



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

Not Reportable

Case no: 659/2020

In the matter between:

DAVE PRETORIUS

APPELLANT

and

KENNETH BEDWELL

RESPONDENT

Neutral citation: *Dave Pretorius v Kenneth Bedwell* (659/2020) [2022] ZASCA 4 (11 January 2022)

Coram: VAN DER MERWE, MOKGOHLOA and HUGHES JJA and PHATSHOANE and WEINER AJJA

Heard: 2 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 9h45 on 11 January 2022.

Summary: Prescription – of damages claim based on acceptance of repudiation of contract – when prescription commences to run – innocent party's cause of action for damages accrues when election to treat the contract as at an end is communicated to repudiating party – special plea correctly dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Wepener, Fisher and Mahalelo JJ, sitting as court of appeal):

The appeal is dismissed with costs.

JUDGMENT

Mokgohloa JA (Van Der Merwe and Hughes JJA and Phatshoane and Weiner AJJA concurring)

[1] This is an appeal against the judgment of the Full Court of the Gauteng Division of the High Court, Johannesburg (the full court), upholding the respondent's appeal and substituting the trial court's order with one dismissing the appellant's special plea of prescription with costs. The appeal is with the special leave of this Court.

[2] The background of the matter is as follows. The respondent, Mr Kenneth Bedwell, was the owner of a holiday home in Oyster Bay in the Eastern Cape (the property). During 2007, he needed money to complete a guest house project he had started. In order to gain access to further funds, Mr Bedwell requested the appellant, Mr Dave Pretorius (who was his brother-in-law), to provide him with a loan against a tender of the property as security. In terms of a written agreement that was subsequently rectified by agreement, they eventually agreed that Mr Pretorius would purchase the property for an amount of R1 850 000. Mr Pretorius would obtain a loan from a bank in the amount of R1 650 000 against the registration of a mortgage bond over the property. Mr Bedwell would continue to occupy the property and would remain liable to maintain the property at his own

cost and pay all rates and taxes. As soon as Mr Bedwell qualified for a mortgage loan in his own name, that would make it possible to cancel the mortgage bond registered over the property in the name of Mr Pretorius, Mr Pretorius would transfer the property back into the name of Mr Bedwell. Mr Pretorius paid the purchase price and the property was registered into his name on 18 October 2007.

[3] Soon thereafter the relationship between Mr Bedwell and Mr Pretorius deteriorated. On 8 April 2008, Mr Bedwell visited the property in the company of his friends. When Mr Pretorius learned that Mr Bedwell was at the property, he made a telephone call to Mr Bedwell and instructed him to leave the property forthwith. However, Mr Bedwell and his friends only left the property the next morning.

[4] On 8 April 2008, Mr Bedwell wrote a letter to Mr Pretorius raising his concern relating to Mr Pretorius' attitude and stated the following:

'(1) I suggest that after your threats this afternoon that we set up a polygraph test between the three of us and we have one [take] statements through your lawyers and my lawyer analysed. NB VERBAL agreements are binding.

(2) All ASSETS in the house belong to me plus the agreement of SALE.

(3) Please reply on the above fax no.' (Original emphasis.)

[5] Mr Pretorius did not respond to Mr Bedwell's letter. He instead sent a letter through his attorney to the security company responsible for security at the property and to Chas Everitt real estate agents, informing them that Mr Bedwell would no longer be entitled to occupy the property. Indeed, Mr Bedwell received a telephone call from the security company wherein he was informed of the letter the security company had received instructing it to deny him access to the property.

[6] During 2009, Mr Pretorius sold the property to a third party. Mr Bedwell only learned of the sale after his son had attended a birthday party at Mr

Pretorius' house on 8 July 2010. The son noticed furniture at Mr Pretorius' house which had been in the property. Upon making enquiries, Mr Pretorius told him that indeed he had sold the property. The son informed Mr Bedwell that evening about the sale of the property.

[7] On 11 October 2011, Mr Bedwell instituted action in the Gauteng Division of the High Court, Pretoria (the trial court) against Mr Pretorius for damages in the amount of R2 040 000. He based his claim on the repudiation of the contract by Mr Pretorius, in that he had sold the property and the furniture. In paragraph 12 of the particulars of claim, Mr Bedwell stated the following:

'On or about 2009, [Mr Pretorius] repudiated the contract between the parties by selling the Oyster Bay property to a third party . . . alternatively, on or about May 2009, [Mr Pretorius] evicted [Mr Bedwell] from the Oyster Bay property, alternatively denied [Mr Bedwell] further use of the Oyster Bay property, which repudiation [Mr Bedwell] has accepted, alternatively, which is accepted herewith.'

[8] Mr Pretorius defended the action and raised a special plea of prescription. He stated in his special plea that he had repudiated the contract on 8 April 2008 and since Mr Bedwell issued summons on 11 October 2011, the claim prescribed in terms of s 11 of the Prescription Act 68 of 1969. By agreement the special plea proceeded to trial as a separated issue. The trial court upheld the special plea and dismissed Mr Bedwell's claim with costs. Leave to appeal was refused. This Court granted Mr Bedwell leave to appeal to the full court. As I have said, the full court overturned the trial court's decision and replaced it with an order dismissing the special plea of prescription with costs. The issue on appeal is whether the order of the full court was correct.

[9] The onus was on Mr Pretorius to prove that the claim of Mr Bedwell had prescribed. This included proof of when prescription had commenced. As I have said, Mr Pretorius pleaded that he had repudiated the contract on 8 April 2008 when he allegedly evicted Mr Bedwell from the property. According to him, this was the date upon which the debt arose, and Mr Bedwell was, at that date, in a

position to reject the repudiation or accept it, cancel the contract and claim damages. Mr Pretorius did not plead that the repudiation had been accepted or that the contract was cancelled. The separated issue was formulated accordingly.

[10] It is settled law that repudiation of a contract occurs where one party to a contract, without lawful grounds, indicates to the other party, whether by words or conduct, a deliberate and unequivocal intention to no longer be bound by the contract.¹ Then the innocent party will be entitled to either: (i) reject the repudiation and claim specific performance; or (ii) accept the repudiation, cancel the contract and claim damages. If he or she elects to accept the repudiation, the contract comes to an end upon the communication of the acceptance of the repudiation to the party who has repudiated. Only then does a claim for damages arise. Accordingly, prescription commences to run from that date.

[11] In my view, the special plea of prescription had to fail for a variety of reasons. First, as I have demonstrated, in the absence of an allegation that the repudiation of 8 April 2008 had been accepted and the contract cancelled, the special plea did not disclose a defence in law. Secondly, in any event, the trial court did not make a credibility finding against Mr Bedwell and his evidence had to be accepted for purposes of determination of the appeal. On his evidence it is doubtful that what occurred on 8 April 2008 objectively amounted to a repudiation by Mr Pretorius, but even so, Mr Bedwell clearly did not accept such a repudiation on that date. It follows that Mr Pretorius did not prove that the running of prescription commenced on 8 April 2008 as alleged.

[12] For these reasons I find that Mr Pretorius' special plea did not disclose a defence in law and failed on the facts. The full court was correct in concluding that it had to be dismissed.

¹ *Nash v Golden Dumps (Pty) Ltd* [1985] 2 All SA 161 (A); 1985 (3) SA 1 (A) at 22D-F

[13] In the result, the appeal is dismissed with costs.

F E MOKGOHLOA
JUDGE OF APPEAL

Appearances

For appellant:

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