IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH

Case no: 1176/2012
Date heard: 13.9.2012
Date delivered: 23.10.2012

In the matter between:

DEVAN ARTHUR JAGJIBAN	**First Applicant**
ANGELA JO ANNE JAGJIBAN	**Second Applicant**
vs	
ROCHELLE RHODA NIEKERK	**First Respondent**
ROCHELLE RHODA NIEKERK N O	**Second Respondent**
LEE NIEKERK	**Third Respondent**
TERRI NIEKERK	**Fourth Respondent**
THE MASTER, EASTERN CAPE PORT ELIZABETH	**Fifth Respondent**

JUDGMENT

TSHIKI J:

A) INTRODUCTION

[1] On 25 May 2001, applicants entered into a written Agreement of Sale of immovable property with the first respondent and the deceased (whose estate is represented by its executrix, the second respondent) as purchasers and sellers respectively. In terms of the said contract applicants purchased certain immovable property (the property) being erf no 14348, Bethelsdorp which property is known as erf no 14348, Bethelsdorp, Port Elizabeth and is situated at no 37 Doreen Crescent,

Cleary Park, Port Elizabeth. The third and fourth respondents who are heirs to the deceased's estate have been cited herein as the interested parties.

[2] It is common cause that the applicants, who are husband and wife respectively, were related to the deceased who, during his lifetime, was the cousin of the first applicant. Applicants bought deceased's property for the reason that he was unable to afford payment of the bond repayments together with the other monies due to the municipality which he owed in respect of the property in question. After the Deed of Sale was signed applicants moved to stay into the house and this is confirmed by the contents of the Deed of Sale whose clause 20 under special conditions reads:

> "20. SPECIAL CONDITIONS
>
> (1) Mr and Mrs Niekerk waives all their rights on the property mentioned in this Deed of Sale.
>
> (2) On making the first payment on the above property, Mr and Mrs D Jagjiban become[s] the sole owners of the above property.
>
> (3) We have agreed that the property will remain in their name until transfer takes place at **Mr Jagjiban's request**.
>
> (4) Mr Jagjiban takes full responsibility for all outstanding debt on the property namely:
>
> (a) Outstanding bond as per sheriff's repossession letter;
>
> (b) Outstanding rates and taxes; and
>
> (c) Outstanding electricity and water."

[3] Indeed, pursuant to the contents of the Deed of Sale applicants assumed possession and occupation of the property.

[4] On 23 April 2010, applicants instituted action proceedings in this Court against first and second respondents as first and second plaintiffs respectively for the rectification of the payment terms as well as the purchase price which in the main agreement is reflected as R140 000.00 instead of R98 564.67 as well as the fact that applicants as purchasers were to pay rates and taxes, outstanding electricity and water accounts on the said house by 25 May 2001. Although this action was defended it was settled on terms as contained in the Deed of Settlement marked "D" signed by the parties which reads:

> " **DEED OF SETTLEMENT**
>
> WHEREAS the Plaintiffs initiated an Action in the above Honourable Court against the Defendants for specific performance in terms of a Deed of Sale pertaining to the purchase price of immovable property situated at 37 Doreen Crescent, Hillside, Port Elizabeth.
>
> WHEREAS the Defendants have indicated that they no longer wish to defend the Action.
>
> WHEREAS the parties have reached an Agreement in relation to the transfer of the immovable property to the Plaintiffs and all matters incidental thereto.
>
> NOW THEREFORE THE PARTIES AGREE AS FOLLOWS:
>
> 1. The Defendants undertake, on presentation, to sign all such documentation as may be necessary in order to effect registration of transfer of the immovable property at 37 Doreen Crescent, Hillside, Port Elizabeth into the joint names of the Plaintiffs.
> 2. On signature of the transfer documents by the Defendants, the Plaintiffs shall pay an amount of R6 670.00 to the Defendants Attorneys of Record, McWilliams & Elliott Incorporated of 83 Parliament Street, Central, Port Elizabeth. The aforementioned is in settlement of the amount paid to the NMMM by the Defendants on behalf of the Plaintiffs.
> 3. Registration of transfer shall be effected by the Plaintiffs' Attorney of Record, at the expense of the Plaintiffs. The aforementioned transfer costs shall

include the cost relating to the cancellation of the Defendants' mortgage bond on the immovable property.

