**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

Case No: 203/11
(Not reportable)

In the matter between:

**B B S EMPANGENI CC** **Appellant**
**(FORMERLY ZTC CASH BUILD CC)**

**and**

**PHOENIX INDUSTRIAL PARK (PTY) LTD** **First Respondent**
**MORELAND ESTATES (PTY) LTD** **Second Respondent**

**Neutral citation:** *BBS Empangeni CC v Phoenix Industrial Park (Pty) Ltd* (203/2011) [2012] ZASCA 33 (29 March 2012).

**Coram:** Brand, Heher, Van Heerden, Cachalia JJA, Boruchowitz AJA
**Heard:** **16 February 2012**
**Delivered:** **29 March 2012**

**Summary: Extinctive Prescription – claim prescribed – contractual obligations underlying claim no longer enforceable – contract not capable of being repudiated.**

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**ORDER**

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**On appeal from:** KwaZulu-Natal High Court, Durban (Swain J sitting as court of first instance):

The appeal is dismissed with costs, such costs to include the costs of two counsel for the first respondent and one counsel for the second respondent.

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**JUDGMENT**

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CACHALIA JA (Brand, Heher, Van Heerden JJA, Boruchowitz AJA concurring):

[1] This is an appeal from a judgment of Swain J sitting in the KwaZulu-Natal High Court. He held that a contractual claim arising from the sale of certain vacant land in an industrial township had become prescribed. The appellant, represented by its member, Mr Donovan William Balmer, bought the land from the respondents under a sale agreement on 11 January 1990. With leave from the high court, it appeals against the finding of that court.

[2] The dispute goes back many years – more than two decades – and it is necessary to describe its history. In terms of the agreement the appellant paid to the respondents a stipulated deposit of R45 500 – which amounted to ten per cent of the purchase price. The balance was to be paid upon registration of transfer. The sale was subject to two suspensive conditions: first, the Surveyor-General's approval of the sub-divisional diagram consolidating the four lots of land that were the subject of the agreement and second, the City Engineer's

certification of compliance in terms of s 148 of the Durban Extended Powers Consolidated Ordinance 18 of 1976. The agreement stipulated that the property would become transferable as soon as these conditions were fulfilled.

[3] A dispute arose between the parties almost immediately over aspects of the completion of the industrial township. Mr Balmer was troubled that there was inadequate provision made for features relating to security, street lighting, tarred roads and services. I shall refer to these as the security features. His unease arose because the industrial township was located near an area with high unemployment and criminality. The country was also in a state of political uncertainty and there was some unrest in the area. Mr Balmer therefore felt that he would not be able to commence business on the property.

[4] These circumstances made Mr Balmer less enthusiastic about taking transfer of the property and he approached the respondents to cancel the agreement. They demurred and insisted that he pay the balance of the purchase price. His attorneys then made written representations to the respondents to delay transfer of the property until his security concerns were allayed, but they accepted ‘unequivocally’ that he was ‘bound to take transfer’. In other words, Mr Balmer did not dispute his obligation to take transfer of the property and to pay the purchase price.

[5] The respondents, however, maintained that the security provided for in the development was adequate and that, in any event, there were no warranties regarding the security features in the agreement. They proceeded to enforce the agreement by demanding payment of the balance of the purchase price against tender of registration of transfer. The appellant responded to the demand by reiterating its earlier stance regarding the delay of the transfer. It also offered to give the respondents ‘a bank guarantee for the payment of the purchase price against transfer at some later stage’.

[6] The respondents indicated that they were willing to delay payment of the full purchase price only until 29 February 1992 on condition that the appellant paid an additional sum of R100 000 as consideration by 18 October 1991. Mr Balmer did not pay this amount and now insisted that he would pay for the land only when the development was completed as originally envisaged. This stance was a change from his earlier acknowledgment that he was liable to take transfer. To support his new standpoint he referred to the contents of a pamphlet that the respondents had shown him at the time he agreed to buy the land. The pamphlet depicted the detail of the completed development including the security features.

