

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED. ✓
1/4/11
11/4/2011
SIGNATURE

CASE NUMBER: 73909/2009

In the matter between:

PRICEWATERHOUSECOOPERS
INCORPORATED

First Applicant

MATTHYS JOHANNES BLOM

Second Applicant

and

BAREND JOHANNES JACOBUS
DU TOIT

First Respondent

DANIËL PETER DU TOIT

Second Respondent

FRANCOIS JONATHAN DU TOIT

Third Respondent

TAMARIN DU TOIT

Fourth Respondent

TIFFANY ANASTACIA DU TOIT

Fifth Respondent

ALETTA CATHARINA DU TOIT

Sixth Respondent

PIERRE VAN ROOYEN

Seventh Respondent

In re:

BAREND JOHANNES JACOBUS
DU TOIT

First Plaintiff

DANIËL PETER DU TOIT	Second Plaintiff
FRANCOIS JONATHAN DU TOIT	Third Plaintiff
TAMARIN DU TOIT	Fourth Plaintiff
TIFFANY ANASTACIA DU TOIT	Fifth Plaintiff
ALETTA CATHARINA DU TOIT	Sixth Plaintiff

and

PRICEWATERHOUSECOOPERS INCORPORATED	First Defendant
PIERRE VAN ROOYEN	Second Defendant
MATTHYS JOHANNES BLOM	Third Defendant

JUDGMENT

GOODEY AJ:

[1] INTRODUCTION:

(1.1) This is an application in terms of section 2(1)(b) of the Vexatious Proceedings Act, Act 3 of 1956.

(1.2) The Applicants filed heads on 14 February 2011.

- (1.3) On Tuesday, 1 March 2011 my Registrar called adv
Swanepoel whose name appear on the heads of the
Applicants as acting on behalf of the Respondents.
- (1.4) Mr Swanepoel informed her that he had previously acted on
behalf of the Respondents on a contingency basis, but due to
financial constraints on the part of the Applicants he is in any
event no longer available to act as he is also tied up in another
matter. He further informed her that the Respondents would
move for an postponement.
- (1.5) Mr Swanepoel indicated that heads may possibly be filed but
that the Respondents would move for a postponement as
aforesaid on 7 March 2011.
- (1.6) Heads were indeed filed by Mr Swanepoel on behalf of the
Respondents on Thursday afternoon, 3 March 2011.
- (1.7) Though late, I accepted the said heads.

[2] **POSTPONEMENT:**

(2.1) On 7 March 2011 when the matter was called, Mr De Beer, appearing on behalf of the Respondents, moved for a postponement.

(2.2) A substantive application in this regard was brought.

(2.3) The Applicants filed an opposing affidavit and the Applicants also filed a replying affidavit in this regard.

(2.4) The matter as to the postponement was duly argued on 7 March 2011.

(2.5) **Result:**

2.5.1 I refused the postponement with costs and indicated that I would give my reasons later. These reasons are clear from what is stated below.

2.5.2 I reiterated that the Respondents should be granted an **opportunity of being heard** and that such an opportunity is either to argue the matter there and then or to stand the matter down until Thursday, 10 March 2011 in order to accommodate the Respondents and afford the Respondents all possible opportunities to be heard.

2.5.3 Mr De Beer informed me that he was only briefed on the postponement.

2.5.4 The matter stood down and Mr De Beer (on behalf of the Respondents) as well as Mr Steyn (on behalf of the Applicants) informed me that contact was made with Mr Swanepoel who would then argue the main action (vexatious proceedings) on Thursday, 10 March 2011.

(2.6) **Respondents reasons for postponement:**

2.6.1 In essence the Respondents say that the matter is not ripe for hearing. In this regard the First Respondent

says the following in paragraphs 3 and 4 of the founding affidavit pertaining to the postponement:

"3. *On Thursday, 3 March 2011, during a conversation between counsel in this matter, it came to the attention of counsel that a replying affidavit had been served by Applicant on or about 8 February 2011.*

4. *Upon enquiry, my attorney's correspondent perused his file and ascertain that in fact such an affidavit had been served upon him, but that it had not been forwarded to my attorney. As a consequence, the heads of argument have been predicated on the premise that no replying affidavit has been filed".*

2.6.2 They further argue that Mr Swanepoel was not informed pertaining to the hearing on 7 March 2011 and no heads were consequently prepared and filed timeously.

2.6.3 I find no merits in these grounds and they all have been addressed as is clear from what is stated hereinafter. Their undertaking to pay costs for the postponement somewhere in the future is also without merits.

(2.7) **Fact of the matter is:**

2.7.1 I have received and perused the replying affidavit.

2.7.2 I have had Mr Swanepoel (on behalf of the Respondents and who has been acting for them and is well familiar with the matter) contacted as aforesaid.

