



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No. A320/2021

(1) REPORTABLE: NO

[1] (2) OF INTEREST TO OTHER JUDGES: NO

[2] (3) REVISED: 19/11/2023

[3] JULIAN  YENDE

27th NOVEMBER 2023

[4] SIGNATURE

DATE

PETRUS JOHANNES LORDAN N.O.

1ST APPELLANT/ DEFENDANT

THEODORIS LOUIS LORDAN

2ND APPELLANT/ DEFENDANT

CHARLES JAKOBUS PIETERSE

3RD APPELLANT/ DEFENDANT

And

TIGHT BUSINESS ENTERPRISES CC

RESPONDENT/PLAINTIFF

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and uploaded on Caselines electronic platform. The date for hand-down is deemed to be 24th November 2023.

JUDGMENT

CORAM: BAQWA et MOTHA JJ et YENDE AJ

Introduction

[1] This is an appeal against the whole of the judgment and order of her Ladyship Acting Justice Lukhaimane granted on the 29 October 2019, in which she dismissed the appellant's special plea with costs. On the 30 October 2020, the court of first instance granted leave to appeal to the Full Bench of the above Honourable Court, with costs in the cause.

Issues to be determined

[2] Whether the respondent's/plaintiff's claim has prescribed on either, or both, of the factual scenario's as pleaded by the respondent in the particulars of claim¹. The appellant's special plea was one of prescription, namely that the summons was served by the respondent only on 6 March 2012 more than 3 years after the respondent's claim arose on 5 January 2009.²

Factual Matrix

[3] On the 5 January 2009, the parties entered a written agreement of sale of immovable property known as portion [...] of the Farm Verzamelin van Waters [...] Registration Department LS, Limpopo Province (hereafter referred to as "the property").

[4] The written agreement contained a special suspensive condition as "clause 18" same is restated herein below:

"SPESIALE OPSKOTERTENDE VOORWAARDE³

¹ See respondent's particulars of claim Caselines paginated pgs. 0001-4 to 0001-7 pars 4-9 thereof.

² See applicant's Special plea Caselines paginated pgs. 0001-30 to 0001-31 pars 2-5 thereof.

³ See Caselines paginated pgs. 0001-15 par 18 of Aansoek "A" to respondent's/plaintiff's POC.

*Hierdie ooreenkoms is onderhewig aan die volgende opskortende voorwaarde;
Dat toestemming vir die oordrag van die bovemelde eiendom afsonderlik van
Gedeelte 21 (n Gedeelte van Gedeelte 7) van die plaas Verzameling van Waters
deur die Minister van Landbou verleen sal word nie later as 30 Junie 2009.
Dat die KOPER sal toesien tot die verkryging van die nodige toestemming en sal
alle koste in daardie verband dra.”*

[5] It is worthy to mention that the parties had in this written sale agreement of immovable property, clearly determined when the special suspensive condition should be fulfilled. On the 6 March 2012, the respondent brought a civil action against the appellant wherein it claimed specific performance of an agreement of sale of immovable property and specifically the transfer of property known as portion [...] of the Farm Verzamelin van Waters [...] Registration Department LS, Limpopo Province.

[6] In its particulars of claim the respondent (the plaintiff in the main action) averred inter alia;

6.1 In paragraph 5⁴ thereof that;

“Ooreenkomstig die bepalings van klousule 18 van die Koopakte Aanhangel”A” hierby, is voemelde koop-ooreenkoms onderhewig gemaak aan die volgende spesiale opskortende voorwaarde, te wete, dat toestemming vir die oordrag van die eiendom afsonderlik van Gedeelte 21 (‘n Gedeelte van Gedeelte 7) van die plaas Verzameling van Waters (Hierna bloot “Gedeelte 21” genoem) deur die Minister van Landbou verleen sal word nie later as 30 Junie 2009 en dat die Eiser sal toesien tot die verkryging van die nodige toestemming en alle koste in die verband sal dra.”

6.2 Paragraph (6)⁵ thereof

⁴ See Caselines paginated pgs. 0001-5 par 5 of POC.

⁵ See Caselines paginated pgs. 0001-6 par 6 of POC

“Die Eiser het dienooreenkomstig toegesien tot die verkryging van die nodige toestemming soos in en deur klousule 18 beoog en ook al die koste in daardie verband gedra, en het die Minister van Landbou op 4 Junie 2009 toestemming vir die oordrag van die eiendom afsondelike van Gedeelte 21 skriftelik verleen. ‘n Afskrif van hierdie skriftelike toestemming vanaf die Minister van Landbou word as Aanhangsel “B” hierby aangeheg”.

