THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 549/2007

YELLOW STAR PROPERTIES 1020 (PTY) LIMITED Appellant

and

MEC: DEPARTMENT OF DEVELOPMENT PLANNING AND LOCAL GOVERNMENT (GAUTENG) Respondent

Neutral citation: *Yellow Star Properties v Department of Development Planning and Local Government* (549/07) [2009] ZASCA 25 (27 March 2009)

Coram: BRAND, MAYA, CACHALIA, MHLANTLA JJA and LEACH AJA

Heard: 11 March 2009
Delivered: 27 March 2009
Updated:
Summary: Contract – damages for breach – contract found to have been invalid in previous litigation between the parties – special plea of *res judicata* or issue estoppel upheld – further special plea that alternative delictual claim had prescribed also upheld.

ORDER

In an application for leave to appeal from the High Court, Johannesburg (Gildenhuys J sitting as court of first instance).

The application is dismissed with costs, including the costs of two counsel.

JUDGMENT

LEACH AJA (BRAND, MAYA, CACHALIA and MHLANTLA JJA concurring):

[1] This is an application for leave to appeal under s 21 of the Supreme Court Act 59 of 1959. The applicant, the plaintiff in the court below, brought an action for damages to which the respondent, in pleading, raised two special pleas. When the matter came to trial before Gildenhuys J in the Johannesburg High Court, it was agreed that the special pleas be decided at the outset in the light of the facts contained in a so-called 'stated case' with the remaining issues to stand over for later decision. Having heard argument, the learned judge upheld both special pleas and dismissed the applicant's claim. He also dismissed a subsequent application for leave to appeal. The applicant's further application to this court for leave to appeal was set down for argument before this court.

[2] The merits of the appeal are obviously vital to the outcome of the application. The

parties therefore agreed to argue the appeal on the understanding that if this court was of the view that the appeal should succeed, the application would be granted and the appeal upheld but, if the appeal was found to be without merit, the application would be dismissed. I turn now to consider which order is appropriate.

[3] In order to consider the validity of the special pleas, it is necessary at the outset to set out the somewhat lengthy history of the litigation between the parties. At the heart of the dispute is a certain piece of immovable property more fully described as 'the remaining extent of Erf 137 Dunkeld West' ('the property'). The respondent, labouring under the mistaken impression that the property vested in the Gauteng Provincial Government and wishing to dispose of it, employed a valuer to ascertain what it was likely to fetch on the open market. The valuer employed valued it at R300 000. As appears below, this valuation was way off the mark. In June 2000 the respondent put the property up for sale on a public auction at which it was purchased by the applicant for R452 900. The parties thereafter signed a formal deed of sale which reflected the Gauteng Provincial Government as the owner and seller of the property and which obliged the applicant to pay a deposit of R45 200, to provide a bank guarantee for the balance of the purchase price and to pay various duties, levies and costs.

[4] Despite the applicant having fully complied with all its obligations under the deed of sale, transfer did not take place as it was discovered that the property, while state land, vested not in the Provincial Government as had been thought but in the National Government. Item 28(1) of Schedule 6 to the Constitution provides for a competent authority to issue a certificate in respect of immovable property owned by the state indicating in which particular branch of government such property is vested, whereupon

a registrar of deeds must make such entries or endorsements necessary to register such property in the name of that sphere of government. In order for the respondent to be able to effect transfer to the appellant, it had to obtain an item 28(1) certificate recording that the property vested in the Gauteng Provincial Government. And in order to obtain such a certificate, it was necessary for the respondent to first persuade National Government to transfer the property to the Gauteng Provincial Government.