2.7.3 I accepted the heads prepared by Mr Swanepoel although out of time.

2.7.4 I have afforded the Respondents the opportunity to be heard on Thursday, 10 March 2011 when Mr Swanepoel would also be available. I then in actual fact heard the matter as aforesaid.

- (2.8) Consequently, apart from the fact that there are no merits in the application for postponement which has been refused there is no prejudice for the Respondents in view of the aforesaid and the fact that the matter stood down until 10 March 2011 (par 2.7.4 above).

[3] MAIN APPLICATION (VEXATIOUS PROCEEDINGS):

(3.1) General

- 3.1.1 The main application is an application in terms of section 2(1)(b) of the Vexatious Proceedings Act, Act 3 of 1956, for a permanent stay of an action instituted by the First to Sixth Respondents under case number 73909/09 and ancillary relief.

- 3.1.2 The said section reads as follows:

"If, on an application made by any person against whom legal proceedings have been instituted by another person or who has reason to believe that the institution of legal proceedings against him is

contemplated by any other person, the Court is satisfied that the said person has persistently and without any reasonable ground instituted legal proceedings in any Court or in any inferior Court, whether against the same person or against different persons, the Court may, after hearing that other person or giving him an opportunity of being heard, order that no legal proceedings shall be instituted by him against any person in any Court or any inferior Court without the leave of that Court, or any Judge thereof, or that inferior Court, as the case may be and such leave shall not be granted unless the Court or Judge or the inferior Court, as the case may be, is satisfied that the proceedings are not an abuse of the process of the Court and that there is a prima facie ground for the proceedings."

(my underlining)

- 3.1.3 I have already indicated that the Respondents were granted that the Respondents were granted the full opportunity of being heard and they were in fact heard as required by the section.

(3.2) **Background**

3.2.1 The background is for all practical purposes common cause and a handy summary thereof is to be found in paragraphs 6 tot 10 of the Applicants' heads which read as follows:

"6. *These events occurred against the backdrop of the tragic story of the murder of Mrs Joyce Du Toit on the 11th of June 1992. The First Respondent was married to Mrs Joyce Du Toit in community of property. More than five years after her murder the First Respondent was found guilty on counts of inter alia the murder of his wife and the falsification of her last will and testament. He was sentenced to an effective 28 years' imprisonment. The First Respondent has since been released on parole in and around June 2008.*

*See: Record, p.718-736;
p.15-19.*

7. A brief summary of the background facts relevant to this application are as follows:-

7.1 After the death of his wife, the First Respondent inherited her half share of the joint estate in terms of, what later turned out to be a falsified will.

7.2 The First Respondent transferred the entire estate to the Ben Du Toit Family Trust. In terms of the liquidation and distribution account the joint estate was valued in an amount of R14,282,076.00.

7.3 The transfer of the assets happened subsequent to the 13th of September 1994 but at least before the 28th of January 1997.

7.1 On the 8th of September 1997 the First Respondent was convicted of the murder of his wife.

7.5 On the 19th of November 1997 and pursuant to an application launched by family members of the First Respondent's deceased wife, the

Seventh Respondent and the Second Applicant were appointed as trustees of the Ben Du Toit Family Trust.

7.6 On the 7th of October 1998 a settlement agreement was reached, which was sanctioned by this Honourable Court, between the Second Applicant, the Seventh Respondent, the curator ad litem for the Second to Fifth Respondents and the First Respondent and his wife at the time. In terms of this agreement it was agreed that all the assets of the Ben Du Toit Family Trust would be sold and that upon sale of all the assets the Second Applicant and the Seventh Respondent would resign as trustees of the Ben Du Toit Family Trust.

7.7 All the assets of the Ben Du Toit Family Trust except for one immovable property, being a game farm, were sold by way of a public auction on the 26th of November 1998.

7.8 *The Second Applicant and the Seventh Respondent resigned as trustees on the 11th of January 1999.*

7.9 *Upon their resignation as trustees a nominee of ABSA Trust, being Martha Magdalena Prinsloo, was appointed as trustee of the trust.*

7.10 *On the 9th of December 2003 the trust was sequestrated by order of this Court upon an application made by Prinsloo in her capacity as trustee of the trust. The application for the sequestration was precipitated by a demand by the First Respondent for repayment of moneys which he alleged was owing to him in terms of a loan account.*

*See: Record, p.9-15;
p.15-35;
p.91-103.*

8. Since the settlement agreement which led to the sale of the properties and the resignation by the Second Applicant and the Seventh Respondent as trustees of the trust, the Respondents have instituted four actions/applications to seek redress for the alleged unlawful conduct of the trustees. These were:

8.1 an application launched in December 1998 to set aside the sale of the properties and interdict the transfer thereof. This application was dismissed.

See: Record, p.36;
p.127.

