

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 14342/2014

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....
DATE

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SIGNATURE

In the matter between:

GEOFFREY COOK

Plaintiff

And

MURRAY MORRISON

First Defendant

NICHOLAS FOX

Second Defendant

CAROL FOX

Third Defendant

FENELLA LAWRENSON

Fourth Defendant

SEABUSH INVESTMENTS (PTY) LTD

Fifth Defendant

SIBUYA GAME RESERVE & LODGE (PTY) LTD

Sixth Defendant

HESBER IMPALA (PTY) LTD

Seventh Defendant

SALISBURY TRADING CC

Eighth Defendant

SUMMARY

Civil procedure – trials – separation of issues in terms of Uniform Rule 33(4) – purposes of separation – facilitating the convenient and expeditious disposal of litigation – curtailment of expensive necessity of leading evidence and inconvenience to numerous witnesses – *onus* on party resisting separation – separation may be ordered in discretion of court at any stage of proceedings – issue of special plea of prescription raised by defendants to plaintiff's particulars of claim – issue of prescription conveniently and properly separated from merits and plaintiff's quantum of damages – effect of plaintiff's election not to replicate to special pleas of prescription.

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] The sole issue for determination in this trial is the question whether the plaintiff's claim against the defendants has prescribed.

[2] On 17 April 2014, the plaintiff issued summons against the defendants for restitution and damages. The pertinent portions of the particulars of claim,¹ alleged as follows:

¹ Paras 11 to 34B.

- “11. *During or about February 2003, the plaintiff, Murray Morrison [first defendant] and Fox [the second, third and fourth defendants], concluded an oral joint venture agreement at Hopewell Farm, Southwell District, Bathurst in the Eastern Cape to create an eco-tourism reserve in the Kenton-on-Sea district in the Eastern Cape. (insertions added).*
12. *The material terms of the joint venture agreement were that:*
- 12.1 *Various portions of land would be incorporated into the reserve;*
 - 12.2 *A large perimeter game fence would be constructed around the reserve;*
 - 12.3 *All internal fences within the reserve would be removed;*
 - 12.4 *The reserve would be stocked with certain game;*
 - 12.5 *Vehicles and equipment would be bought to maintain the infrastructure of the reserve;*
 - 12.6 *Lodges and/or camps would be constructed in the reserve and made open to the public in exchange for a fare to generate income from visitors;*
 - 12.7 *The plaintiff, Murray Morrison, Fox and the guided visitors would be able to traverse the entire reserve;*
 - 12.8 *For the purposes of operating the reserve –*
 - 12.8.1 *the land inside the reserve would be owned by separate corporate entities as pleaded in paras 14 and 15;*
 - 12.8.2 *game stock in the reserve, vehicles and equipment would be owned by a different corporate entity to the one pleaded in 12.8.1; and;*
 - 12.8.3 *the eco-tourism business would be owned by a different corporate entity to the ones pleaded in 12.8.1 and 12.8.2.*
13. *The product of the joint venture became known as Sibuya Game Reserve.*
14. *In 2003 the reserve was established on the following tracks of land:*

- 14.1 *Portion 15 of the Gorah 398 which was owned by Hesber Impala (Pty) Ltd;*
- 14.2 *Portion 3 of Theopollis 306 which was owned by Fox;*
- 14.3 *Portion 4 of Newtown 305 which was owned by Fox.*
- 15. *During the period 2005 to 2006 three adjacent portions of land were acquired by Seabush Investments (Pty) Ltd and subsequently consolidated to form Portion 23 of The Gorah 398. In 2007 Portion 23 of The Gorah 398 was included into the reserve and the large perimeter game fence around the reserve was extended to include this land.*
- 16. *The principal features of the joint venture, as agreed upon by the joint venture partners in or about February 2003 [pleaded in paras 11 and 12 above], were implemented from 2003 onwards.*
- 17A. *On 7 May 2008 the plaintiff, Murray Morrison and Fox concluded a written agreement, a copy of which is attached as annexure "POC1", and which was signed by Fox at Kenton-on-Sea and by the plaintiff and Murray Morrison in Sandton. The terms of this agreement are specifically incorporated.*
- 17B. *The parties concluded the aforesaid agreement so that:*
 - 17B.1 *Fox would concentrate on game farming and thus acquire 100% of the shares in Salisbury Trading CC;*
 - 17B.2 *The plaintiff and Murray Morrison would concentrate on eco-tourism and thus acquire 100% of the shares in Sibuya Game Reserve & Lodge (Pty) Ltd;*
 - 17B.3 *The plaintiff and Murray Morrison would acquire the sole right to conduct an eco-tourism business on the land belonging to Hesber Impala (Pty) Ltd for a period of 20 years in exchange for which Fox would be paid R20 000 (twenty thousand rand) per month escalating annually at the CPIX rate (the plaintiff and Murray Morrison to exercise this right via Sibuya Game Reserve & Lodge (Pty) Ltd which they would own 50% each).*
- 18. *... As at January 2010 the status of the joint venture and the individual corporate entities operating the Sibuya Game Reserve was as follows:*
 - 18.1 *Seabush Investments (Pty) Ltd, who owned the land within the reserve described as Portion 23 of the Gorah 398, had:*