[5] However, it then also came to light that the valuation of R300 000 obtained by the Provincial Government before the auction was wholly unrealistic, probably because the valuer had by mistake only had regard to a portion of the property while the true value of the whole property was several million rand. The respondent does not appear to have been overly concerned by this as it persisted in attempting to persuade national government to allow the property to be transferred to the applicant. But it is hardly surprising that the Ministry of Public Works, to whom administration of the property had been assigned, on learning that the property had been sold for but a fraction of its true value, refused to do so. Accordingly, as National Government refused to transfer the property to the Gauteng Provincial Government, the respondent could not obtain an item 28(1) certificate relating to the property and was unable to effect transfer to the applicant.

[6] When despite the passage of time transfer did not take place, the applicant raised the matter with the respondent. In response, in a letter from the head of Gauteng's Department of Development Planning and Local Government dated 12 December 2000 the applicant was informed that the property in fact vested in the national Department of Public Works and not in the provincial government, and it was

suggested that the applicant take the matter up with the legal section of the national department. It can be accepted that until receipt of this letter the applicant did not know that the respondent was not the owner of the property. Despite the applicant then consulting its attorney as well as a number of other government officials, it was unable to obtain transfer.

[7] Eventually, in June 2001 the applicant launched proceedings in the Pretoria High Court in case 15278/01 in which it cited the present respondent, as well as the Minister of Land Affairs and the registrar of deeds, as respondents. In its founding affidavit the applicant described the delays which had taken place and stated that it had established that if the Minister of Land Affairs – as the competent authority contemplated by item 28(1) – did not provide a certificate under that item, the property could not be registered in the name of the Gauteng Provincial Government which was necessary for transfer to the applicant to take place. It therefore sought an order, inter alia:

> '3. Compelling the (Minister of Land Affairs) to issue a certificate in terms of Item 28 of Annexure 6 to the Constitution, Act 108 of 1996, on an urgent basis . . . and to provide the (registrar of deeds) with the said certificate;
>
> 4. Compelling the (registrar of deeds) to effect the transfer over the property as a matter of urgency, upon receiving the certificate from the (Minister of Land Affairs).'

[8] When the matter came before Van Der Walt J on 30 January 2002, both the respondent and the Minister of Land Affairs argued that the applicant lacked *locus standi*, contending that the individual who had concluded the sale, one Harding, had represented not the applicant but a close corporation still to be formed. They also

argued that the parties had not been *ad idem* in regard to the property that was the subject of the sale. Both these contentions were rejected by the learned judge, and it has not been suggested that he erred in doing so. During the course of the hearing a copy of a certificate issued in respect of the property by the Minister of Land Affairs under item 28(1), was handed to Van Der Walt J. In his view, this obviated the need to deal with the relief sought in the application before him. He therefore merely granted an order which authorised the registrar to effect transfer upon receipt of 'the certificate' from the Minister of Land Affairs.

[9] At first blush, this is somewhat confusing. In making this order the learned judge presumably had in mind that 'the certificate' would facilitate transfer to the applicant (viz. It would be a certificate reflecting the Provincial Government as the owner of the property and thereby entitled to transfer it to the applicant). But the document handed in certified that the property vested in the National Government and, in itself, rather than providing the solution to the problem, constituted the very obstacle to the property being transferred to the applicant. The solution to this conundrum is to be found in Van Der Walt J's subsequent judgment of 31 July 2002 dismissing an application for leave to appeal brought by the Minister of Land Affairs in which he expanded on his reasons for judgment. The learned judge said that while the certificate handed in had been in the name of National Government, it had been stated in the papers that the Provincial Government was in the process of obtaining the property from the National Government to enable it effect transfer to the applicant, and that the stage at which it could do so had not been reached. This observation clearly indicates that the learned judge had not intended his order to authorise transfer directly to the applicant at that stage. It merely authorised the registrar of deeds to do so when 'the

certificate' reflecting the provincial government as owner came to hand.

[10] Unfortunately for the applicant, no such certificate was ever issued as the national government persisted in opposing transfer of the property to the applicant at a price which bore no relationship to its true market value. As a result, the order of Van Der Walt J in no way overcame the difficulty facing the applicant. The national government remained the owner of the property and the respondent remained unable to transfer it to the applicant. A position of stalemate had therefore been reached.