8.2 The second was an application launched on an urgent basis under case number 1164/2003 wherein the Respondents inter alia sought to set aside the sale of the properties and an order that the Second Applicant and the Seventh Respondent restore the trust to the

position it was at their appointment as trustees. This application was struck from the roll for lack of urgency and apparently abandoned by the First Respondent.

*See: Record, p.38-40;
p.140-224.*

6.1 *The Respondents instituted an action under case number 19546/07 for damages based on the same cause of action and factual allegations as the present action. This action was disposed of in the following manner:-*

8.3.1 *The summons and particulars of claim consisted of more than 450 pages. It included voluminous and irrelevant annexures. The Second Applicant was not joined as a defendant in that action. An application in terms of Rule 30 was launched seeking to strike*

out the annexures to the particulars of claim. This application was upheld.

8.3.2 An exception was filed to the particulars of claim. The Respondents delivered a notice of intention to amend to which the First Applicant objected.

8.3.3 The Respondents filed an ex parte application to join the Second Applicant as a defendant and filed an application for leave to amend.

8.3.4 The Second Applicant sought leave to intervene in the joinder application. After the Second Applicant's intervention the application to join him as defendant was dismissed.

8.3.5 The application for leave to amend the particulars of claim was dismissed.

8.3.6 *The original exception to the particulars of claim was upheld. The Respondents failed to amend.*

8.3.7 *An application to dismiss the action was filed whereafter the Respondents withdrew the action.*

*See: Record, p.50-54;
p.329-368.*

5.4 *Summons in the present action was issued on the 1st of December 2009. The Defendants have not yet pleaded but instead the First and Second Applicants have launched the present application. The Respondents have filed a notice of intention to amend their particulars of claim increasing the claim to R652,657,276.00. No objection was filed to this notice of intention to amend but the Respondents have not pursued the amendment in that they have not filed amended pages.*

9. *Apart from these proceedings the First Respondent has also laid a complaint with the Public Accountants and Auditors Board against the Second Applicant. After some investigation the Board and its successor, IRBA, concluded that there was no prospect of success in the disciplinary enquiry and no further steps were taken against the Second Respondent.*

*See: Record, p.39-42;
p.224-268.*

10. *The Second Respondent was also summonsed to appear at an insolvency enquiry on the 19th of August 2004 into the affairs of the insolvent estate of the trust."*

(3.3) **Applicants' case**

3.3.1 In essence the Applicants argue that the actions instituted by the Respondents (especially the First Respondent) are vexatious, without substance and an

abuse of the Court proceedings as more fully set out in the following sub-paragraphs.

- 3.3.2 In essence the Applicants say that the unlawful conduct complained of by the Respondents has nothing to do with the Applicants as they had nothing to do with same. In any event, there has been a settlement which was implemented.
- 3.3.3 Furthermore, in terms of the settlement between the trustees and the beneficiaries (including all the Respondents) it was agreed that all the assets of the trust would be sold. The nett proceeds from the sale of the assets would be invested and ABSA took over as trustee.
- 3.3.4 In short, the Second Applicant and the Seventh Respondent's involvement in the trust terminated on the 11th of January 1999 and the damages claimed by the Respondents have no casual nexus with the alleged unlawful conduct.

- 3.3.5 In any event, (so the Applicants say) the alleged claims of the Respondents have prescribed.
- 3.3.6 During argument, the Respondents also raised the issue that the Sixth Plaintiff (Aletta Catharina du Toit) is still a minor. This impacts on prescription.
- 3.3.7 Only Mr Steyn (on behalf of the Applicants) filed supplementary heads in this regard.
- 3.3.8 In this regard the provisions of section 13(1)(i) of the Prescription Act read together with subsection (1)(a) are applicable.
- 3.3.9 The effect of this section of the Prescription Act is that prescription continues to run against a minor Plaintiff but that the prescription is not completed until a period of one year has expired from the date that the Plaintiff has reached the age of majority.
- 3.3.10 The gist of Mr Steyn's argument is briefly as follows (as per his supplementary heads of argument):

- "5. *The fact that the Sixth Plaintiff was also a party to the action instituted in 2007 has not affected the protection that she as a minor has in terms of section 13(1)(i) of the Prescription Act. Similarly the institution of this action, should it be withdrawn or barred, would not affect the protection afforded to her as a minor.*
8. *It is not alleged by the Plaintiffs that any one of them has a divisible claim against the Defendants separate and independent from the other Plaintiffs.*
9. *The fact that the Sixth Plaintiff is still a minor cannot assist the Plaintiffs as a group.*
- 12.6 *The Plaintiffs cannot now, nine years after the resignation of Messrs Blom and Van Rooyen, in their own name institute an action for the recovery of damages which is calculated on the devaluation of the trust assets which occurred between November 1997 and December 1998 because:*