6.3 Paragraph (7)⁶ thereof

“Alternatiewelik tot paragraaf 6 hierbo: Die toestemming van die Minister van Landbou in klousule 18 van die Koopakte Aanhangsel “A” vereis was desdieteenstaande, nie nodig nie, maar oorbodig”.

[7] The respondent has in its pleadings also attached the written agreement of sale as annexure “A”, the Minister’s consent as annexure “B” same which was obtained and/or received on 08 March 1995 as well as annexure “C” which appears to be another Minister’s consent however same is dated the 4 June 2009.

[8] The appellant raised a special plea of prescription against respondent’s claim based on the version put forth in the respondent’s particulars of claim as mentioned *supra*. The respondent’s claim is based on an alleged personal right flowing forth from the agreement of sale which is a debt subject to prescription in terms of the Prescription Act 68 of 1969 “(the Act)” ⁷

[9] The prescription period applicable to the respondent’s claim is 3 years from the date from which the debt is due⁸

⁶ Ibid ,para 7

⁷ See *eThekwini Municipality v Mounthaven* 2019 (4) SA 349 (CC) par [8].

⁸ Section 11(d) read with section 12(1) of the Prescription Act 68 of 1969.

[10] The appellants strongly contended that the respondent's first contention, as mentioned *supra*, that the respondent did comply with the above-mentioned suspensive condition and had done so by 4th June 2009, and that the court *a quo* erred in not finding that, in law, the mutual rights of the parties flow from the said agreement relate back to, and are deemed to have been in force from, the date of the agreement and not from the date of fulfilment of the condition, i.e., *ex tunc*. As a result, the debt which the respondent seeks is deemed to have become due on the date of the signing of the contract.

[11] The appellant's further contended that with regard to the respondent's second contention, as pleaded, that "the suspensive condition contained in clause 18 of the agreement of sale mentioned *supra* was *superfluous*. The court of first instance erred in not finding that prescription on this ground had begun to run from the date of signature of the agreement, that all rights flowing from the agreement, being unconditional, thus commenced from 5 January 2009, and that the respondent's claim, as based on this ground also had prescribed. Accordingly on the facts purely pleaded by the respondent/plaintiff and supported by the "Aanhangsal "B" and Aanhangsal "C" to the particulars of claim, the respondent's action commenced out of time and thus it had effectively prescribed by the time the summons were issued being 6 March 2012.

[12] The respondent contends that the appellant's special plea is untenable owing to the fact that the suspensive condition in the agreement of sale of the immovable property in *casu* was only fulfilled on 4 June 2009 and therefore the period of prescription began to run from the date of fulfilment of same.

Legal framework.

Conditional contracts;

[13] R H Christie⁹ has this to say “Classically, the effect of fulfilment of a condition precedent is not only that the whole contract, or however much of it was suspended, becomes enforceable, but also that this enforceability operates retrospectively as if the contract had been unconditional from the onset.¹⁰ This is not simply a figure of speech, as the date of the enforceable contract from the time of its making rather than the time of fulfilment of the condition may affect liability for tax¹¹ but, as can be seen from the cases in footnotes 6-12 at page 132 above, this rule is not taken to its logical conclusion. Wessels¹² considers the conflicting authorities and concludes that, when a conditional sale has been perfected by the fulfilment of the condition, the better view is probably that the fruits produced by the *merx* in the interim period (for instance apples from the tree) belong to the party in possession of the *merx*, but accruals (for instance the young of animals) to the buyer. Furthermore, Wessels¹³ concludes that the better view is probably that these rules apply to potestative as well as to casual conditions. The rule that the contract becomes enforceable retrospectively also does not apply if the contract provides otherwise,¹⁴ nor does it affect rights acquired in good faith by third parties during the period of suspension.”¹⁵

[14] In *ABSA Bank Ltd v Sweet and Others*¹⁶ where the court had to deal with the suspensive condition on a lease agreement, had this to say

“It is also now, it appears, accepted that when a suspensive condition is fulfilled the contract and the mutual rights of the parties relate back to, and are deemed to have been in force from, the date of the agreement and not from the date of the fulfilment of the condition i.e. *ex tunc* (see Pothier: obligations 220; Wessels: Law of Contract in South Africa 2nd Edition Vol 1 para 1352; Kerr op cit p 340; De

⁹ The law of contract in South Africa 5th Edition at page 145.

¹⁰ *Hayter's Radio Exchange v Hidge; Marnitz v Stark* 1952 2 SA 144 (N) 148; *Dharsey v Shelly* 1995 2 SA 58 (C) 64B-C; *Graham v Trackstar Trading 363 (Pty) Ltd* [2003] 1 All SA 181(SE).