4. The parties shall each bear their own legal costs in relation to the Action.
5. The parties acknowledge that this Agreement is in full and final settlement of all or any claims the other party may have against the other arising out of the marriage and any other relevant matters and there are no outstanding matters which have not been dealt with."

[5] It is clear from the Deed of Settlement aforesaid that on signature of the Deed of Settlement applicants herein would have to pay R6 670.00 to the first and second defendant's attorneys. It is further stated in the Deed of Settlement that the transfer costs to be paid by the applicants (plaintiffs) to their attorneys of record shall include costs relating to the cancellation of respondents' (defendants') mortgage bond on the immovable property in issue. The agreement was concluded by noting that there were no outstanding matters which the parties had not dealt with concerning the property in issue.

B) ISSUES

[6] Respondents have responded to applicants' allegations and have raised, *inter alia*, certain points *in limine* of note of which are:

[6.1] that the application has not complied with section 97 of the Deeds Registry Act 47 of 1937 in that no notice of the application and order to be sought has been made to the Registrar of Deeds;

[6.2] that the agreement sought to be enforced was entered into on 25 May 2001 and therefore the applicants' cause of action has prescribed.

[7] I may mention that respondents have also raised the objection that applicants should have lodged their claims against the deceased estate no more than one year after his death. Secondly that applicants should never have instituted the application against the first respondent in both her personal and representative capacities. Thirdly, the provisions of the National Credit Act 34 of 2005 are applicable in these proceedings but have not been invoked.

[8] During the argument Mr P. Scott appeared for the applicants and Mr M. Mackay represented the respondents.

C) REASONS FOR JUDGMENT

[9] I must say at this stage that there is no substance in the points raised by respondents in paragraph 7 above. Mr Mackay for respondents could not be able to support the contention by the respondents in this regard. The first respondent was supposed to have been cited in her personal capacity as one of the purchasers of the property in issue. By the same parity of reasoning, she, as the appointed representative and executor of her late husband's estate should and has been correctly cited in her representative capacity. Respondents having advanced no sufficient facts to support this contention, I need not say more on this point because there is no merit in the respondents' objection in this regard. Equally there is no substance in respondents' contention that the National Credit Act applies herein. Neither has any argument been advanced in support of that contention. It also has no merit and cannot be sustained.

D) FAILURE TO COMPLY WITH SECTION 97 OF THE DEEDS REGISTRY Act 47 of 1937

[10] Section 97 (1) of the Deeds Registries Act 47 of 1937 provides:

> "**97 NOTICE TO REGISTRAR OF APPLICATION TO COURT**
>
> (1) Before any application is made to the Court for authority or an order involving the performance of any act in a deeds registry, the applicant shall give the registrar concerned at least seven days' notice before the hearing of such application and such registrar may submit to the Court such report thereon as he may deem desirable to make".

[11] Subsection 2 of section 97 has no relevance to the issue at hand. In my view, applicants have complied with the subsection (1) above in that a notice to the registrar of Deeds to which the registrar has responded has been made within the required period stipulated in subsection (1). The mere fact that the Act requires a notice of seven days before the order is granted is designed to allow the registrar to also have site of and have regard to all the papers which the Court has to consider, which should be inclusive of both applicants' and respondents'. There would be no point in issuing such notice at the inception of the case because the respondents' papers would not have been filed in Court at that stage. In this case a full set of papers to which the Registrar of Deeds has responded has been forwarded to the registrar. In any event, the above provisions are directory and cannot be interpreted to be peremptory otherwise an absurdity would occur. The purpose is to ensure that whenever there has to be an interference by the Court in any matter relating to the property registered in the Deeds office, the Registrar of Deeds should be advised of the intended order. (See ***Ex Parte* Sanders Et Uxor** 2002 (5) SA 387 (C) at 390J-391A). Non compliance with the seven day notice provision of section 97 (1) can even been condoned by the Court. This interpretation accords with the purpose of

the provision, namely to allow Registrars of Deeds an opportunity to submit a report expressing their views on applications where relief is sought envisaging "the alteration of registered documents" (See ***Haviland Estates (Pty) Ltd and Another vs Mc Master*** 1969 (2) SA 312 (A) at 319 (H)).