[11] The applicant then heard rumours of the property being subdivided. This news led to it bringing urgent proceedings in the Pretoria High Court in case 4578/2002, seeking an order restraining the respondent, as well as the Minister of Land Affairs and the registrar of deeds, from effecting any subdivision of the property. It also claimed an order directing the registrar of deeds to transfer the property to it within 48 hours and obliging the respondent to file all documents necessary to facilitate such passing of transfer. As the original item 28(1) certificate produced at the earlier hearing had gone missing, the applicant sought an order directing the registrar of deeds to be satisfied with a copy of it 'for purposes of effecting transfer'.

[12] It seems both from the relief sought and from the comment in the founding affidavit that once the item 28(1) certificate had become available the relief claimed in case 15278/2001 'became superfluous… in order (to) pass transfer to the Applicant', that the applicant still mistakenly regarded the certificate that had been handed to Van Der Walt J as being all that was required for the respondent to pass transfer. However, the registrar of deeds drew the court's attention to the fact that the existing item 28(1)

certificate recorded the property as vested in the national government, and also observed that before transfer to the applicant could be effected, it would be necessary for the property to be transferred from the national to the provincial government so that the latter could, in turn, transfer it to the applicant.

[13] The Minister of Public Works then applied to intervene as a party to oppose the relief sought. In doing so, she stated that she had been charged with the administration of the property, ownership of which vested in national government as reflected the item 28 certificate, that such certificate did not result in the property vesting in the provincial government, and that the applicant was not entitled to insist upon transfer. She also stated that as the responsible minister of state, only she had the discretion to sell the property, a discretion which she had not yet exercised. But in any event, she said she would probably not agree to the property being transferred to the applicant as it was worth several million rand more than the amount the applicant had undertaken to pay.

[14] By reason of certain allegations made in the papers and undertakings given after the institution of the proceedings, the necessity to seek an interdict in regard to the proposed subdivision of the property fell away. But the applicant persisted in claiming transfer of the property and the matter came to be argued before Smit J. Despite opposition from the appellant, the learned judge correctly allowed the Minister of Public Works to intervene as an interested party. She was, after all, the minister of state charged with the administration of the property and the only person who had the authority to sell it.

[15] In proceeding to deal with the relief sought by the applicant, Smit J concluded that while the Premier of Gauteng is authorised under s 2 of the Gauteng Land Administration Act 11 of 1996 to dispose of provincial land which vests in the Gauteng Provincial Government, it is the State President who under s 2(1) of the State Land Disposal Act 38 of 1961 has the power to dispose of land vesting in national government. He also accepted the allegation made by Minister of Public Works that the State President had assigned that power to her, and concluded that in the circumstances the provincial government had not been authorised in law to sell the property; that the sale to the applicant had therefore been *ultra vires* and void *ab initio*; that there was accordingly no valid *causa* for the transfer of the property to the applicant; and that the applicant was therefore not entitled to transfer of the property which remained vested in the national government. The application was accordingly dismissed.

[16] The applicant did not seek to appeal against this decision. Instead, in a letter addressed by its attorney to the respondent on 30 August 2004, it accused the respondent of having repudiated the sale by failing or refusing to transfer the property, and stated that it had decided to accept such repudiation and that it thereby cancelled the agreement. The attorney further demanded payment of more than R6,8 million as damages to be made within 30 days, failing which action would be instituted.

[17] In the light of Smit J's finding that the sale had been void at all times, it is hardly surprising that the respondent refused to make the payment demanded and, in due course, the applicant instituted action as it had threatened. In formulating its claim, it relied on the same breach of contract it had in the letter of 30 August 2004 (viz. the

failure or refusal to transfer the property to the appellant). In the alternative, it relied on a delictual claim, alleging that the respondent's servants, in selling the property, had either been aware that the respondent was not authorised in law or in fact to sell the property and had acted in bad faith; alternatively, that they had acted negligently in that they ought to have been aware that the respondent was not so authorised to conclude the sale. As a further alternative, the applicant averred that the respondent had maliciously or negligently failed to effect transfer in breach of Van Der Walt J's order of 30 January 2002.