¹¹ *Peri-Urban Areas Health Board v Tomaselli* 1962 3 SA 346 (A).

¹² Paras 1390-13-92.

¹³ In paras 1396-1402.

¹⁴ *G&G Investment and Finance Corpn (Pty) Ltd v Kajee* 1962 2 SA 73 (D) 80D.

¹⁵ *ABSA Bank Ltd v Sweet* 1993 1 SA 318 (C) 323H-I.

¹⁶ *Ibid* at page 128.

Wet and Yeats op cit p137; Joubert op cit p 177; Lee v Honore op cit para 99 p 34 ; Christie op cit p 168; Marnitz v Stark 1952 (2) SA 144 (N) p 148B; Peri-Urban Areas Health Board v Tomaselli 1962 (3) SA 346(AD)... Lee and Honore op cit para 99 say ‘When a suspensive condition is realised the mutual rights of the parties relate back to the date of the contract, but without prejudice to the rights in the subject-matter which third parties may have acquired in good faith pending the condition’”.

[15] In *Dharsey v Shelly*¹⁷ where the court had to deal also with a suspensive condition in the sale of land, had this to say

“the only condition which had to be fulfilled was an adequate valuation of the property. This, according to Mr Lloyd, was obtained but only communicated to the Bank after 3 April 1992. The imposition of this condition by the Bank was, in my opinion, a suspensive condition of the “grant” of loan. The effect of fulfilment of a suspensive condition (with certain exceptions relating to risk and fruits which are not relevant to this issue) is that the contract becomes enforceable retrospectively to the date of conclusion thereof, Christie *The (sic)* Law of Contract in South Africa 2nd ed at 168-169. Put otherwise, ‘the obligation has its full effect as if it was unconditional from the start’”.

[16] The Supreme Court of Appeal in *Africast (Pty) Limited v Pangbourne Properties Limited*¹⁸ when dealing with a suspensive condition in a contract held that;

“A contract containing a suspensive condition is enforceable immediately upon its conclusion but some of the obligations are postponed pending fulfilment of the suspensive condition. If the condition is fulfilled the contract is deemed to have existed *ex tunc*. If the condition is not fulfilled, then no contract came into existence. Once the condition is fulfilled, [T]he contract, and the mutual rights of the parties relate back to, and are deemed to have been in force from, the date of

¹⁷ *Dharsey v Shelly* 1995 2 SA 58 (C) 64B-C at page 64A-B.

¹⁸ [2014] 3 All SA 653 (SCA) at para 37 (majority decision).

the agreement and not from the date of the fulfilment of the condition, i.e., *ex tunc*”.

[17] In *Tuckers Land and Development Corp v Strydom*, Joubert Judge of Appeal had this to say when dealing with *conditioe existente*;

“Vervullig van die opskortende voorwaarde bring mee dat die koop/verkoop was sy regsgevolge betref volmaak (perfecta) word. Die koop/verkoop was reeds ‘n voldonge feit serdert die aangaan daarvan aangesien die opskortende voorwaarde hoegenaamde nie die bestaan daarvan qua koop/verkoop geraak het nie. Pendente conditione was daar ‘n voorwaardelike koop/verkoop. Existente conditione word die koop/verkoop ontdaan van sy voorwaardelike karakter sodat dit omskep word in ‘n onvoorwaardelike koop/verkoop. Daar ontstaan by vervulling van die opskortende voorwaarde nie ‘n nuwe koop/verkoop nie want die koop/verkoop bestaan reeds vanaf die oomblik toe dit aangegaan is hoewel dit pendente conditione ‘n voorwaardelike koop/verkoop was.”

Prescription

[18] Prescription is regulated by the Prescription Act 68 of 1969. It is the process by which legal rights are acquired, weakened, or lost as a result of persistent action or inaction over a period of time¹⁹. Prescription exists in the public interest, providing certainty especially for the sake of debtors²⁰. It is not contrary to public policy for a debtor to agree, after the debt is already extinguished by prescription, not to raise prescription as a defence.

[19] In terms of section 11 of Act, the periods of prescription of debts are:

“(a) thirty years in respect of:

(i) any debt secured by mortgage bond;

(ii) any judgment debt;

(iii) any debt in respect of any taxation imposed or levied by our or under an

¹⁹ See Wille’s ‘Principles of South African law’ 9th edition Chapter 26 at 851-855.