[12] I have already indicated that in this case the provisions of section 97 (1) of the Deeds Registries Act have been complied with and there has been no prejudice to any of the parties herein.

C) PRESCRIPTION ACT 68 OF 1969

[13] Section 12 (1) of the Prescription Act 68 of 1969 (the Act) provides:

> "**12 When prescription begins to run**
>
> (1) Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due."

[14] In the present case we have to ascertain whether or not the debt has arisen and if so, when. The Act does not define the term debt but in the context of section 10 (1) of the Act the term debt has a wide and general meaning and includes an obligation to do something or refrain from doing something. (See ***Electricity Supply Commission v Sterwarts and Lloyds of SA (Pty) Ltd*** 1981 (3) SA 340 (A) at 344F-G). 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 ***Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd*** 1991 (1) SA 525 (A) at 532H).

[15] In my view, in this case, for prescription to commence running applicants must have paid the full purchase price inclusive of the conveyencer's fees. Section 20 (3) of the Special Conditions provides that "we have agreed that the property will remain in their name (seller's name) until transfer takes place at Mr Jagjiban's request". In my view, this means that once the purchasers have paid the price as well as conveyencer's fees they would have to request the respondents or their attorneys to effect transfer of the property to their names. In this regard applicants shall have to trigger the commencement of the debt by first complying with all their obligations, and thereafter request or demand that respondents or sellers effect registration of the property. The latter stage never occurred in this case, yet this requirement forms part of the terms of the contract of sale.

[16] In addition, the parties have again signed a document known as the Deed of Settlement exhibit "D" which makes it clearly that the applicants had not yet paid the R6 670.00 to defendants' attorneys at the time of the signature of that agreement which was signed on 2 August 2010. Up to that stage there had been no debt due and, therefore, no prescription had commenced to run. Therefore, the argument by or on behalf of respondents that the debt has prescribed does not hold water and therefore has no substance.

[17] It follows, therefore, that the special defences raised by the respondents cannot succeed.

[18] On the merits the respondents have not made out a case for consideration by the Court. It seems to me that they have placed their entire defence on the points *in*

limine which I have found to have no substance. The facts of this case are clearly distinguishable from those of the case of ***Desai NO v Desai and Others*** 1996 (1) SA 141 (A) to which I have also relied on for guidance. In that case prescription had commenced and continued without interruption until the expiry of three years after the debt became due. This has not been the position in the present case. Applicants herein paid the sum of R6 670.00 to respondents' attorneys on 19 October 2010 an act which commenced the running of prescription. However, when the applicants filed this application the debt had not prescribed because three years had not lapsed since the full payment was made.

[19] Therefore, I grant the order in terms of paragraphs 1-4 of the Notice of Motion as amended. In view of the fact that no further respondents have opposed this application, I have deleted the entire portion of para 4 and replaced it with the following:

> **"4. Respondents to pay costs of this application jointly and severally the one paying the other to be absolved**".

PW TSHIKI
JUDGE OF THE HIGH COURT

Counsel for the applicants	:	Adv P Scott SC
Instructed by	:	Joyzel L Obbes Suite 203-207 AA House, 4 Rink Street Central PORT ELIZABETH (Ref: Miss Obbes/hr)
Counsel for the respondents	:	Mr M Mackay
Instructed by	:	Shaun Masimla Attorneys 184 Standford Road Korsten PORT ELIZABETH (Ref: Mr Masimla/avl)