[7] The dispute was not resolved and, on 13 August 1992, the respondents applied to the high court to order the appellant to pay the transfer costs and the balance of the purchase price against tender of transfer of the land. The appellant duly delivered its answering affidavit in which it asserted – reflecting its new stance – that the agreement was to be rectified to include the security features referred to in the pamphlet so as to accord with the common intention of the parties.

[8] The appellant also disputed that the second suspensive condition mentioned above – the City Engineer's compliance certificate – had been fulfilled. The City Engineer issued a certificate on 15 March 1991. The appellant took the point that s 148(2) of Ordinance 18 of 1976 called for the Town Clerk – not the City Engineer – to sign the certificate. This meant, so the appellant asserted, that the respondents were not in a position to pass transfer of the property. The respondents did not file a replying affidavit and, during February 1992, they enrolled the matter to be heard on an allocated date, but the matter did not then proceed. The parties took no further steps and, on 11 September 1992, the respondents removed the matter from the roll.

[9] In the interim the respondents were advised by counsel that Mr Balmer's defence concerning the fulfilment of one of the two suspensive conditions – the compliance certificate – was good. The implication of this advice was that this condition had not been fulfilled and the property was therefore not registrable. During June to October 1994 the respondents' attorneys again attempted to persuade Mr Balmer to take transfer, but he remained unyielding.

[10] On 4 October 1994, the respondents were registered as the title holders in the Certificate of Registered Title – an event of which Mr Balmer was at the time not aware. Nevertheless, the consequence was that it was no longer in dispute that both suspensive conditions had now been fulfilled, and the property could have been transferred to the appellant in terms of the agreement.

[11] Although there was further communication between the parties concerning the implementation of the agreement, the respondents made no particular mention that the property had become registrable. However, on 17 October 1994, Mr Yarker, the respondents' attorney, wrote to Mr Balmer to discuss finalisation of the matter.

[12] By December 1994 the respondents considered cancelling the sale, but there is no clear evidence that they did so. At about this time there was a telephone conversation between Mr Kenneth Forbes of the respondents and Mr Balmer during which Mr Forbes asked Mr Balmer whether he was prepared to take transfer of the property. Mr Balmer again refused. Beyond this, what exactly was said had faded from their memories. What is clear is that Mr Balmer remained unwilling to take transfer of the property as the issues pertaining to his security concerns had not been resolved. Mr Forbes was left with the impression that Mr Balmer was not interested in proceeding with the sale. The respondents then began to explore options to find another buyer for the property. There was no further communication between the parties for several years.

[13] On 18 October 2000, unbeknown to the appellant, the respondents sold the property to the eThekwini Municipality, and transfer was passed on 20 December 2002. Three more years went by.

[14] On 4 November 2005 – almost 11 years after his last communication with the respondents – Mr Balmer stirred. He requested his attorneys to establish what had happened to the property, and discovered that the municipality owned it. So he instructed his attorneys to recover the deposit he had paid in 1990 together with interest, but the parties were not able settle this dispute either. The appellant believed that the sale and transfer of the property was a breach of the agreement between the parties and an 'uncommunicated' repudiation of it.

[15] On 11 July 2006 the appellant notified the respondents' attorneys that it had elected to cancel the contract and to claim repayment of the deposit plus 'damages' in the amount of R390 000, 'being the return which [the appellant] would have earned on the [deposit] over the last 16 years'. These amounts were not forthcoming.

[16] On 19 July 2006, the appellant resuscitated the dormant application by delivering a supplementary affidavit and, on 21 August 2006, it commenced an action against the respondents for recovery of the deposit as well as damages for breach of contract amounting to R3 125 500. The amount of damages was calculated by subtracting the purchase price of the property from its market value as at 11 July 2006. It is evident that there had been a dramatic increase in the value of property since the agreement was concluded in 1990.