18.1.1 two shareholders in the plaintiff who held 50% and Murray Morrison who held 50%;

18.1.2 two directors in the plaintiff and Murray Morrison.

18.2 Hesber Impala (Pty) Ltd, who owned the land within the reserve described as Portion 15 of the Gorah 398 and the Remainder of North Gorah 302 as well as the large perimeter game fence, had:

18.2.1 three shareholders in the plaintiff who held 25%, Murray Morrison who held 25%, and Fox who held 50%;

18.2.2 four directors in the plaintiff, Murray Morrison, Nicholas Fox and Fenella Lawrenson.

18.3 Fox owned the land within the reserve described as Portion 3 of Theopollis 306 and Portion 4 of Newton 305 as well as all of the shares in Salisbury Trading CC, who owns game in the reserve.

18.4 Salisbury Trading CC, who owns game in the reserve and is responsible for maintaining the general infrastructure in the reserve:

18.4.1 was wholly owned by Fox;

18.4.2 had only one director in Nicholas Fox.

18.5 Sibuya Game Reserve & Lodge (Pty) Ltd, who owned and operated the eco-tourism business within the reserve which included lodging and hospitality, had:

18.5.1 two shareholders in the plaintiff who held 50% and Murray Morrison who held 50%;

18.5.2 two directors in the plaintiff and Murray Morrison.

18.6 Additionally:

18.6.1 Sibuya Game Reserve & Lodge (Pty) Ltd was permitted to construct two tented camps on the land owned by Hesber Impala (Pty) Ltd;

18.6.2 In exchange for permitting Sibuya Game Reserve & Lodge (Pty) Ltd to operate the two tented camps on its land, Hesber Impala (Pty) Ltd was entitled to recompense from Sibuya Game Reserve & Lodge (Pty) Ltd.

19. *By 2010 the plaintiff and Murray Morrison were the only two directors and shareholders of Seabush Investments (Pty) Ltd and Sibuya Game Reserve & Lodge (Pty) Ltd.*
20. *However, during this time they expressed differences of opinion regarding the operation and funding of these two companies.*
21. *In consequence of these differences, the plaintiff and Murray Morrison held various discussions and/or negotiations during the course of 2010 to facilitate the plaintiff's exit from both Seabush Investments (Pty) Ltd and Sibuya Game Reserve & Lodge (Pty) Ltd.*
22. *On or about 2 August 2010, in Johannesburg, the plaintiff and Murray Morrison concluded an oral agreement which is referred to as the 'Swop Agreement', to facilitate the plaintiff's exit from the two companies.*
23. *The material express terms of the Swop Agreement, inter alia, were that:*
 - 23.1 *The plaintiff would sell his shareholding in both Seabush Investments (Pty) Ltd and Sibuya Game Reserve & Lodge (Pty) Ltd together with all of his claims against both companies to Murray Morrison for a mere R1 (one rand) each;*
 - 23.2 *The plaintiff would resign as director of both Seabush Investments (Pty) Ltd and Sibuya Game Reserve & Lodge (Pty) Ltd;*
 - 23.3 *The plaintiff would settle a debt owed to Investec Bank Ltd by Seabush Investments (Pty) Ltd;*
 - 23.4 *The plaintiff would pay R900,000 (nine hundred thousand rand) to Murray Morrison;*
 - 23.5 *The plaintiff would continue to hold 25% of the shareholding in Hesber Impala (Pty) Ltd in his personal capacity;*
 - 23.6A *In exchange for the plaintiff performing as agreed to in paras 23.1, 23.2, 23.3, and 23.4 the parties would cause to be sub-divided and thereafter transferred to the plaintiff a portion of land owned by Seabush Investments (Pty) Ltd known to the parties as the 'Swop Land' on which the 'Top House' was situated;*

