Case no: 718/93

IN THE: SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

JAYANTILAL VARJIVANDAS DESAI N O Appellant

and

RAJENDRA DESAI, NAGIN DESAI AND

RAMOLA DESAI N N O First Respondent

RAJENDRA DESAI AND

RAMOLA DESAI N N O Second Respondent

KANTILAL DESAI Third Respondent

RAMESH PURSHOTTAMDAS DESAI Fourth Respondent

PRAVIN PURSHOTTAMDAS DESAI Fifth Respondent

MANILAL DESAI Sixth Respondent

Coram: CORBETT CJ, JOUBERT, F H GROSSKOPF

HARMS JJA et VAN COLLER AJA Heard:

25 August 1995 Delivered: 22 September 1995

J U D G M E N T F

H GROSSKOPF JA:

The first five respondents were the applicants in an application launched in the Durban and Coast Local Division. According to the notice of motion they sought an order directing the appellant (then first respondent) to take all steps and sign all documents necessary to effect transfer to them and the sixth respondent (then second respondent) of a one-seventh share in each of the following two immovable properties:

(1) Sub 424 of lot 49, no 862 situate in the County of Victoria, Province of Natal, in extent 7,1566 hectares ("sub 424 of lot 49");

(2) Remainder of lot 661 Tongaat, situate in the Township of Tongaat and in the North Coast Regional Water Services Area, Administrative District of Natal, in extent 6,8248 hectares ("remainder of lot 661").

The one-seventh share in both these properties were

registered in the name of the late Varjivandas Purshottamdas Desai ("the deceased") who died on 12 June 1979. The appellant is the deceased's son and the executor in his estate. The six respondents are either brothers of the deceased or executors of those brothers who have passed away. Although some of the respondents are now indeed executors, I shall also refer to the six brothers as respondents.

Until 1978 the deceased and the six respondents carried on business and owned certain properties as partners in two partnerships called Desai Brothers and Desai Investment Company. These partnerships were dissolved in 1978, and on 23 October 1978 all seven partners signed an agreement ("the agreement") to give effect to the dissolution, to settle certain pending court actions and to resolve other disputes between the deceased on the one hand and the six respondents on the other. The agreement was couched in the form of an "offer to purchase" addressed by the six respondents to the deceased, who accepted the offer.

Clause 13(d) of the agreement ("clause 13(d)") reads as follows:

> "Upon discharge of the winding up order in respect of the partnerships, you will:
>
> (a).....
>
> (b).....
>
> (c).....
>
> (d) Procure registration of transfer of the cessation of your interests in the partnerships' immovable properties, such registration to be effected at our expense by our conveyancers."

The outcome of this case depends largely on the interpretation and effect of clause 13(d).

During October 1979, and pursuant to the provisions of clause 13(d), the appellant in his capacity as executor signed powers of attorney to effect the registration of transfer of the deceased's one-seventh share in the two properties. These powers of attorney were furnished to the conveyancers nominated by the respondents in terms of clause 13(d). It appears to be common cause that the appellant at the same time also

provided the conveyancers with all the other documentation which they required for registration of transfer of the two properties. Despite being duly authorized by the appellant to pass transfer of the two properties, the conveyancers failed to proceed in terms of the authorization.

On 24 July 1984, and after the death of two of the deceased's brothers, the appellant signed a fresh power of attorney authorizing the passing of transfer of the deceased's one-seventh share in the remainder of lot 661. The papers do not disclose whether the appellant also signed a fresh power of attorney regarding the deceased's share in sub 424 of lot 49. Thereafter many years went by without transfer being passed. The appellant eventually wrote to the respondents' attorneys on 20 November 1990 claiming that his obligation to pass transfer "has long since become prescribed". He further informed the respondents that he was cancelling and withdrawing the powers of attorney authorizing such transfer. This gave rise to the application in April 1991.

Hugo J dismissed the application on two bases in the court of first instance. First, on the ground that the agreement was one of sale, and insofar as it purported to be a "contract of sale of land or any interest in land", it did not comply with the provisions of s 1(1) of the Formalities in respect of Contracts of Sale of Land Act 71 of 1969, which was the applicable statutory enactment in force at the relevant time. The learned judge held that the description of the immovable property referred to in clause 13(d) was insufficient to identify the property, and that the contract of sale in respect thereof was accordingly of no force or effect in terms of s 1(1). Secondly, the application was dismissed on the ground that the appellant's obligation to pass transfer was a "debt" which had been extinguished by prescription.