[18] The respondent pleaded specially to these claims as follows: first it alleged that the action had been instituted on 29 October 2004, more than three years after both the contractual and delictual claims relied upon had arisen, and that they had consequently prescribed under s 11 of the Prescription Act 68 of 1969; secondly, it pleaded that:

(a) Smit J had found that:

(i) the sale had been void *ab initio*;

(ii) there was accordingly no valid *causa* for the property to be transferred;

(iii) transfer by the provincial government was therefore not legally possible; and

(iv) in the circumstances the provincial government could not be ordered to transfer the property to the appellant;

(b) These issues having been finally determined by Smit J, it was not open to the appellant to raise them in its claim by reason of *res judicata* or 'issue estoppel'.

(c) The appellant was therefore estopped from alleging or relying on a breach of the contract or Van der Walt J's order or from pursuing its main claim founded in contract

which was based on such alleged breaches.

[19] As already mentioned, these special pleas were determined in the light of the facts agreed in a stated case. Gildenhuys J held in relation to the second special plea that the appellant's contractual claim could not succeed as it was based on a contract of sale that had been found by Smit J to have been void *ab initio*, that the appellant was bound by that finding on the basis of issue estoppel or *res judicata*, and that the repudiation of a contract void *ab initio* could not support a claim for damages arising from its repudiation. In regard to the first special plea, the learned judge found it unnecessary to make any ruling on whether the claim in contract had prescribed as that claim was in any event incompetent on the basis of issue estoppel or *res judicata.* However, he held that the appellant's claim in delict had prescribed as more than three years had elapsed after the debt sued upon had become due before summons was issued. It is against these findings that the applicant now seeks leave to appeal to this court.

[20] For convenience, I intend to deal at the outset with the second special plea and the finding in the court *a quo* the appellant's claim could not succeed as the appellant was bound by the previous finding of Smit J that the sale was invalid *ab initio*. In regard to this issue, the appellant contended that Van Der Walt J had held the contract of sale to have been valid and enforceable, and that such issue had therefore been *res judicata* when it came before Smit J whose findings were consequently not binding and were to be regarded as no more than *obiter*.

[21] In considering this argument, it is necessary to deal briefly with the principles of *res judicata* and so-called 'issue estoppel' relied on by both sides. The underlying ratio of the *exceptio rei judicatae vel litis finitae* is that where a cause of action has been litigated to finality between the same parties on a previous occasion, a subsequent attempt by one party to proceed against the other on the same cause of action should not be permitted. In *National Sorghum Breweries v International Liquor Distributors* 2001 (2) SA 232 (SCA) at 239 para [2] Olivier JA stated the requirements for a successful reliance on the *exceptio* to be as follows:

'The requirements for a successful reliance on the *exceptio* were, and still are: *idem actor, idem reus, eadem res* and *eadem causa petendi*. This means that the *exceptio* can be raised by a defendant in a later suit against a plaintiff who is 'demanding the same thing on the same ground' (*per* Steyn CJ in *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 562A); or which comes to the same thing, 'on the same cause for the same relief' (*per* Van Winsen AJA in *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472A-B; see also the discussion in *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995 (1) SA 653 (A) at 664C-E); or which also comes to the same thing, whether the 'same issue' had been adjudicated upon (see *Horowitz v Brock and others* 1988 (2) SA 160 (A) at 179A-H).'