- 23.6B *Murray Morrison would provide the plaintiff with a written contract of sale on terms orally agreed to by the parties, within two days, so as to enable the plaintiff to create the Swop Land by subdivision and to thereafter have it transferred to the plaintiff;*
- 23.6C *The terms orally agreed to by the parties, to be incorporated into the written contract of sale as pleaded in para 23.6B were recorded in an email sent by Murray Morrison to the plaintiff on 2 August 2010, a copy of which is attached as annexure 'POC2';*
- 23.7 *The terms pleaded in paras 23.1 to 23.6 were subject to Murray Morrison being able to sell his shares in Sibuya Game Reserve & Lodge (Pty) Ltd to Fox on terms agreeable to Murray Morrison.*
24. *In partial fulfilment of the Swop Agreement:*
- 24.1 *The plaintiff transferred his shareholding in Seabush Investments (Pty) Ltd and Sibuya Game Reserve & Lodge (Pty) Ltd to Murray Morrison as agreed;*
- 24.2 *The plaintiff resigned as director of Seabush Investments (Pty) Ltd and Sibuya Game Reserve & Lodge (Pty) Ltd as agreed;*
- 24.3 *The plaintiff settled the debt owed by Seabush Investments (Pty) Ltd to Investec Bank Ltd which was an amount of R1,161,984 (one million one hundred and sixty one thousand nine hundred and eighty four rand) as agreed;*
- 24.4 *The share register of Hesber Impala (Pty) Ltd was corrected to reflect that the plaintiff is the holder of 25% of the shareholding in that company in his personal capacity as agreed;*
- 24.5 *Murray Morrison reached an agreement with Fox on the sale of Sibuya Game Reserve & Lodge (Pty) Ltd, as agreed.*
25. *However:*
- 25.1 *A written contract of sale in respect of the Swop Land was never concluded in the manner agreed to orally by the parties, and recorded in Murray Morrison's email of 2 August 2010, because Murray Morrison, contrary to what was agreed to in the Swop Agreement, insisted on*

inserting additional restrictive terms that were unacceptable to the plaintiff;

25.2 The portion of land known as Portion 23 of the Gorah 398 was never subdivided in consequence of which the Swop Land was never created.

26. On 8 September 2010 Murray Morrison purported to impermissibly sever and cancel part of the Swop Agreement with the following result:

26.1 that Murray Morrison refused to perform the remainder of those obligations due under the Swop Agreement, in particular he refused to furnish the plaintiff with a written contract for the sale of land in respect of the Swop Land as contemplated by the parties, with the result that –

26.1.1 The Swop Land was never created from the subdivision of Portion 23 of the Gorah 398; and

26.1.2 The plaintiff never received transfer of the Swop Land as a quid pro quo for his performance;

26.2 that Murray Morrison nevertheless retained the performance that he received under that portion of the Swop Agreement that he purportedly did not cancel, inter alia –

26.2.1 he retained for himself all of the shareholding in both Seabush Investments (Pty) Ltd and Sibuya Game Reserve & Lodge (Pty) Ltd as transferred to him by the plaintiff for a mere R1 each;

26.2.2 he retained for himself and/or Seabush Investments (Pty) Ltd the sum of R1,161,984 as paid by the plaintiff to settle the debt owed to Investec Bank Ltd;

26.2.3 he retained for himself and/or Seabush Investments (Pty) Ltd the Swop Land which should have been created out of the subdivision of Portion 23 of the Gorah 398 and transferred to the plaintiff.

27. In acting as aforesaid, Murray Morrison's conduct is unconscionable and contra bonos mores and amounts to a breach and/or repudiation of the Swop Agreement.

