



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CIRCUIT LOCAL DIVISION, GEORGE)**

Case No: 918/2020

In the matter between:

HENDRIK BRUWER N.O

First Plaintiff

MARLISA BRUWER N.O.

Second Plaintiff

JACO VAN HEERDEN N.O.

Third Plaintiff

FRANCOIS SLABBERT N.O.

Fourth Plaintiff

and

**THE TRUSTEES OF THE TIME BEING
OF THE PHILLIP FOURIE FAMILY TRUST**

Defendant

JUDGMENT *RE* DEFENDANT'S SPECIAL PLEA OF PRESCRIPTION:

DELIVERED ELECTRONICALLY ON 28 JANUARY 2022

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] The defendant has raised a special plea of prescription against the plaintiffs' particulars of claim which was served on 8 July 2020. Neither party elected to lead evidence, and the matter was set down for argument before me on 27 January 2022.

[2] The plaintiffs' claim is based on an alleged repudiation of an oral agreement which was concluded in April 2016 at Knysna between the plaintiffs' trust ("*the Bruwer Family Trust*") and the defendant ("*the Phillip Fourie Family Trust*"). It is alleged that in terms of the oral agreement the Philip Fourie Family Trust agreed to sell 10% of its shareholding in a company called Motto Holdings (Pty) Ltd for a consideration of R1.2 million, and that the parties would conclude a written deed of sale of the shares. Pending the conclusion of the written agreement the Bruwer Family Trust was to make part-payment in respect of the purchase price of the shares.

[3] According to the plaintiffs' particulars, the Bruwer Family Trust effected various payments amounting to R808 273,66 to the Philip Family Trust or to third parties nominated by the latter, in terms of the oral agreement. The payments are indicated in a schedule "A" attached to the particulars. The plaintiffs further allege that the Philip Fourie Family Trust repudiated the oral agreement by neglecting and or refusing to enter into a written agreement in respect of the sale of shares within a reasonable time, notwithstanding written demand. As a result of the repudiation, the

plaintiffs accepted the repudiation and cancelled the agreement on or about 11 June 2019.

[4] As a result of the repudiation the plaintiffs seek repayment of the amount of R808 273,66, alternatively damages for breach of contract, and in the further alternative, a claim of unjustified enrichment.

[5] The basis for the defendant's special plea is two-fold. First, the defendant points out that the alleged oral agreement of April 2016 was entered into more than three years prior to the summons being dated, issued and served upon the defendants. Secondly, the defendant points out that, in terms of schedule "A" the payments allegedly made by the plaintiffs in terms of the oral agreement were made in the period between 18 April 2016 and 6 February 2017. Since the summons was only served on 8 July 2020, these amounts were also affected more than three years prior to the issue of the summons.

B. THE LAW

[6] It is settled law that a person invoking prescription bears a full *onus* to prove it. A defendant bears the full evidentiary burden to prove a plea of prescription, including the date on which a plaintiff obtained actual or constructive knowledge of the debt. The burden shifts to the plaintiff only if the defendant has established a *prima facie* case.¹

¹ *Macleod v Kweyiya* [2013] ZASCA 28; 2013 (6) SA 1 (SCA) para 10.

[7] The defendant's special plea is based on sections 10(1) and 11(d) of the Prescription Act 68 of 1969. Section 10(1) provides

“Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.”

[8] Section 11(d) provides:

“save where an Act of Parliament provides otherwise, three years in respect of any other debt.”

[9] Another section that is relevant to these proceedings is section 12(1), which provides that, subject to certain provisions which are not relevant to these proceedings, prescription shall commence to run as soon as the debt is due. And, in terms of section 12(3), 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.

[10] The word “debt” does not refer to the “cause of action”, but more generally to the claim, and accordingly, in deciding whether a ‘debt’ has become prescribed, one has to identify the “debt”, or, put differently, what the “claim” was in the broad sense of the meaning of that word.’²

[11] In *Makate v Vodacom (Pty) Ltd*³ the Constitutional Court adopted the dictionary meaning ascribed to the word ‘debt’ in the *Shorter Oxford English*

² *Drennan Maud & Partners v Town Board of the Township Pennington* [1998] ZASCA 29; 1998 (3) SA 200 (SCA) (212F-J).

³ *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC) para 87-93.

