Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NUMBER: 902/2020
DATE HEARD: 05 February 2021
DATE DELIVERED: 22 September 2023

In the matter between:

SOPHIA NENE NKOPANE APPLICANT

and

SOL PLAATJE LOCAL MUNICIPALITY 1ST RESPONDENT
THE REGISTRAR OF DEEDS, KIMBERLEY 2ND RESPONDENT
THE MASTER OF THE NORTHERN CAPE HIGH COURT 3RD RESPONDENT

JUDGMENT

Eillert AJ

[1] The Applicant in this matter, Ms Sophia Nene Nkopane, is the

Master's representative[1] in the estate of the late Ms Eliza Moetsi Nkopane, the deceased. On 5 June 2020 the Applicant launched the application against the Sol Plaatje Municipality, the First Respondent, wherein she sought the following relief:

(a) That the First Respondent be ordered to pass transfer of the property known as Erf 20865, Galeshewe, Kimberley, also known as 20865 Nxumala Street, Galeshewe, Kimberley, to the estate of the late Eliza Moetsi Nkopane (Id. 281012 0395 082), within a period of 90 days from the date of this order;

(b) That the First Respondent be ordered to pay the costs of the application, alternatively the Respondents jointly and severally, should the Second and Third Respondents oppose the application.

[2] The First Respondent opposed the application. The Registrar of Deeds, Kimberley, and the Master of the Northern Cape High Court, who were cited as Second and Third Respondents respectively, did not oppose it. In addition, the Third Respondent filed a report stating that he does not have an objection to the application and abides by the decision of the Court.

[3] The Applicant claims transfer of the immovable property from the

[1]In terms of a Letter of Authority issued by the Master of this Court in terms of section 18(3) of the Administration of Estate's Act, no. 66 of 1965 (as amended)

First Respondent on the basis of section 9 of the Less Formal Township Establishment Act, no. 113 of 1991 ("*the Act*")[2]. It is not in dispute that the First Respondent, at least initially, allocated the immovable property to the deceased.

[4] Although the First Respondent filed an answering affidavit dealing with the merits of the application, the Applicant did not file a replying affidavit.

Prescription

[5] When the First Respondent's heads of argument were filed, two court days before the hearing, the First Respondent raised the issue of prescription for the first time. The First Respondent did not raise prescription in the answering affidavit, and the Applicant was therefore never afforded the opportunity to address the issue of prescription in the papers.

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[2]The Act has with effect from 1 July 2015 been repealed by the Spatial Planning and Land Use Management Act, no.113 of 1991. The provisions of the Act which are relevant stipulate as follows:

"**9. Registration of ownership.**-

(1) If, at an allocation under section 8 (1), the developer intends to transfer ownership of an erf, he shall, as soon as the township register in respect of the designated land has been opened, or, if such allocation takes place after the opening of the township register, as soon as possible after the allocation, lodge a deed of transfer, made out in the name of the person to whom the erf has been allocated, on the form prescribed for that purpose under the Deeds Registries Act, 1937 (Act No. 47 of 1937), at the deeds registry, whereupon the registrar of deeds shall register the erf in the name of such person…

(7) Ownership of the erf shall be deemed to have been transferred on the date of registration by the registrar of a deed of transfer referred to in subsection (1).

[5] At the hearing the issue of prescription was dealt with as a point in limine.[3] Mr Rust, on behalf of the Applicant, objected to the First Respondent raising prescription at such a late stage and cited authorities which in his submission support an approach that the court ought not to allow it. Mr Groenewaldt, for the First Respondent, on the other hand submitted that if the issue is glaringly clear on the papers, the court can take judicial notice of the issue. Furthermore, Mr Groenewaldt submitted that the issue raised is a point of law, which can be raised in any of the papers filed. He contended that on the objective facts, the Applicant's claim has prescribed.

[6] It is therefore necessary that this court first determines whether the First Respondent should be allowed to raise the issue of prescription, in the manner that it did.

[7] Section 17(2) of the Prescription Act, no. 68 of 1969 ("*the Prescription Act*"), provides that *"(A) party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings: Provided that a court may allow prescription to be raised at any stage of the proceedings*."

[3]A legal point raised at the outset, having a determinative effect on the rest of the proceedings.

[8] Saner, in Prescription in South African Law[4], states that *"(I)n motion proceedings, as a general rule, prescription must be raised on affidavit with the necessary facts and allegations clearly set out."*

[9] In **Njongi v MEC, Department of Welfare, Eastern Cape**[5] the Constitutional Court was seized with adjudicating prescription after the Respondent in the High Court raised prescription in a notice as a question of law. Yacoob J stated in paragraph [36] of the judgment as follows:

"[36] Even if one assumes that prescription runs while the unlawful administrative decision precluding payment remains effective, the notice is irregular. It implies that prescription is a point of law. Prescription raises questions of both fact and law. It is for this reason that, as pointed out by the judge in Ntame, prescription must ordinarily be raised on affidavit. In my view, the notice incompetently raises the issue of prescription. In addition the notice quite improperly makes the factual averment (facts are normally stated on affidavit) that the circumstances that would result in the interruption or delay of prescription did not exist... The applicant would need to traverse the factual substratum of any claim of prescription only if and after prescription had been properly raised and the facts supporting it had been put forth on affidavit..."

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[4]LexisNexis, Service Issue 33, Page 3 – 259 *et seq*
[5]2008 (4) SA 237 (CC)

[10] The application of Yacoob J's reasoning in Njongi would mean that *in casu* it is similarly irregular and incompetent for the First Respondent to raise prescription in its heads of argument and at the hearing only. The First Respondent ought to have raised the issue of prescription in the answering affidavit so that the Applicant could have dealt with the issue in reply.