28. *On 29 September 2010 the plaintiff accepted Murray Morrison's breach and/or repudiation of the Swop Agreement and cancelled the Swop Agreement, alternatively the plaintiff hereby cancels the Swop Agreement.*
29. *In addition to the material express terms of the Swop Agreement [pleaded above] it was an implied and/or tacit term of the Swop Agreement that if the Swop Land could not be subdivided and transferred to the plaintiff because Murray Morrison failed to furnish the plaintiff with a written contract of sale then Murray Morrison would be obliged to make restitution to the plaintiff of whatever performance he had received from the plaintiff including the performance retained by him as pleaded in paragraph 26.2 [above].*
30. *In breach of the implied and/or tacit term pleaded in paragraph 29, Murray Morrison has failed to make restitution.*
- 30A. *The plaintiff repeats the contents of paragraph 28 that on 29 September 2010 he accepted Murray Morrison's breach and/or repudiation of the Swop Agreement and cancelled the Swop Agreement, alternatively the plaintiff hereby cancels the Swop Agreement.*
- 31A. *As a result of the breaches and/or repudiation aforesaid, the plaintiff has suffered a loss and/or damages.*
- 31B. *The plaintiff's loss and/or damages result from him not being restored to his former position because Murray Morrison impermissibly retained the performance pleaded in paragraph 26.2 for himself.*
32. *If damages and/or the quantum cannot be agreed then the plaintiff is entitled to a statement and debatement of account on two bases:*
 - 32.1 *he was a shareholder of both Seabush Investments (Pty) Ltd and Sibuya Game Reserve & Lodge (Pty) Ltd and is accordingly entitled to the information; and*
 - 32.2 *he is a partner in the broader joint-venture known as the Sibuya Game Reserve.*
33. *As at 2 August 2010, the reasonable estimated market value of:*
 - 33.1 *Seabush Investments (Pty) Ltd was R12.6 million (twelve million six hundred thousand rand);*
 - 33.2 *Sibuya Game Reserve & Lodge (Pty) Ltd was R18 million (eighteen million rand);*

- 33.3 *the Swop Land with the Top House was R4 million (four million rand).*
- 34A. *As an alternative to the damages claim pleaded and the relief sought in para 31, the plaintiff alleges that:*
- 34A.1 *Murray Morrison has been enriched on the basis pleaded in para 26.2.*
- 34A.2 *the plaintiff has been impoverished on the basis pleaded in paras 24.1, 24.2 and 24.3;*
- 34A.3 *Murray Morrison's enrichment was at the expense of the plaintiff; and*
- 34A.4 *the enrichment was unjustified.*
- 34B. *In quantifying the extent of the plaintiff's enrichment claim, paras 32 and 33 are repeated."*

THE DEFENDANTS' SPECIAL PLEAS

[3] The defendants, in their pleas, pleaded a special plea of prescription, mainly in the following terms: that in paragraph 28 of the particulars of claim the plaintiff alleged that he accepted the first defendant's breach and/or repudiation of the "Swop Agreement" and cancelled the said agreement on 29 September 2010; that prayers (a), (b), (c), (d) and (e) of the amended pages 16 and 17 of the particulars of claim arise from the alleged Swop Agreement and its purported cancellation by the plaintiff on 29 September 2010; the plaintiff's summons was issued on 17 April 2014, being a date which is more than 3 years after the date of the purported cancellation of the Swop Agreement by the plaintiff; and that, to the extent that the plaintiff has any claims or causes of action against the defendants, which the defendants denied, such claims or causes of action have prescribed. On this basis, the

defendants' claim that the plaintiff's claim be dismissed with costs. The defendants thereafter pleaded over on the merits. It is common cause that there was no repudiation to the special plea. I shall revert to this aspect later in the judgment.

APPLICATION FOR SEPARATION OF ISSUES

[4] At the commencement of the trial, which was supposed to be of long duration, there was an application brought in terms of Uniform Rule 33(4) by the first and the fifth defendants, for the separation of their, as well as the second to the seventh defendants' special pleas of prescription from all other issues. In the alternative, the application sought to separate the prescription issue and the merits, or that the merits be stayed until final determination of the special pleas of prescription, alternatively the merits. The application for separation was opposed strenuously by the plaintiff on the grounds, *inter alia*, that prescription cannot be separated out since the issue of whether or not the plaintiff's claims have prescribed depend in some measure on whether a partnership is extant, further that the existence of a partnership entails a factual enquiry that requires to be determined by the leading of evidence in the pending trial. I deal in more detail later below with the submissions made opposing the separation. The second, third, fourth, sixth and eighth defendants did not take part in these proceedings.