[17] The respondents delivered their pleas and special pleas in the action on 20 November 2006 and their replying affidavits in the application proceedings on 11 May 2007. On 15 May 2007 the high court referred the question of costs – which was the only remaining issue in the application proceedings – to the trial court. The trial commenced on 19 October 2009. Proceedings were adjourned

and resumed on 1 December 2010. The court delivered its judgment promptly on 6 January 2011. It dismissed the appellant's action and granted it leave to appeal on 4 March 2011.

*The proceedings before the trial court*

[18] The central issue before the trial court was whether the respondents had repudiated the agreement with the appellant by selling the property to the municipality in October 2000. The appellant's case was that they had, which entitled it to cancel the agreement. The respondents pleaded that they had cancelled the agreement before selling the property and had informed Mr Balmer that they had done so, after the appellant had repudiated the agreement by refusing to take transfer. The respondents also advanced alternative defences. The first respondent alleged that the appellant had waived or abandoned its rights under the agreement. The second respondent contended that the appellant had represented to the respondents that it no longer wished to be bound by the agreement, and was thus estopped (prohibited) from asserting the contrary.

[19] The respondents further pleaded that the appellant's claim had become prescribed. In this regard two distinct periods, associated with two distinct claims, were in issue: first, from the time when the suspensive conditions had ultimately been satisfied on 4 October 1994 and the transfer of the property to the municipality on 20 December 2002, when the respondents were alleged to have repudiated the agreement, and second, the period between 20 December 2002 and the issue of summons on 21 August 2006. If the first period applied, the appellant's claim to demand transfer of the property would have become prescribed on 3 October 1997. In the case of the second period the prescriptive period would have expired by 19 December 2005 in respect of the appellant's right to claim cancellation of the agreement, payment of the deposit and damages.

[20] In deciding whether or not the respondents had validly cancelled the agreement before transferring the property to the municipality, the judge considered that, once they had changed their election from specific enforcement in the application proceedings to cancellation, they were obliged under the agreement to notify the appellant of this fact. He held that the evidence did not establish that the respondents had done so. In the light of this conclusion the court deemed it unnecessary to consider whether the appellant's conduct in refusing to take transfer amounted to a repudiation of the agreement, entitling the respondents to cancel the agreement. The court also briefly considered the first and second respondent's waiver and estoppel defences respectively, and rejected both. This left prescription.

[21] Concerning the first period referred to above – 4 October 1994 to 20 December 2002 – the trial court held that prescription had begun to run in respect of the respondents' right to claim payment and also of the appellant's right to claim transfer on 4 October 1994, when the suspensive conditions were satisfied. It also held that the appellant ought reasonably to have ascertained this fact by December 1994, when – from the communications between the parties' representatives – it would have been clear to the appellant that the respondents were ready to transfer the property. Furthermore, the court concluded, there was no merit in the appellant's contention that the respondents had wilfully concealed the fulfilment of the suspensive conditions from it. The appellant's claim was thus held to have become prescribed.

[22] The court also considered and rejected another of the appellant's contentions – that the launching of application proceedings by the respondents in August 1992 constituted an acknowledgment of liability to transfer the property and therefore 'interrupted' the running of prescription as contemplated in s 14(2) of the Prescription Act 68 of 1969 (the Act). The judge reasoned that when the respondents began those proceedings, they did so because the appellant had maintained that it was not obliged to pay the purchase price. Whether the

appellant was justified in its stance, the court said, was of no consequence. What was relevant, it continued, was that the respondents had not believed that they were liable to transfer the property to the appellant without the latter's payment of the balance of purchase price and the transfer costs. And, the court concluded, in the absence of the respondents' unconditional acknowledgment of liability to pass transfer, prescription had not been interrupted.

[23] The conclusion that the claim had become prescribed during the first period made it unnecessary for the trial court to consider the second period, 20 December 2002 to 21 August 2006. The judge nevertheless did so 'for the sake of completeness'. He found that the appellant had consciously refrained from enquiring what had happened to the property for fear that this may revive the respondents' demand that it take transfer. And, the court concluded, in the light of the fact that the respondents had sold the property to the municipality in October 2000, this information would have been available to the appellant – at the latest by the end of 2001 – by the exercise of reasonable care.