[22] It has been recognised though that the strict requirements of the *exceptio*, especially those relating to *eadem res* or *eadem petendi causa* (the same relief and the same cause of action), may be relaxed where appropriate. Where a defendant raises as a defence that the same parties are bound by a previous judgment on the same issue (viz. *idem actor* and *eadem quaestio*), it has become commonplace to refer to it as being a matter of so-called 'issue estoppel'. But that is merely a phrase of convenience adopted from English law, the principles of which have not been subsumed into our law,[1] and the defence remains one of *res judicata*. Importantly

1 *Smith v Porritt and Others* 2008 (6) SA 303 (SCA) para 10 and *Kommissaris van Binnelandse Inkomste*

when dealing with issue estoppel, it is necessary to stress not only that the parties must be the same but that the same issue of fact or law which was an essential element of the judgment on which reliance is placed must have arisen and must be regarded as having been determined in the earlier judgment.

[23] Fundamental to the respondent's opposition in case 4578/2002 was the allegation that the sale was invalid as the necessary statutory authority to sell the property had vested solely in the Minister of Public Works, a contention which Smit J upheld. The appellant accepted that if the decision of Smit J holding the sale to be invalid was not *obiter* but was binding between the parties, the issue would have been finally determined between the parties and the special plea that this issue was *res judicata* would have been correctly upheld. The applicant's case on this issue is one of issue estoppel and stands or falls on whether, by reason of the earlier judgment in case15278/2001, the validity of the sale had been finally determined between the parties by Van Der Walt J and was *res judicata* when it came before Smit J.

[24] Counsel for the appellant argued that while the decision of Smit J was probably correct, it was no bar to the appellant successfully raising *res judicata* or issue estoppel. In this regard, while the law indeed allows a party to rely upon such a defence even if the original judgment was incorrect,[2] I have grave reservations about whether it is permissible to do so if the effect will be to enforce a contract which is legally invalid.[3] This would of course be the case if Smit J was correct in concluding

v ABSA Bank Bpk 1995 (1) SA 653 (A) at 669H-I and 670C-E.

2 *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A)
3 *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) SA 1 (SCA) at [16] and [23].

that, in law, only the Minister of Public Works was authorised to sell the property. But in the light of the view I have of the matter, it is unnecessary to consider this any further.

[25] The applicant's argument that the validity of the sale was *res judicata* in case 4578/2002 faces insurmountable difficulties. As appears from what I have already said, in order for the applicant to succeed on this issue the case had to involve the same parties who had been in case 15278/2001 and had to turn on the same issue that had been finally determined in the judgment of Van Der Walt J. For the reasons that follow, neither of those two requirements were fulfilled.

[26] The obvious problem facing the applicant is that although it and the respondent were parties to both proceedings, the Minister of Public Works, to whom the State President had assigned the power to administer the property, was not a party in case 15278/2001 but, pursuant to its successful application for leave to intervene, became a party in case 4578/2002. On the other hand, the Minister of Land Affairs, who was a party in case 15278/2001 was not a party in case 4578/2002. Counsel for the applicant sought to overcome this difficulty by arguing that each minister had represented the national government in whom ownership of the property vested and which had therefore effectively been the relevant party before court at both hearings

[27] This argument cannot be upheld. Section 91(2) of the Constitution provides for the President to assign powers and functions to ministers, and s 92(1) provides for ministers 'to be responsible for the powers and functions . . . assigned to them'. A minister's powers and functions are always subject to constitutional control and the

doctrine of legality and 'can be validly exercised only if . . . clearly sourced in law.'[4] In addition s 2(1) of the State Liability Act 20 of 1957 provides that any claim against the State may be brought against the minister of 'the department concerned'. This can only mean that a claim may be brought against the minister whose department is responsible for the debt sought to be recovered (and not against any other minister) and that the affairs and functions of different departments of state and their ministers are to be regarded as separate and distinct.