*12.6.1 it is not damages that they have suffered
in their own name or as a group;*

*12.6.2 the damages that the trustees nomine
officio for the trust allegedly suffered has
prescribed;*

*12.6.3 any derivative action by the beneficiaries
upon the failure of the trustees for the
trust has prescribed.”*

3.3.11 Reference to various authorities were also made
which are well-known and not necessary to repeat.

(3.4) Respondents case

3.4.1 The Respondents confirm that the facts are common
cause which has been referred to in paragraph 3.2
above.

3.4.2 In a nutshell Mr Swanepoel, on behalf of the
Respondents argues as follows:

3.4.2.1 Firstly, it is argued that the previous matters cannot be considered as vexatious in that they are not by a long shot as numerous as those that came up in instances where the Courts have granted relief under the Act (Act 3 of 1956).

3.4.2.2 Secondly, in none of the previous matters were the merits of Respondents' claim/s ever considered, and on each occasion the matter was disposed of on a technicality.

3.4.2.3 Thirdly, the following are referred to in the heads of argument (paragraph 4 thereof):

"4. Applicants aver that the 11 farms which constituted the majority of the trust assets were in a poor state when the trustees took over the management thereof. (4) This does not explain the following:

Why the trustees appointed a farm manager with no experience in ostrich farming;

Why some 319 ostriches died of hunger in less than a year;

Why if the trust only owed some R 60 000.00 when the trustees took over, and had no overdraft, they incurred an overdraft of R1.5 million in less than a year, in contravention of the Court order which authorised an overdraft of only R 500 000.

Why no business plan was prepared.

Why the assets were sold in direct breach of the settlement agreement without any attempt to market same.

Why the farms were sold at R 500.00 per hectare by the trustees when in 1996 First Respondent had attained a price of R 5 400.00 per hectare for an adjacent farm."

3.4.2.4 Fourthly, the Respondents alleged that the Applicants have not in any satisfactory manner dealt with Respondents' contention that they were grossly negligent in managing

the affairs of the trust, and so such denial is found in the Applicants' papers.

3.4.2.5 Lastly, the issue of the Sixth Respondent being a minor (paragraph 3.3.6 above) is raised.

(3.5) **The Law:**

3.5.1 It is trite law that the "doors of the Court" are not lightly close to a litigant. In this regard the following is stated by Solomon AJ (although before the Act) in ***Western Assurance Co v Caldwell's Trustees 19`8 A.D. 262 (at 273):***

"strong grounds must be shown to justify a court in granting so exceptional a remedy. The Courts of law are open to all, and it is only in very exceptional circumstances that the doors will be closed on anyone who desires to prosecute an action".

3.5.2 Also see:

Argus Printing & Publishing Co Ltd v Anastassiades (1954) 1 ALL SA 111(W) where the test to be applied is set out as follows:

"It seems clear from these decisions that the elementary right of free access to the courts should not be interfered with by the summary dismissal of an action without hearing evidence, on the ground that it is vexatious, unless it is manifest that the action is so unfounded that it could not possibly be sustained. It must be quite clear that failure of the action is a foregone conclusion".

- 3.5.3 The fundamental right of access to the courts have been once again dealt with by the Constitutional Court in Road Accident Fund v Mdeyide 2011(2) SA26 CC at p30 where the following was said:

"[1.] The fundamental right of access to courts is essential for constitutional democracy under the rule of law (According to s 1(c) of the Constitution, the Republic of South Africa is a sovereign democratic State founded on the

values of, inter alia, supremacy of the Constitution and the rule of law.)

In order to enforce one's rights under the Constitution, legislation and the common law, everyone must be able to have a dispute that can be resolved by the application of law, decided by a court. The right of access to courts is thus protected in the Constitution (*Section 34 of the Constitution states: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal of forum.'*)

[2.] In the interests of social certainty and the quality of adjudication, it is important, though, that legal disputes be finalised timeously. The realities of time and human fallibility require that disputes be brought before a court as soon as reasonably possible. Claims thus lapse, or prescribe, after a certain period of time. If a claim is not instituted within a fixed time, a litigant may be barred from having a dispute decided by a court. This has been recognised in our legal system – and others – for centuries.”

- (3.6) Apart from other authorities both counsel also referred to:

Ernest & Young & Others v Beinash & Others
1999(1) SA 1114, at 1138-1139

Beinash & Another v Ernest & Young & Others
1999(2) SA 116 (CC), at 120-122

[4] CONCLUSION:

- (4.1) Taking all the circumstances into account, I have not been persuaded that the relief sought should be granted.

- (4.2) Therefore, I make the following order:

- (a) "The application for postponement is dismissed with costs".
(b) "The application is dismissed with costs".


GOODEY AJ
8/4/11

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