[24] As to whether the respondents had wilfully refrained from disclosing the sale of the property, the court held – as it did regarding the disclosure of the fulfilment of the suspensive conditions – that they had not. In this regard the court accepted the respondents' evidence that, by the time they had decided to sell the property to the municipality, they had assumed that the agreement had been cancelled. There was consequently no reason, the court said, for the respondents to have intentionally withheld this information from the appellant. Therefore, and allowing the appellant another reasonable period of six months after the end of 2001 within which to make an election to treat the contract as at an end, prescription, the court held, began to run from no later than 1 July 2002, and would thus have run its course by 30 June 2005. Therefore, the judge concluded, because the appellant served its summons only on 21 August 2006, its claim for cancellation of the agreement, payment of the deposit and damages had also become prescribed during the second period.

*The grounds of appeal*

[25] As will become apparent later in this judgment, I think that the judge's finding that prescription had begun to run on 4 October 1994, when the suspensive conditions were fulfilled, and that the appellant's claim had become prescribed well before the respondents transferred the property to the municipality in December 2002, disposes of the appeal. The appellant advanced three grounds of criticism against the finding. First, that the high court had erroneously assumed that the appellant's cause of action was for the transfer of the property because of the respondents' correlative right to demand payment as at 4 October 1994. The appellant's true cause of action, it was contended, was based on the respondents' repudiation of the agreement, which occurred when they transferred the property to the municipality much later. And the claim arising from the repudiation only arose on 11 July 2006, when the appellant exercised its election to cancel the contract. Second, it was contended, the appellant's cause of action on 4 October 1994, as pleaded in its opposing affidavit in the application proceedings, was for the agreement to be rectified, which is a claim that cannot prescribe because it is not a claim in respect of a debt. Third, the respondents' cause of action was in any event not complete on 4 October 1994 because they had not installed the security features under the rectified agreement. This means, so the contention went, that the respondents' claim to receive payment (and the appellant's obligation to take transfer) could not have begun to run then. I deal with the appellant's three contentions in turn.

[26] As to the first – that its claim was not for the transfer of property, I do not believe that the judge misunderstood the nature of the appellant's claim. What the court found under this heading was that the appellant's claim for the transfer of the property had become prescribed before the respondents sold the property to the municipality – and the appellant thus had no enforceable obligation against the respondents. In consequence the sale could not constitute a repudiation of the agreement. I have no conceptual difficulty with this line of reasoning.

[27] It is beyond dispute that the suspensive conditions were fulfilled by 4 October 1994. This means that the respondents' claim for payment of the purchase price as against their obligation to transfer the property to the appellant arose then. So prescription would have begun to run against this claim – and the appellant's correlative claim for transfer of the property – on 4 October 1994, when the debt became due in terms of s 12(1) of the Act. Both claims, being reciprocal, would thus have become prescribed three years later, on 3 October 1997.[1] However, if the respondents had wilfully withheld information regarding the fulfilment of the suspensive conditions – and that the debt was therefore due – from the appellant, prescription would not have commenced running until the appellant became aware of the existence of the debt.[2] The appellant would be deemed to have had such knowledge if it could have acquired it by exercising reasonable care.[3] As I have mentioned the high court decided these issues in the respondents' favour. The appellant takes issue with these findings.

[28] Concerning the first finding, that the non-disclosure of the fulfilment of the suspensive conditions was wilful, the appellant submits that the respondents deliberately withheld this information – the consequence of which was that the property had become registrable – from it for fear of having to pay its costs in the application proceedings.

[29] The evidence shows that after their attorneys advised them that the point taken by the appellant regarding the validity of the certificate was good, the respondents resubmitted the sub-divisional diagram for endorsement after correcting the error, even though it had been pointed out to them that resubmission might lead to an adverse costs order against them. The

[1] *Santam Ltd v Ethwar* 1999 (2) SA 244 (SCA) at 255B-G.