RESERVATION OF RULING

[5] At the conclusion of argument on the separation, and prescription issues, which lasted at least one day, I reserved judgment. This, to the great, but incomprehensible and visible consternation of the plaintiff's counsel. The reason for the reservation of the judgment on the separation issue, was more than plain. The issues raised in the separation application required more than careful consideration, with due regard to the facts and applicable legal principles. Be that as it may, what follows hereafter is my determination of the issues raised. By agreement between the parties, no evidence was led.

[6] There is no doubt at all in my mind that the separation applications have profound merit and despite the plaintiff's protestations, and these ought to succeed. The separation issue first. Without going into great detail, it is settled law that one of the main purposes of separation of issues under Rule 33(4) is facilitating the convenient and expeditious disposal of litigation, and such separation may be ordered at any stage of the proceedings. See, for example, *Denel (Edms) Bpk v Forster* 2004 (4) SA 481 (SCA) at 485. It is also a discretionary matter. In *Rauff v Standard Bank Properties* 2002 (6) SA 693 (W) at 703F-H, the Court said:

"The entitlement to seek the separation of issues was created in the Court Rules so that an alleged lacuna in the plaintiff's case or an answer to the case can be treated; or simply so that a factual issue can be determined which can give direction to the rest of the case and in particular to obviate a parcel of evidence. The purpose is to determine the fate of the plaintiff's claim (or one of the claims) without the costs and delays of a full trial. Proper handling of litigation – and accordingly professional handling of a case – requires that this avenue be explored

to the advantage of the own client, the flow of Court hearings and even of the other client ...”

In my view, this present application for separation is such a case. In any event, the *onus* was on the plaintiff to satisfy the court that this application should not be granted. See *Braaf v Fedgen Insurance Ltd* 1995 (3) SA 938 (C) at 939. Such *onus* has not been discharged in the present matter. The special pleas of prescription raised by the defendants, are ones of law, which may decide the outcome of the trial, one way or the other, without the expensive necessity of leading evidence. It was in the interest of justice, and public interest, to dispense with the lined-up witnesses as quickly as reasonably possible, and adjudicate first on this issue of prescription properly and carefully. The fact that, as a result of the reservation of the judgment, the long duration of the trial was curtailed and lost to the parties, is an irrelevant, yet regrettable, consideration. For all these reasons, I am inclined to grant the separation of issues which I hereby do. The merits of the plaintiff’s claim and possible quantum of damages flowing therefrom will stand over for later determination, depending on the outcome of the prescription issue.

THE PRESCRIPTION ISSUE

[7] I turn to the vexed issue of prescription. In order to properly set the scene at the outset, in an appeal concerning whether a claim by a liquidator under sec 32 of the Insolvency Act 24 of 1936 to have a court set aside an impeachable transaction, and to make a declaration that the liquidator is entitled to recover the alienated property, prescribes under the Prescription

Act 68 of 1969, and if so, when prescription starts to run against the claim, the Court in *Duet and Magnum Financial Services CC (in liquidation) v Koster* [2010] 4 All SA 154 (SCA) at para [9] said:

“It seems to me that the liquidators misunderstood their own claim. Prescription is about rights that come into existence but have ceased to exist by the passage of time. If a right has not come into existence then there is nothing that is capable of expiring. That is why prescription is raised in a plea. If no existing right has been alleged in the particulars of claim, then the particulars of claim are excipiable and will not attract a plea. It is only once facts have been alleged that establish the existence of a right that the question whether that right had expired, is capable of arising.”