²⁰ See *De Jager en andere v ABSA Bank Bpk* 2001 (3) SA 537 (SCA) para 12.

law

- (iv) any debt owed to the State in respect of the any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;
- (b) fifteen years in respect of any debt owed to the State and arising out of an advance or loan or sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);
- (c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b);
- (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.”

When prescription begins to run

[20] In terms of section 12(1) and (2) of the Act prescription begins to run as soon as the debt is due unless the debtor wilfully prevents the creditor from knowing of the existence of the debt, in which case it commences to run when the creditor becomes aware of its existence²¹. The debt does not become due for this purpose until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises²². A creditor is deemed to have the necessary knowledge if he could have acquired it by exercising reasonable care²³.

Discussion

[21] This Court share the sentiments expressed in *Peri-Urban Areas Heath Board v Tomaselli*²⁴ that “*it is thus, the legal act of making or entering into the contract which creates the right and duties of the parties to the contract and not the fulfilment of the condition itself*”.

²¹ See *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd* (in liquidation) 1998 (1) SA 811 (SCA) at 825-827; *Deloitte, Haskins & Sells Consultants (Pty) Ltd v Bowthorpe, Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 532.

²² Prescription Act no 68 of 1969 , s 12(3), as amended by Act 11 of 1984.

²³ *Ibid*, See *Drennan Maud & Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) 209G.

²⁴ 1962(3) SA 346 (A) 351G-352A.

[22] It is trite that the facts pleaded in the particulars of claim in the main determines, the cause of action and the relief sought. The special plea by the opposing party is informed by the facts pleaded. In *casu*, it is common cause that the special plea was informed by the facts pleaded as mentioned *supra*.

[23] The court of first instance should have looked into the facts pleaded including the attachments thereto. Having regard to precedents and case law and it ought to have upheld the special plea of prescription on the grounds that based on the facts pleaded by the respondent/plaintiff its claim has indeed prescribed²⁵. It is the view of this Court that the facts in *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd*²⁶ are distinguishable from the present case. The *Trinity Asset Management* matter dealt with the question as to when prescription begins to run on a loan agreement, the capital of which was according to the terms of the contract, “due and repayable to the Lender within 30 days from the date of delivery of the Lender’s written demand”²⁷ and the majority of the Court (per Justice Cameron) held that prescription on the loan agreement commenced to run from the date upon which the Lender advanced same despite the 30 days demand provision referred to *supra*, on the basis that this is the ordinary consequence of a commercial loan contract and that the parties had not specifically agreed that prescription should be dealt with otherwise²⁸. In the present case the respondent claims specific performance of an agreement of sale of immovable property and specifically the transfer of a property known as portion of the Farm Verzameling as described in paragraph [9] *supra*.

[24] This court agrees with the final observation made by Justice Cameron in *Trinity Asset Management*²⁹ matter and that the same considerations ought to apply *in*

²⁵ See respondent’s particulars of claim Caselines paginated pgs. 0001-4 to 0001-7 pars 4-9 thereof.

²⁶ [2017] ZACC 32.

²⁷ The terms of agreement in *Trinity Assets Management (Pty) Ltd* are set out in par 55 of the minority judgment by Mojapelo AJ.

²⁸ *Ibid* paras 131 to 137.

²⁹ *Ibid* 133.

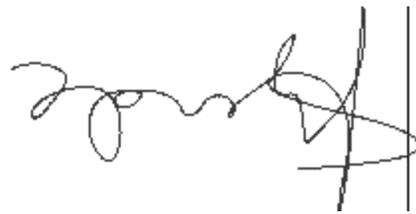
casu. The ordinary consequence of fulfilment of a suspensive condition is that the agreement between the parties is deemed to be valid in all respects from the date of signature thereof as the parties in the present matter had not recorded any specific stipulations regarding prescription, the running of prescription is unaffected and thus commences, by virtue of the aforesaid deeming provisions, from the date of signature as well.

[25] The Court finds that as adumbrated supra, the respondent's/plaintiff's claim on either basis pleaded in the particulars of claim has prescribed on the 6th March 2012 when the respondents/plaintiffs issued summons against the appellant/defendant.

[26] In light of the above I propose that the following order be made:

- (1) The appeal is upheld.
- (2) The order of the court a quo is substituted with the following:

The appellant's special plea is upheld with costs.

A handwritten signature in black ink, appearing to read 'J. Yende', is written over a horizontal line. To the right of the signature, there are two vertical lines, one of which is a solid line and the other is a dashed line.

J. YENDE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

M.MOTHA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree.

SELBY BAQWA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree, and it is so ordered.

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Heard: 16 October 2023

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