[2] Section 12(2) of the Prescription Act provides: '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] 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.'

respondents instructed their attorneys to oppose such an order on the ground that the practice had always been for transfers to take place under the city engineer's endorsement. However, there is not a scintilla of evidence to support the suggestion that the respondents had deliberately withheld information regarding the resubmission from the appellant. The high court correctly found that the evidence showed that the respondents had throughout, at least until the discussion between Mr Forbes and Mr Balmer in December 1994 – two months after the certificate of registered title had been granted – evinced an intention to proceed with the transfer. It is any event improbable that the respondents would have consciously prevented the appellant from coming to know that the property had become registrable for the simple reason that they wanted the property transfer to go ahead – not delayed or terminated – and were frustrated because Mr Balmer appeared to be intent on delaying it. Furthermore, it was never put to any of the respondents' witnesses that they had withheld this information from the appellant for fear that the appellant would seek a costs order against them. The evidence simply falls far short of establishing that the respondents deliberately withheld this information from the appellant, and the high court was correct to dismiss this argument.

[30] I turn to the appellant's second submission – that the high court erred in finding that Mr Balmer ought to have known by no later than December 1994 that the property had become registrable had he exercised reasonable care. In this regard the appellant contends that it was perfectly reasonable for it to have done nothing while the dispute regarding the non-fulfilment of the suspensive conditions and rectification were, in Mr Balmer's words, 'locked . . . up in the courts'. This was a reference to the fact that nothing had come of the motion proceedings that the respondents had initiated (but removed from the roll). The judge, however, meticulously recorded the interactions between the respondents and Mr Balmer from June to December 1994, and particularly the conversation between Mr Forbes and Mr Balmer in December – when Mr Forbes pressed Mr Balmer to take transfer of the property. As the evidence showed, Mr Balmer

demurred and informed Mr Forbes that he was not in a position to take transfer then. In effect Mr Balmer again wanted to delay the transfer as he had done virtually from the beginning.

[31] Although Mr Forbes could not recollect the detail of the conversation – understandably, because it had taken place so long ago – there is no evidence that Mr Balmer enquired whether the requisite certificate from the municipality had been obtained. This behaviour is strange for a person who was advised to resist the respondents' attempt to enforce the agreement by taking a technical point that the certificate was not signed by the correct official, and a few months later, when he was asked whether he was prepared to take transfer, did not enquire – then or soon afterwards – whether this problem had been solved.

[32] I do not think that Mr Balmer's excuse that he had no need to do anything while the motion proceedings were pending passes the test for the exercise of reasonable care. The contrary is true. By December 1994, following the conversation with Mr Forbes, it must have been clear to Mr Balmer that the respondents were ready to transfer the property to him whatever the status of their legal dispute. But it is equally clear that Mr Balmer was not interested in taking transfer of the property; at best he was intent on delaying the process until his security concerns were addressed, at worst he wanted to walk away from the agreement, and was prepared to use any excuse to achieve this. This attitude, rather than the fact that the litigation had not been finalised, appears to have been the probable reason for Mr Balmer's failure to act diligently to establish whether the suspensive conditions had in fact been satisfied. Again, the appellant's criticism of the high court's judgment must founder.

[33] This brings me to the appellant's third submission – that its rectification defence in the application proceedings, being a claim that cannot prescribe, meant that its claim on the 'rectified' contract could not have become prescribed. The corollary of this submission is that prescription could not have begun to run

against the respondents' claim for payment of the purchase price on the unrectified agreement on 4 October 1994.

[34] This submission has no merit. The appellant's cause of action as pleaded in its particulars of claim was that the respondents repudiated the agreement concluded in 1990 – not the rectified agreement. In respect of that agreement, as I have mentioned, it is common cause that prescription began to run on 4 October 1994 against both the respondents' claim for payment of the purchase price and the appellant's corresponding obligation to take transfer. And once the claim based on that agreement became prescribed, the respondents could logically no longer have repudiated it.