[8] The main contentions of the plaintiff, as I understood the argument, came to this: the special pleas of prescription are defective because they both refer to the plaintiff’s “*cause of action*” as having prescribed, that a cause of action does not prescribe, as only a “*debt*” does under sec 10(1) read with sec 11(d) of the Prescription Act 68 of 1969 (“*the Prescription Act*”). In this regard, reliance is placed on, *inter alia*, *Off-Beat Holiday Club v Sanbonani Holiday Spa Share Block* [2016] ZASCA 62, *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13, and *Aeronexus (Pty) Ltd v Firstrand Bank Limited* [2011] JDR 0181 (SCA). The contention of the plaintiff is also that, the oral joint venture agreement between the first defendant and Fox, which became known as Sibuya Game Reserve, has never terminated *ipso facto*, that the first defendant and Fox are still partners in the joint venture. As a consequence, so the argument proceeded, sec 13 of the Prescription Act does not require certain people in particular relationships, such as a partnership, to sue each other for as long as their partnership endures. In this

regard, reliance was placed on, *inter alia*, *Absa Bank Ltd v Keet* 2015 (4) SA 474 (SCA).

[9] The plaintiff in other words contended that: the plaintiff is not obliged to replicate to a special plea of prescription, but is entitled to advance any legal arguments on the facts pleaded; that an exception cannot be taken to a point of prescription in reference to *Living Hands (Pty) Ltd and Another v Ditz and Others* 2013 (2) SA 368 (GSJ); that when the plaintiff accepted the defendants' repudiation and proceeded to cancel the agreement (2010) prior to the issue of summons, a number of claims arose, not all of which are debts; that the plaintiff's vindicatory claim against the defendants is alive and extant; and that the present proceedings are not motion proceedings which require all the evidence to be contained in the papers.

[10] It is also necessary to refer briefly to *Van Deventer v Ivory Sun Trading* 77.² There, the Court was concerned with the issue whether a right of pre-emption, acquired by virtue of a testamentary disposition and registered against the title deed of a farm, prescribed prior to the appellant exercising such right. In the process of upholding the appeal, the Court at para [21] said:

"In Umgeni Water v Mshengu Ponnann JA set out the position in determining whether a debt is due:

'[5] ... According to s 12(1) of the Act, prescription shall commence to run "as soon as the debt is due". The words "debt is due" must be given their ordinary meaning. [The Master v IL Back & Co Ltd 1983 (1) SA 986 (A) at 1004F.] In its ordinary meaning a debt is due when it is immediately claimable by the creditor and, as its correlative, it is immediately payable by the debtor. Stated another

² 2015 (3) SA 532 (SCA).

way, the debt must be one in respect of which the debtor is under an obligation to pay immediately. [See *Western Bank Ltd v SJJ van Vuuren Transport (Pty) Ltd and Others* 1980 (2) SA 348 (T) at 351; and *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 909 and the cases there cited.]

[6] A debt can only be said to be claimable immediately if a creditor has the right to institute an action for its recovery. In order to be able to institute an action for the recovery of a debt a creditor must have a complete cause of action in respect of it. The expression “cause of action” has been held to mean: “... every fact which it would be necessary for the plaintiff to prove ... in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved”; or slightly differently stated: “the entire set of facts which give rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not ‘arise’ or ‘accrue’ until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action.” [*Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838 and the cases there cited by Corbett JA; see also *Truter and Another v Deyssel* 2006 (4) SA 168 (SCA) in paras 16, 18 and 19.]” (footnotes omitted)

[11] Having all the above legal principles in mind, the facts of the present matter require close examination. Contrary to the plaintiff’s assertions, *inter alia*, that its vindicatory action in respect of the shares is not a debt, including its restitution claim, as well as its claim for a statement and debatement of account, the defendants in the special pleas argued otherwise. For their contention, the defendants relied on, amongst others, *H.A. Clarke v J. Bradfield*,³ for the view that the plaintiff never had possession of the shares or became owner thereof. See also *Van der Merwe v Karroo Vleisbeurs Bpk*.⁴ In short, the continued argument was that as the plaintiff is not owner of the shares, the remedy of *rei vindicatio* was not available to it, it may not vindicate

³ (1891-1892) 6 EDC 238.