*Dictionary*⁴, and concluded⁵ that a debt is: [1] *something owed or due: something (as money, goods or services) which one person is under an obligation to pay or render to another; [2] A liability or obligation to pay or render something; the condition of being obligated.*'

[12] There have been different expressions of when a 'debt is due'. It has been said a 'debt is due' when it is owing and already payable or immediately claimable or immediately exigible at the election of the creditor.⁶ Put differently, there must be a debt in respect of which the debtor is under an obligation to perform immediately.⁷ It has also been said that a debt is due when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.⁸

[13] Still, there is a difference between when a debt comes into existence, and when it becomes recoverable, although these dates may coincide.⁹

⁴ 5ed (1993).

⁵ See paras 85-86.

⁶ See *Electricity Supply Commission v Stewarts & Lloyds SA (Pty) Ltd* 1979 (4) SA 905 (W) at 908E; *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* [1990] ZASCA 136; 1991 (1) SA 525 (A) at 532H.

⁷ *Frieslaar NO and Others v Ackerman and Another* [2018] ZASCA 3 (2 February 2018) para [22].

⁸ *Truter & another v Deyssel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) para 15.

⁹ *List v Jungers* 1979 (3) SA 106 (A) at 121C-D.

[14] A right to claim performance under a contract ordinarily becomes due according to its terms or, if nothing is said, within a reasonable time, which in appropriate circumstances, can be immediately.¹⁰

[15] As it was put in *Munnikhuis v Melamed* : ‘*If a debtor fails or refuses to perform some time after the debt becomes due, the failure or refusal does not give rise to a fresh or different debt unless the creditor then cancels the agreement. If the creditor does not, it remains entitled to sue for performance. The breach of contract does not, however, create a new cause of action for specific performance. It may well create a new cause of action for cancellation, and even for damages*’.¹¹

C. HAVE THE CLAIMS PRESCRIBED?

[16] As I have already indicated, the main relief sought by the plaintiff is restitution, alternatively damages for breach of the oral agreement, and in the further alternative, a claim based on unjustified enrichment.

[17] It has been held¹² that the obligation to restore arises on cancellation of a contract as a matter of law and the claim for restitution is a contractual remedy. Similarly, the cause of action for damages resulting from the repudiation of an obligation which was to be performed in terms of the agreement only accrues when

¹⁰ *Munnikhuis v Melamed* NO 1998 (3) SA 873 (W) at 887E-F; M M Loubser, *Extinctive Prescription* (1996) at 53; *Hanuscke Beleggings CC v Kungwini Local Municipality* [2012] ZASCA 112 para 13.

¹¹ At 888A-B.

¹² *Baker v Probert* 1985 (3) SA 429 (A) at 438J-439C and 446E.

the plaintiff elected to cancel the contract and to treat it as at an end.¹³ This much appears from the plaintiffs' particulars, at any rate, where it is stated that the damages claimed flow from the cancellation of the oral agreement resulting from the breach of contract.

[18] In other words, in respect of the restitution and damages claims, a 'debt' within the contemplation of the Prescription Act became due when the plaintiff elected to cancel the contract and to treat it as at an end.¹⁴ To put it differently, the defendant's *“debt to make restitution or to pay damages becomes due in terms of s 12(1) of the Prescription Act, when the innocent party exercises his or her election to accept the repudiation, rescind the contract and the election is communicated to the party who has repudiated”*.¹⁵ As Friedman J (as he then was) stated¹⁶:

“The purchaser's wrongful repudiation does not per se bring the contract to an end. The seller is not obliged to accept it immediately; he has an election and may take a reasonable period of time in order to decide whether to accept the purchaser's repudiation. During that time, i e until he has exercised his election, it is open to the purchaser to retract his repudiation and tender performance of his obligations. It is only when the seller has exercised his election to accept the repudiation that the contract is cancelled. Only when the date of cancellation has been crystallised can any question of damages arise. It would be entirely artificial in a case such as this to assess the plaintiff's damages by reference to an anterior date, viz the date of repudiation, on which date the contract was still alive and no claim for damages had

¹³ See authorities cited in *Cook v Morrison and Another* (A5058/16) [2017] ZAGPJHC 330 (18 August 2017) at paras [32] – [35]; See also *Pretorius v Bedwell* (659 of 2020) [2022] ZASCA 4 (11 January 2022) para [10].

¹⁴ *Cook v Morrison and Another* (A5058/16) [2017] ZAGPJHC 330 (18 August 2017) para [30].

¹⁵ *Cook v Morrison and Another* para [35].