[28] While the two different ministers whom the applicant sued in cases 15278/2001 and 4578/2002 are members of the same sphere of government, the President has assigned to them separate and distinct powers and functions. Each can only exercise those powers and functions that were individually bestowed on her. They cannot act on behalf of each other in performing a public function, nor can one be validly sued in circumstances in which the law authorises the institution of proceedings against the other. Therefore the Minister of Public Works, who was not a party to the proceedings in case 15278/2001, cannot be bound by a decision on an issue arising in that case and the applicant has failed to establish the necessary requirement of *idem actor*.

[29] The applicant also faces difficulties in regard to the requirement of *eadem quaestio*. For purposes of *res judicata* or issue estoppel, the relevant issue must be one which the court is called upon to determine in its judgment.[5] Where, as is here the case, the court is dealing with motion proceedings, the issues which arise for determination are those contained in the parties' affidavits and a court can only decide

4 *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007(1) SA 343 (CC) at [29] [39] and [68].
5 *Horowitz v Brook and Others* 1988 (2) SA 160 (A) at 179 B - G.

an issue not raised in the papers if such issue has been fully canvassed by the parties in the expectation that it will be determined as an issue before court. [6] There is no suggestion of that having here been the case.

[30] Bearing that in mind, the issues arising and the relief sought in case 15278/01 were clearly not the same as that in case 4578/2002. In the former, while both the respondent and the Minister of Land Affairs in their papers disputed the applicant's *locus standi* to sue on the basis that the person who had concluded the sale had not represented the respondent, and suggested that the property had not been properly described in the deed of sale (a point abandoned in argument), they raised neither the issue of the sale being invalid by reason of the provisions of the State Land Disposal Act nor the fact that the property was not the respondent's to sell. Consequently, but most importantly, the question of invalidity was not dealt with in judgment of Van Der Walt J who, after dismissing the point raised in respect of locus standi, clearly assumed the sale to be valid.

[31] The validity of the sale was thus not an issue decided by Van Der Walt J upon which he ruled that the applicant was entitled to relief. Nor was it an issue mentioned by the learned judge in his judgment in the application for leave to appeal as being one of the issues he had been obliged to decide in the main application. But it was an issue pertinently raised in the papers in case 4578/2002 and was found by Smit J to be determinative of those proceedings. The two proceedings were determined by regard being had to different issues and the applicant clearly failed to establish the essential requirement of *eadem quaestio*.

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6 *Horowitz* at 179H-181A

[32] It is readily apparent from what I have set out above that the applicant cannot rely on *res judicata* or issue estoppel as it has failed to establish the fundamental requirements of that defence. As its case on the enforceability of the sale stands or falls on this issue, and as the validity or otherwise of the sale had not been finally determined between the parties in case 15278/2002, the findings of Smit J, which were not appealed against, cannot be merely regarded as *obiter* as the applicant contends but must be taken as having been *res judicata* when the applicant instituted its action for damages. As a result, the applicant is precluded both from enforcing any claim for damages under the invalid contract or, for that matter, from enforcing its delictual claim for damages based on its allegation that the respondent maliciously or negligently failed to transfer the property despite the order in case 15278/2002.

[33] This conclusion renders it necessary to consider the special plea in regard to prescription only insofar as it relates to the claim that the respondent's servants acted negligently in selling the property. In this regard the respondent pleaded that the purported sale of the property had been concluded in mid 2000 whereas the action had only been instituted more than three years later, on 29 October 2004, and that the claim had therefore prescribed under s 11 of the Prescription Act 68 of 1969.

[34] In seeking to avoid this, the applicant argued that it had not relied on a claim which had arisen on the date of the sale as the negligence relied upon – in particular in paragraph 14.2.2 of the particulars of claim where it is alleged that the respondent's servants had 'failed to take steps to be authorized to sell the property by the relevant

department of state which was authorised to sell the property' – had occurred well after the sale.