⁴ 1963 (3) SA 831 (C) at 835.

them. The shares were not transferred to the plaintiff. The defendants dispute the existence of a partnership between the plaintiff and the defendants, and consequently, the reliance by the plaintiff on the provisions of sec 13(1)(d) of the Prescription Act, was misplaced. They say that relationship was no more than a joint venture which does not have all the essentials of a partnership proper. Instead, the defendants relied on the provisions of secs 10, 11 and 12 of the Prescription Act emphasising the view that, the plaintiff's claim was a debt which is susceptible to extinctive prescription after three years from September 2010. The latter period is, it will be recalled from paragraphs 26 to 28 of the particulars of claim whereat the plaintiff alleged breach of the agreement, and acceptance of the repudiation, as well as cancellation of the Swop Agreement.

[12] In summary, the defendants' argument came to this: the amended particulars of claim undeniably show that, the first defendant allegedly breached the so-called Swop Agreement on 8 September 2010; thereafter, and on 29 September 2010, the plaintiff duly accepted the first defendant's repudiation and proceeded to cancel the agreement; that the summons in the instant matter, in which the plaintiff cited the first and fifth defendants, and other defendants, was only issued on 17 April 2014, more than three years after the repudiation and cancellation of the Swop Agreement, and that, as a consequence, the plaintiff's claims and debts, and all causes of action, which arose on 29 September 2010, including any damages claims, became prescribed. This, in reference to the main relief sought whereat the plaintiff seeks, as against the first and fifth defendants, the alleged delivery to him of

50% shareholding in the fifth defendant, which he sold to the first defendant in March 2010, as well as reinstatement to the board of directors of the fifth defendant. It is plain that the plaintiff also seeks an order against the first defendant and the fifth defendant in terms of which they are obliged to transfer to him 50% of the shares in the fifth defendant, and the reinstatement to the board of directors of the fifth defendant. The monetary claims of the plaintiff are also clearly set out in the amended particulars of claim.

[13] It is common cause that since the acceptance of repudiation and the cancellation of the agreement in September 2010, no further action took place. Despite this, the plaintiff persists that its claims are not debts and its cause of action has not prescribed. This approach and conduct of the plaintiff, in my judgment militates, substantially against the plaintiff's cause. In dismissing a special plea of prescription, in a somewhat different setting where a defective summons was originally issued, but later amended, the Court in *Aeronexus v Firstrand Bank Limited*,⁵ said:

"The term 'debt' is not defined in the Act. In interpreting it, courts have given it a broad, flexible meaning, capable of different, context-based connotations. This meaning refers more generally to the claim and is wider than the technical term 'cause of action' (the phrase ordinarily used to describe the set of material facts relied upon to establish the debt. It is therefore critical to guard against confusing a debt with the cause of action which begets it."

At para [15] of the judgment, the Court proceeded to state that:

⁵ (249/2010) [2011] ZASCA 21 (17 March 2011) at para [13].

“It is well to bear in mind that ‘it is inaction, not legal ineptitude, which the Prescription Act is designed to penalise ...’.”

In the footnote, reference is made to *Mazibuko v Singer* 1979 (3) SA 258 (W) at 266A, and *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 825F-H.

[14] In my view, based on all the above legal principles, the contentions of the defendants that since the summons in the present matter was issued on 17 April 2014 only, more than three years after the cancellation of the agreement, any claims or causes of action or debts against them have prescribed, are well-grounded. The special pleas of prescription must succeed. In *Van Deventer v Ivory Sun Trading 77 supra*, at para [23], the Court said:

“To determine whether the debt was due, the appellant had to have a complete cause of action in respect of such debt. This means, according to Umgeni Water and the cases cited therein, that every fact necessary to prove and support the appellant’s right to judgment had to exist for the appellant to be able to institute action for specific performance.”

In my view, the plaintiff clearly had a complete cause of action in respect of its alleged claims upon the acceptance of the defendants’ repudiation and cancellation of the agreement in September 2010, already.

[15] In arriving at the above determination, I have had regard to recent case law, such as *Staegemann v Langenhoven and Others*,⁶ and *Absa Bank Ltd v*

⁶ 2011 (5) SA 648 (WCC).