[11] However, the Supreme Court of Appeal's approach in **MEC for Health: Eastern Cape Province v Mbodla**[6] is also instructive. In Mbodla, the court *a quo* adjudicated on an application in terms of section 3(4)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act, no. 40 of 2002 ("*the Legal Proceedings Act*"), for condonation of the Plaintiff's failure to deliver a notice required by section 3(1)(a), read with section 3(2)(a), of the Legal Proceedings Act. During the proceedings in the court *a quo* the Defendant filed a notice in terms of rule 6(5)(d)(iii) of the Uniform Rules, raising a legal point that the court could not condone the Plaintiff's failure as the Plaintiff's claim had prescribed. The court *a quo*, on the papers before it, issued a declaratory order that the Plaintiff had timeously complied with the requirements of the Legal Proceedings Act. After finding that it was inappropriate for the court *a quo* to have reached a final conclusion on the issue of prescription on the papers before it, the Supreme Court of Appeal considered the

[6](449/2013) [2014] ZASCA 60 (6 May 2014)

approach that the court *a quo* ought to have followed. In paragraph [7] Wallis JA stated as follows:

"[7] *Rule 6(5)(g) deals with this situation as is apparent from its opening words, which are:*

'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision.'

This Court has confirmed that the powers this rule vests in the court are extremely broad and should be exercised to ensure that matters are decided justly and expeditiously. They are usually exercised because of the presence of disputes of fact in the papers before the court, but the rule is not confined to that situation. If a court is unable to make a just decision because the parties have failed to place sufficient information before it to enable it to do so, it may in an appropriate case, exercise its powers under the rule to give directions that will enable the deficiencies to be remedied and a just decision to be rendered."

[12] The consequences of a decision either way on the issue of prescription are serious. I am of the view that it would not be appropriate in the matter at hand to lightly dispose of the issue by a mere finding disallowing the First Respondent to raise the issue of prescription in the manner that it did.

[13] *In casu*, the issue of prescription cannot properly be adjudicated on the papers as they currently stand. It may very well be that there is merit in the First Respondent's contention that the Applicant's claim has prescribed, seeing that the Applicant was appointed as the Master's representative on 12 July 2012, and that the Applicant only instituted the application on 22 June 2020, some eight years later. In terms of sections 10(1) and 11(d) of the Prescription Act, "any other debt" prescribes after the lapse of a period of three years after the debt becomes due. However, had the First Respondent raised the issue of prescription properly in the papers, it is possible that the Applicant in reply could have provided evidence that the running of prescription had been interrupted in terms of section 14 of the Prescription Act, or that the debt only became due on a later date in terms of the provisions of section 12 of the Prescription Act.

[14] Furthermore, the First Respondent only relied on one authority, being Balduzzi v Rajah[7], to submit that the Applicant's claim should resort under the definition of a "debt" and accordingly prescribes after a lapse of a period of three years. However, developments in more recent case law, namely that of **Absa Bank Limited v Keet**[8], **Makate v Vodacom**[9] and **Off-Beat Holiday Club v Sanbonani Holiday Spa Shareblock Limited**[10] may affect this submission. This court has not had the benefit of having heard full legal argument on the question of whether the Applicant's claim for

[7](17136/2007) [2014] ZAGPJHC 209 (4 April 2014)
[8]2015 (4) SA 475 (SCA)
[9]2016 (4) SA 121 (CC)
[10]2017 7 BCLR 916 (CC)

transfer of the immovable property does fall under the definition of a debt as employed in the Prescription Act considering the more recent decisions of the Supreme Court of Appeal and Constitutional Court referred to *infra*.

[15] In light of the aforegoing, it would not be appropriate at this juncture to dismiss the First Respondent's point in limine out of hand. It would rather be appropriate for this court to make such order as to it seems meet with a view to ensuring a just and expeditious decision in the matter. Uniform Rule 6(5)(e) *inter alia* provides that the court may in its discretion permit the filing of further affidavits, and an order to this effect will therefore be made.

Costs

[16] With regard to costs, I am of the view that it is due to the First Respondent's conduct of the matter that it cannot be finally adjudicated at this stage and that further proceedings are necessary. Had the First Respondent raised the issue of prescription properly in its answering affidavit, the Applicant would have been in the position to address the issue in reply and the issue would have been properly ventilated before the matter proceeded to the hearing. Unfortunately, because the First Respondent only raised prescription in its heads of argument, this has not been possible. In the circumstances, the wasted costs that are going to be incurred as

a result of the outcome of the proceedings at this stage are attributable to the First Respondent, and it would not be equitable for the deceased estate to be burdened with these costs.

[17] In the premise I make the following order[11]:

1. The application is postponed *sine die* to allow the filing of further affidavits by the parties on the issue of prescription;

2. The First Respondent is directed to deliver a supplementary answering affidavit, setting out only the facts on which it relies in support of the issue of prescription, within 20 court days of the date of this judgment;

3. The Applicant is directed to deliver a supplementary replying affidavit, addressing only the issue of prescription, within 10 court days after the delivery by the First Respondent of the supplementary answering affidavit;

4. The matter may thereafter be re-enrolled for hearing;

5. The parties will deliver supplementary heads of argument on the issue of prescription in accordance with the practice rules of this Court;

[11]Due to the circumstances beyond my control, it was not possible to finalise this judgment without delay. I sincerely regret the delay.

6. The wasted costs of the Applicant occasioned by this order shall be paid by the First Respondent.

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ACTING JUDGE

On behalf of the Applicants: **Adv J.M Rust** Instructed by: Haarhoffs Inc
On behalf of the First Respondents: **Mr S.J Groenewaldt** Instructed by: Towell & Groenewaldt Attorneys