[35] This was not an issue raised by the applicant in the stated case in which it relied solely on its contention that prescription had been interrupted by the institution of proceedings in cases 15278/2001 and 4578/2002, alternatively only commenced to run after judgment in those two cases. The applicant is bound by that agreement and cannot now seek to move the goalposts. In any event, the claim as pleaded is not capable of the import the applicant seeks to ascribe to it. Paragraph 14.2.2 of the claim particularises only one of the aspects in which it is alleged (in para 14.2) that the respondent's servants has acted negligently 'in selling the property'. It is quite clear from a reading of the pleading that the applicant relies solely upon negligence at the time of the sale.

[36] As I have said, it was the applicant's suggestion, albeit offered somewhat tentatively in argument, that prescription had been interrupted by the institution of proceedings in cases 15278/2001 and 4578/2002. Again, this cannot be accepted. Under s 15(1) of the Prescription Act the running of prescription is interrupted by the service of any process on the debtor whereby the creditor claims payment of the debt. The debt claimed in the present case is an amount of damages allegedly suffered due to negligence on the part of the respondent's servants. In neither case 15278/2001 nor 4578/2002 was payment of such a debt claimed and the relief sought in both of those proceedings was wholly inconsistent with such a claim. The institution of proceedings in the two applications therefore did not interrupt prescription in respect of the applicant's claim for damages.

[37] It was then argued by the applicant that by reason of the provisions of s 12(3) of the Prescription Act, prescription only began to run once Smit J had delivered his judgment as until then the applicant could not have known that the sale was invalid. Again, this argument cannot be accepted. The section provides that a creditor shall be deemed to have knowledge of the identity of the debtor and of the facts from which the debt arises if he could have acquired it by exercising reasonable care. In the present case, the applicant was told by the Department of Development Planning and Local Government in its letter of 12 December 2000 that the property 'belongs to the National Department of Public Works and not the Gauteng Department of Education who instructed the disposal of the property.' From then on, the applicant was aware that the property did vest in the respondent. This was also clearly set out in the respondent's opposing affidavit in case 15278/2001 which was filed in August 2001, more than three years before the institution of the applicant's action for damages. It may be that the applicant had not appreciated the legal consequences which flowed from the facts, but its failure to do so does not delay the date prescription commenced to run.

[38] In the light of these considerations it is clear that the applicant's delictual claim for damages arose in mid 2000, that prescription commenced to run by no later than December that year, that the claim had therefore prescribed well before the institution of action in October 2004, and that the learned judge in the court *a quo* correctly upheld the special plea in that regard.

[39] To summarise, both special pleas were correctly upheld in the court below.

There is no merit in the appeal and the application for leave to appeal must therefore be dismissed. Both parties employed two counsel and it was not suggested by the applicant that the costs of two counsel were not warranted.

[40] One further matter must be mentioned. In his further particulars, the respondent had both admitted the applicant was entitled to be repaid the deposit of R45 200 it had paid after the conclusion of the deed of sale and tendered to repay such sum. Counsel for the applicant submitted that irrespective of the outcome of the special pleas, this court should therefore order the respondent to repay that deposit.

[41] The facts relevant to this issue have not been ventilated in the evidence before us. We do not know if the deposit has been repaid and, if not, why the respondent has not done so. Not only can we not speculate on the facts but the question of the respondent's liability to repay in terms of his tender was not raised as an issue either in the stated case or in the notice of appeal. It is not properly before this court and, in the circumstances, the invitation to deal therewith must be declined.

[42] The application for leave to appeal is dismissed with costs, such costs to include the costs of two counsel.

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LE LEACH

ACTING JUDGE OF APPEAL

APPEARANCES:

FOR APPLICANT: AD WILSON and PJ BLOMKAMP

INSTRUCTED BY: EARLE FRIEDMAN & ASSOCIATES, JOHANNESBURG

LOVIUS BLOCK ATTORNEYS, BLOEMFONTEIN

FOR RESPONDENT: P M KENNEDY SC and M SELLO

INSTRUCTED BY: STATE ATTORNEY, JOHANNESBURG and BLOEMFONTEIN