The first five respondents thereupon appealed with the leave of the court of first instance to the full bench of the Natal Provincial Division. The judgment of the full bench has been reported sub nom Desai and Others v Desai and Another 1993(3) SA 874(N). The full

terms of the agreement have been set out in the reported judgment and I do not propose to do so once again. The full bench came to the conclusion that clause 13(d), read with certain other provisions of the agreement, was never intended to be a contract of sale of land or any interest in land within the meaning of s 1(1) of Act 71 of 1969. In view of that finding the question whether there was an adequate description of the immovable property in clause 13(d) became irrelevant.

With regard to the question of prescription the full bench concluded at 882B that the appellant's only obligation in terms of clause 13(d) was "to deliver to the purchasers the documentation required to effect transfer in terms of the relevant requirements of the Deeds Registries Act and the regulations thereunder." Following upon that conclusion the full bench held at 882J-883A that once delivery of the documentation had been accomplished, the appellant's obligation was duly performed and therefore discharged. In the result there remained no debt which could be extinguished by prescription. However, when the

appellant withdrew the powers of attorney in November 1990 it had to be implied that a new obligation to deliver the requisite documentation arose (883D-G). This new obligation had not yet prescribed when the notice of motion in the court of first instance was served on the appellant in April 1991. A similar argument was addressed to us on behalf of the respondents. I shall deal with it more fully hereunder.

In the result the full bench upheld the appeal and granted the relief sought in the notice of motion. The appellant appeals to this court against the judgment and order of the full bench with leave of the Chief Justice. The appellant appeared in person, while the respondents were represented by counsel.

For the reasons which follow I am of the opinion that the appellant's "debt", i.e. the obligation to procure registration of transfer in terms of clause 13(d), was indeed extinguished by prescription. Seeing that this finding is decisive of the case, it is unnecessary to consider the other aspects raised in argument, including the submissions relating to the

true nature of the agreement and the applicability of s 1(1) of Act 71 of 1969.

S 10(1) of the Prescription Act 68 of 1969 ("the Act") lays down that a "debt" shall be extinguished after the lapse of the relevant prescriptive period, which in the instant case was three years (see s 11(d)). The term "debt" is not defined in the Act, but in the context of s 10(1) it has a wide and general meaning, and includes an obligation to do something or refrain from doing something. (See Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd 1981(3) SA 340(A) at 344F-G; Oertel en Andere NNO v Direkteur van Plaaslike Bestuur en Andere 1983(1) SA 354(A) at 370B.) It follows that the undertaking in clause 13(d) to procure registration of transfer was a "debt" as envisaged in s 10(1). One should also bear in mind that the Act now provides for a so-called strong prescriptive regime whereby the prescribed debt is in fact extinguished, as opposed to the so-called weak prescription under the old 1943 Prescription Act which merely provided

for the corresponding right to become unenforceable, while the debt itself was only extinguished after 30 years. (See Oertel's case, supra, at 366F-H; Cape Town Municipality & Another v Allianz Insurance Co LM 1990(1) SA 311(C) at 329F-G.)

S 12(1) of the Act provides that "prescription shall commence to run as soon as the debt is due". This court held in Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd 1991(1) SA 525(A) at 532H that for prescription to commence running -

> "there has to be a debt immediately claimable by the creditor or, stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately."

(See also Benson and Another v Walters and Others 1984(1) SA 73(A) at 82B-E.)

The appellant, as debtor in terms of clause 13 of the agreement, was not obliged to perform immediately, but only "upon

discharge of the winding up order in respect of the partnerships". The debt was therefore not immediately due. It does not appear from the papers exactly when the winding up order was discharged, but it is common cause that this requirement was in fact satisfied while the deceased was still alive. It follows that the debt became due, and prescription commenced running by not later than the date of death of the deceased, which was 12 June 1979.

The subsequent furnishing of the two powers of attorney by the appellant in October 1979 can be regarded as a "tacit acknowledgment of liability" on his part whereby the running of prescription was interrupted in accordance with the provisions of s 14(1) of the Act. However, prescription commenced to run afresh in terms of s 14(2) from the day on which the interruption took place. There is no evidence of any further interruptions after October 1979. It is true that the appellant signed a fresh power of attorney on 24 July 1984 in respect of at least one of the two properties, but by that time the three year

prescriptive period had already lapsed and the debt had accordingly been extinguished by prescription. There was in any event no further acknowledgment of liability by the appellant which could have interrupted the running of prescription after 24 July 1984. When the respondents eventually commenced legal proceedings in April 1991 the debt had clearly been extinguished by prescription. Those legal proceedings could then no longer bring about any judicial interruption of prescription in terms of s 15 of the Act.

The argument advanced by the respondents in support of their contention that prescription did not extinguish the debt, can be summarized as follows. The only obligation owed by the appellant in terms of clause 13(d) was to provide the conveyancers, nominated by the respondents, with all the necessary documentation required to effect transfer of the relevant immovable property into the names of the respondents. Once that had been done the appellant's debt was discharged by performance and there no longer remained any debt due

by the appellant to the respondents under clause 13(d). In the result prescription could not even begin to run in terms of s 12(1) of the Act. When the appellant subsequently withdrew or cancelled the powers of attorney he committed a breach of his contractual obligation under clause 13(d), thereby entitling the respondents to claim specific performance, which they did by means of their application.

