whether the applicant should have referred the matter to trial on the basis that he ought to have foreseen a dispute of facts. In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [9] the Supreme Court of Appeal held that

> "A real, genuine and bona fide dispute of fact can exist only where the Court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed."

[18] On the unrefuted facts, it is the respondents who raised the issue of lack of authority on the part of the applicant. Clause 12.2 of the agreement defines the authority the applicant has or undoubtedly bestows the applicant with the authority in question. The applicant inherited the estate in terms of the parties joint will and the estate was reported to the Master of the High Court. Even if there was no tear sheet reflecting the publication of the liquidation and distribution account, as the respondents seem to suggest and rely upon, clause

[9] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] 2 All SA 512 SCA

12.2 cloaked the applicant with the authority to proceed. The issue of the applicant's wife's estate is not a material dispute which prevents him from launching the present application or proceeding on motion. It follows that there was no dispute of facts at any stage. Thus, the applicant was justified to proceed on motion.

CAN THE TRUST DENY LIABILITY TO THE APPLICANT IN VIEW OF ITS PREVIOUS ACKNOWLEDGEMENT OF INDEBTEDNESS?

[19] The applicant relied on the respondents' acknowledgment of indebtedness when they issued a resale settlement account in 2019. The respondents dispute liability. The resale settlement account is attached as an annexure to the founding affidavit[10]. This repayment appears to conform with the terms of the agreement.

[20] The respondents did not raise a real *bona fide* dispute of fact such that the matter ought to have been referred to oral evidence or such that the applicant's case should be dismissed. Without considering the "with prejudice" correspondence referred to in the replying affidavit, the applicant's case is made out in the founding affidavit and confirmed in the replying affidavit. The issues raised by the respondents have not been satisfactorily and justifiably raised. The respondents' version that the applicant had no *locus standi* is addressed by the agreement. The issue of prescription is addressed by clause 14.2 of the agreement. In the circumstances the respondents cannot refute liability to the applicant and are liable to the applicant for the for payment of the amount of R1 158 104,42 as repayment of a Life Right Sale Agreement.

[21] The applicant sought attorney and client costs. The applicant has succeeded in this application. The usual order is that costs should

[10] Founding affidavit, Annexure FA5, Caselines 002-47

follow the course. In the present matter the respondents have defended the application needlessly after receiving the funds from the new occupier. The applicant was entitled in terms of the agreement to be reimbursed. There is no reasonable explanation to withhold the monies loaned from the applicant who invested the funds as a retired person to enjoy the benefit of occupation in the residential village. The respondents are liable for the costs herein. The applicant has requested a punitive costs order. The defences had no merit and I am of the view the respondents should pay the applicant's cost on an attorney and client scale.

[22] For the reasons above I make the following order:

ORDER

1. The first to third respondents shall pay the applicant the amount of R1 158 104, 42.
2. Interest on the above amount at the prescribed rate *a tempora morae,* from 4 June 2019 to date of final payment.
3. Costs on an attorney and client scale.

_____

S C MIA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Appearances:

On behalf of the applicant	: Adv. DR de Wet
Instructed by	: Bernard Vukic Potash and Getz Inc.
On behalf of the respondents	: Adv. G. Olwagen-Meyer
Instructed by	: Casper Le Roux Inc
Date of hearing	: 02 November 2021
Date of judgment	: 29 June 2022