¹⁶ Quoted with approval in *Culverwell and Another v Brown* 1990 (1) SA 7 (A), at 28A-F.

yet arisen. It seems, moreover, that those cases in which it has been held that the decisive date is the date of repudiation have proceeded on the unwarranted basis that the innocent party is obliged to accept the repudiation immediately, which is clearly not so.”

[19] Mr McIntosh, representing the defendants, placed significant reliance on the Constitutional Court case of *Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited*¹⁷, where the following was stated¹⁸:

“A further principle has been developed, based on policy considerations, which provides that a creditor should not by his or her own inaction delay the running of prescription. This policy-based principle appears to have influenced courts to accept as a general rule that all debts payable on demand are immediately enforceable on the conclusion of the contract, and that it is at this point that prescription begins to run.”

[20] However, as Mr Van Der Merwe representing the plaintiffs correctly stated, the facts of that case are distinguishable from the current matter because it was not dealing with restitution or restitutionary damages, but with a written loan agreement which expressly stated that repayment was “due on demand”. In fact, the judgment did not deal at all with the case law relating to restitution and restitutionary damages, and therefore cannot be read as changing the state of the law with regard thereto. In any event, a reading of the remarks made by Mojaelo AJ in the *Trinity* judgment indicates that the Constitutional Court accepted that there are instances in which the policy considerations concerning an inactive creditor will not avail a litigant. The

¹⁷ *Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited* (CCCT248/16) [2017] ZACC 32; 2017 (12) BCLR 1562 (CC); 2018 (1) SA 94 (CC) (5 September 2017).

¹⁸ At para [41]. See also paras [40] and [47] of that case.

instances mentioned in Mojapelo AJ's judgment are firstly the clear provisions of the Prescription Act, and secondly the intention of the parties expressed in a contract.¹⁹ I do not understand these instances to constitute an exhaustive list.²⁰ What is instructive for the current case is that the plaintiff pertinently states in the particulars that it accepted the repudiation of the oral agreement, and cancelled the agreement on 11 June 2019, which as I have already indicated, is a necessary requirement for a restitutionary claim. This factor alone takes the factual circumstances of the present case outside the realm of the discussion of *Trinity Asset management v Grindstone* case.

[21] As regards the further alternative claim of unjustified enrichment, it is pleaded in general terms in the plaintiffs' particulars of claim, without specifying the *conditiones*. For its part the defendant's special plea deals even more generally with the plaintiffs' claim in this regard, stating that the "*plaintiffs' claim has prescribed in its entirety*", without dealing specifically with the unjustified enrichment claim.

[22] The general rule is that prescription begins to run when a debtor receives a benefit to which (s)he is not entitled, and the creditor thereupon acquires the right to claim restitution.²¹ However, prescription will not invariably begin to run as soon as there is payment or performance without legal cause. Where the payment or performance is made subject to a condition or *modus* which is not subsequently

¹⁹ See paras [46] - [47].

²⁰ See, for example, Froneman J's comments in the same judgment at para [156].

²¹ *Van Staden v Fourie* (36/89) [1989] ZASCA 36; [1989] 2 All SA 329 (A) (30 March 1989) at 215B-H.

fulfilled the debt to make restitution only becomes due when it is settled that the condition or *modus* will not be fulfilled and the prescription period begins to run from that date.²² In other words, depending on the *condictiones*, the due date of the debt for purposes of prescription may be different. Given the general manner in which the defendant's special plea has dealt with the claim regarding unjustified enrichment, I am not satisfied that it has discharged the *onus* to establish when the debt became due in respect of the unjustified claim. But in any event, on the facts accepted in the special plea, it only became clear that the condition or *modus* agreed to between the parties would not be fulfilled when or after the letter of cancellation was sent, namely on 11 June 2019. That moment could not have been at the point of the payments being made.

D. ORDER

[23] In the result the following order is made:

- a. The defendant's special plea of prescription is dismissed, with costs.

N. MANGCU-LOCKWOOD
Judge of the High Court

²² *Van Staden op cit*; De Vos *Verrykingsaanspreeklikheid in die Suid Afrikaanse Reg* 3 ed 1987 159-160.

APPEARANCES

For the Plaintiffs : **Adv D van der Merwe**
Instructed by : **Mr D Barnard**
Login-Martin Attorneys Knysna

For the Defendant : **Adv B van Voller**
Instructed by : **Mr Z McIntosh**
McIntosh Attorneys George