I have difficulty in understanding how the appellant's contractual obligation could suddenly have revived, by way of implied term or otherwise, many years after the alleged performance thereof. My main problem with the respondents' argument, however, is their interpretation of clause 13(d), and more particularly their construction of the nature of the debt owed in terms thereof. Clause 13(d) may not have been very happily worded, but it is reasonably clear in my judgment that it placed an obligation on the appellant to "procure registration of transfer" of certain immovable properties. The obligation was to pass transfer and not merely to sign and deliver documents. Although clause

13(d) provided that registration of transfer had to be effected at the respondents' expense by their conveyancers, the appellant was the only person who could authorize the passing of transfer.

S 20 of the Deeds Registries Act 47 of 1937 reads as follows:

> "Deeds of transfer .... shall be executed in the presence of the registrar by the owner of the land described therein, or by a conveyancer authorized by power of attorney to act on behalf of the owner, and shall be attested by the registrar."

An executor in the estate of a deceased owner falls within the definition of "owner" in s 102(1) of Act 47 of 1937, while "land" includes "a share in land" in terms of that section. The appellant as "owner of the land" was the only person therefore who could execute the deeds of transfer in the presence of the registrar. He could act in person or through a conveyancer authorized by power of attorney to act on his behalf. Innes

CJ held as follows in Tames v Liquidators of the Amsterdam

Township Co 1903 TS 653 at 656:

> "Both by the common law and by statute the seller is bound to pass transfer; as a matter of fact he is the only person who can do so. If we look at the manner in which transfer was originally passed in Holland, we find that both parties used to appear in person before the Scheepenen; at a later period, and as a matter of convenience, conveyancers were employed to do the work. But I take it that even now if a seller wished to pass his own transfer, and had sufficient legal knowledge, he could go to the Registrar and put the deed through. It is still the seller who gives transfer, even though he has executed a power of attorney and appointed an agent to act for him."

(See also Blundell v McCawley 1948(4) SA 473(W) at 478; York & Co (Pvt) Ltd v Tones NO (1) 1962(1) SA 65 (SR) at 66G.)

A seller and a purchaser of immovable property may of course agree, as was done by the parties in the present case, that the

buyer will nominate the conveyancer. That does not mean that in passing transfer such conveyancer is now acting on behalf of the buyer, and no longer as the representative of the seller who signed the power of attorney authorizing him to pass transfer. If registration of transfer is not duly effected the buyer must demand performance from the seller. The latter, and not the conveyancer, is legally bound to pass transfer. The same principles would obviously apply in the present case, even on the supposition that the agreement was not one of purchase and sale.

One may ask what possible defence the appellant in the present case could have raised if the respondents had timeously taken legal action against him to procure registration of transfer. In my judgment it would certainly not have availed the appellant to have pleaded that once the required documentation had been handed to the

conveyancers he had fully performed his obligation in terms of clause 13(d). The conclusion that the appellant's contractual obligation could not have been discharged simply by the delivery of the necessary documentation, is borne out by the fact that a subsequent revocation of the powers of attorney (which the respondents conceded could be done before they were acted upon) would have amounted to a breach of the appellant's contractual obligation, had it not been for the running of prescription. Such a breach of course presupposes the existence of a contractual obligation which has not yet been discharged.

In my judgment the respondents' submissions cannot, therefore, be sustained, and the appellant's contention that his debt in terms of clause 13(d) has been extinguished by prescription should be

upheld.

There remains the appellant's application for condonation of the late filing of the record. The appellant was required to furnish security by the order granting him leave to appeal to this court. His failure to provide security timeously caused the late filing of the record. The respondents filed an affidavit opposing the granting of condonation, but when the appellant's application for condonation was heard, counsel appearing for the respondents no longer opposed the application, but simply left it for the court to decide. The appellant's failure to comply with the time limits did not in my opinion constitute a major infraction of the rules, and having regard to the finding on the merits 1 am of the view that condonation should be granted. But seeing that the opposition of the respondents was not unreasonable in the circumstances the

appellant should bear all the costs of the application for condonation. The following order is made:

(3) The appellant's application for condonation is granted, but the appellant is ordered to pay all the costs consequent upon such application.

(4) The appeal is allowed with costs.

(5) The order of the full bench of the Natal Provincial Division is set aside and replaced with the following order:

"The appeal is dismissed with costs".

F H GROSSKOPF
Judge of Appeal

Corbett CJ
Joubert JA Harms JA Van Coller
AJA Concur