[35] Moreover, the respondents are correct in their submission that the claim for rectification was not one that, if successful, was an answer to their claim for payment of the purchase price. This is because the clause that the appellant sought to have inserted into the contract, as formulated in its answering affidavit, did not create reciprocal obligations – it provided only that the respondents install the security features within a reasonable time of the fulfilment of the suspensive conditions. The respondents were never placed in *mora* in respect of the obligation that that clause would create. So the appellant's assertion that prescription of the respondents' claim for payment of the purchase price had not started to run because the security features had not been installed is incorrect.

[36] Finally, the appellant submitted that, if prescription had begun to run against it on 4 October 1994, the respondents' admission in their founding papers in the application that they were obliged to give transfer to the appellant upon fulfilment of the suspensive conditions, amounted to an express or tacit admission of liability to give transfer to the appellant against payment of the purchase price. Therefore, so the submission went, in terms of s 14(1) of the Act the running of prescription was interrupted when these admissions were made.

[37] Section 14(1) of the Act says that the running of prescription is interrupted when a debtor acknowledges liability, and s 14(2), that prescription runs afresh from the day of the interruption. The appellant contends that, when the respondents acknowledged their legal responsibility to transfer the property to the appellants in the application proceedings – which, it said, was a continuing or recurring admission of liability – prescription was interrupted. The trial court rejected the contention holding that the tender to transfer the land was conditional upon the appellant's unconditional acceptance of an obligation to furnish a guarantee to secure payment of the purchase price and to pay transfer costs, which did not happen. Being conditional, so it was held, the respondents' acknowledgment was not an admission of liability as contemplated by the section.

[38] The appellant contends that the court was incorrect to characterise the respondents' tender to transfer the property against payment of the purchase price as a 'conditional' acknowledgement, which fell outside the ambit of s 14(1). In my view the judge again was correct. In *Road Accident Fund v Mothupi*[4] this court said that whether or not a statement constitutes an acknowledgement of liability for the purpose of s 14 of the Act is a question of fact turning on the intention of the debtor – the respondents in this case. It is clear from a fair reading of the respondents' founding affidavit in the application proceedings and their evidence at the trial that they were only prepared to give transfer of the property if the appellant accepted its reciprocal obligation to take transfer and pay the purchase price. And, even though the appellant had initially accepted that it was 'bound to take transfer', it changed tack because of Mr Balmer's security concerns; its stance was that it was not obliged to take transfer or to pay the balance of the purchase price – hence the respondents' decision to enforce the contract. The respondents' tender to transfer the property was therefore conditional upon the appellant accepting that it was liable to take transfer and to

[4]See *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) para 37.

pay the purchase price – and did not amount to an acknowledgment of liability contemplated by s 14 of the Act.

[39] To conclude, the high court correctly held that both the appellant's and the respondents' claims arising from the agreement had become prescribed before the property was transferred to the municipality in 2002. This means that when the property was transferred there was nothing left of the agreement to be repudiated. This conclusion renders it unnecessary to consider the other findings of the high court.

[40] The following order is made. The appeal is dismissed with costs, such costs to include the costs of two counsel for the first respondent and one counsel for the second respondent.[5]

**A CACHALIA**
**JUDGE OF APPEAL**

[5] The second respondent engaged the services of only one counsel for the appeal.

APPEARANCES

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|---|---|
| For Appellant: | G D Harpur SC<br>Instructed by:<br>Pearce Du Toit and Moodie, Durban<br>Naudes Attorneys, Bloemfontein |
| For first Respondent: | P J Olsen SC (with him P J Combrinck)<br>Instructed by:<br>Livingston Leandy Inc, Durban<br>McIntyre & Van der Post, Bloemfontein |
| For second Respondent: | A M Stewart SC<br>Instructed by:<br>Garlicke & Bousfield Inc, Durban<br>Webbers Attorneys, Bloemfontein |