Keet.⁷ The latter case mainly concerned the question whether a claim under *rei vindicatio* became prescribed after three years by virtue of sec 10 of the Prescription Act. In the present matter, the applicability of vindication has already been discarded. I have also had regard to other case law relied upon by the plaintiff. These include, *Makate v Vodacom (Pty) Ltd*,⁸ and *Off-Beat Holiday Club v Sanbonani Holiday Spa*.⁹ The facts of these cases are readily distinguishable from the facts of the instant matter. For example, in the *Makate* matter, the plea of prescription was dismissed since Vodacom failed to prove that its obligation towards Makate was a debt susceptible to prescription, pending an obligation to first negotiate. The negotiation, “... *will not involve the payment of money, the delivery of goods or the rendering of services*”. (See paragraph 198 of the judgment.)

THE REPLICATION

[16] I must again deal briefly, with the issue of repudiation. The defendants complained that the plaintiff has not replicated to the special pleas of prescription, and that in terms of the Rules of Court, the plaintiff is time barred from replicating. This, so the complaint proceeded, prejudiced the defendants since they are unable to prepare for the trial and do not know what to expect. In the heads of argument, the plaintiff countered, in essence as pointed out, that it was not necessary to deliver a replication if the plaintiff wishes only to deny the allegations contained in the special pleas, and that the consequences, if any, is that by not replicating, are that the plaintiff is deemed

⁷ 2015 (4) SA 474 (SCA).

⁸ [2016] ZACC 13.

⁹ (20231/2014) [2016] ZASCA 62 (25 April 2016).

to have denied all of the allegations in the special pleas. In this regard, reliance was placed on, *inter alia*, *Milne N.O. v Shield Insurance Co Ltd*,¹⁰ and for the contention that plaintiff elected not to replicate because no fresh facts were needed to demonstrate that his claims have not prescribed.

[17] In *Matiwane v Minister of Police*,¹¹ however, a contrary view was expressed when the Court said:

“It seems to me that such allegations require to be dealt with by the filing of a replication even when it results in a bare denial and a joinder issue. Such allegations require consideration by attorney and counsel and their decision should be reflected in the formal pleading by replication. In my view it is a salutary practice and a more elegant form of pleading in such cases as this one, where new allegations and issues are raised in the plea, to file a replication which formally deals therewith and contains a joinder of issue.”

[18] The plaintiff's contentions regarding his reasons for not replicating to the special plea may be convenient and justified to him for present purposes. However, the factual situation is that in terms of Uniform Rule 26, the plaintiff remains *ipso facto* barred. However, it is by now settled procedural practice that this fact alone does not preclude the plaintiff from proceeding with the pending action. In simple terms, it means the pleadings are deemed to be closed, and the plaintiff is perfectly entitled to have the trial set down for hearing. See in this regard, *Moghambaram v Travagaimmal*,¹² as well as Uniform Rule 25(2). The fact that the plaintiff remains barred, may or may not be to the advantage of the defendants at the subsequent trial. It is difficult to

¹⁰ 1969 (3) SA 352 (A).

¹¹ 1979 (3) SA 312 (ECD) at 313H.

¹² 1963 (3) SA 61 (D).

predict. What, however, remains of importance, in my judgment, and for present purposes, is that I am not called upon or able to make a definitive finding on the effect of the plaintiff's election not to replicate to the special pleas of prescription. This, largely in view of my determination that his claims against the participating defendants in the present proceedings, have become prescribed. The failure to replicate seems to strengthen the defendants' cause for now. For the sake of completion, I must mention that the second, third, fourth, sixth and eighth defendants are not part of the present proceedings.

CONCLUSION

[19] To sum up. The finding is that due to the plaintiff's inaction since September 2010, his claims and debts against the defendants have become prescribed, debts or causes of action, in terms of secs 10, 11 and 12 of the Prescription Act. The reliance by the plaintiff on the provisions of sec 13(1)(d) of the Prescription Act to the effect that, the plaintiff and the defendants "*are partners and the debt is a debt which arose out of the partnership relationship*", was misplaced. I am however unable to make a conclusive determination on the effect of the plaintiff's failure to replicate to the special pleas, in the context of the current proceedings although the failure of the plaintiff to replicate in these circumstances, seems to tilt the scales in favour of the opposing defendants. The costs, which is a discretionary matter, must follow the outcome.

[20] In the result I make the following order:

20.1 The issue of the special pleas of prescription is separated from the merits and quantum of damages of the plaintiff for later determination, if it becomes necessary.

20.2 The special pleas of prescription are upheld with costs.

D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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