

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 14748/16

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

20/05/2021
DATE


SIGNATURE

YUNUS ABOO BAKER N.O
SOPHIE THABANG KEKANA N.O
ALLAN DAVID PELLOW N.O
JAN LODEWIKUS PRETORIUS N.O
ISMASYS (PTY) LIMITED

1st Plaintiff
2nd Plaintiff
3rd Plaintiff
4th Plaintiff
5th Plaintiff

and

INVESTEC BANK LIMITED
SMITH TABATA BUCHANAN BOYES INC.

1st Defendant
2nd Defendant

JUDGMENT

MNGQIBISA-THUSI J

[1] The plaintiffs have instituted an action against the defendants in which they seek relief in the following terms:

“1.1 As against the First Defendant:

1.1.1 An order that the disposition in terms of which the insolvent paid an amount of R 60 million to the First Defendant to be set aside and that the First Defendant be ordered to pay to the First to Third Plaintiffs the sum of 60 million.

1.2 As against the Second Defendant:

1.2.1 An order that the Second Defendant pay the amounts appearing in column 4 of annexure “C” to the lenders appearing in column 1 of annexure ‘C’;

1.3 Interest on the amounts claimed at 9% per annum against the First and Second Defendants,

1.4 Costs against the First and Second Defendants.

1.5 Further and/or alternative relief”.

[2] The first to fourth plaintiffs are the joint liquidators of Bluecore Investments (Pty) Ltd (in liquidation) (“Bluecore”). On 1 December 2009 Bluecore was placed under provisional liquidation and was finally wound-up on 16 March 2010.

- [3] This action is brought by the creditors of Bluecore in the stead of the liquidators after the liquidators were indemnified as envisaged under s 32(1)(b) of the Insolvency Act¹ (“the Insolvency Act”).
- [4] At a pre-trial meeting held on 23 May 2019, the parties agreed that there should be a separation of issues in terms of Uniform rule 33(4) and that the issue of merits be postponed *sine die* pending a determination of the special plea of prescription raised by the defendants.
- [5] Bluecore had intentions of developing a golf and eco estate to be known as ‘The Hills’ (“the development”). The land earmarked for this development is situated at Portions 72 and 73, portions of Portion 1 of the farm Rietfontein, Gauteng Province (“the development land”).
- [6] During July 2006, Bluecore entered into a loan facility agreement with the first defendant, Investec Bank Limited (“Investec”), in order to acquire the development land.
- [7] The loan facility provided, *inter alia*, that:
- 7.1 facility amount in the sum of R140 million;
 - 7.2 Investec would be entitled to a 30% profit participation in the development;

¹ Act 24 of 1936. Section 32(1)(b) of the Insolvency Act provides that: “(b) If the trustee fails to take any such proceedings they may be taken by any creditor in the name of the trustee upon his indemnifying the trustee against all costs thereof”.

7.3 Bluecore would cede and pledge the money held by Investec Retail Treasury in the trust account of the second defendant, Smith Tabata Buchanan Boyes Inc.

[8] In pursuit of its intention and in order to acquire the development land, in March 2006 Bluecore concluded loan agreements with a number of lenders (the creditors) who would, in turn, be prospective purchasers of stands within the development. In terms to the individual loan agreements between Bluecore and the lenders, each lender undertook to provide Bluecore with a capital amount in the sum of R374, 000.00. Further the loan agreements provided, *inter alia*, that:

- 8.1 once the stands are transferable, the purchase price would be set-off against the loan amounts owing by Bluecore to the purchasers;
- 8.2 Bluecore was prohibited from selling the stands except with the written consent of the lender until the capital amount was fully repaid;
- 8.3 the amounts provided by the were to be deposited into the trust account of the second defendant;
- 8.4 the second defendant would only release the capital amount once the relevant stands have become registrable; and
- 8.5 should Bluecore become insolvent, the second defendant would pay back to the lenders the amount of the loans given to Bluecore.

[9] The loan agreements were also subject to certain suspensive conditions which were to be fulfilled by 31 August 2006 or at a later agreed date. The suspensive conditions included, amongst others, that:

- 9.1 Bluecore obtains a Record of Decision from the Gauteng Department of Agriculture, Conservation and Environment and that Bluecore obtains all necessary approvals, consents, authorisations and exemptions for the development to start and be completed;
- 9.2 Bluecore acquires the final rezoning the development land into erven;
- 9.3 Bluecore would obtain funding in the amount of R100 million in order to buy the development land;
- 9.4 In the event of the suspensive conditions are not fulfilled, the agreement shall be of no force and effect;
- 9.5 the second defendant was enjoined to release the capital amount to Bluecore provided by the lenders on the fulfilment of the specified suspensive conditions and to confirm in writing to the lenders that the funds have been released to Bluecore after deduction of its administrative fee.

[10] On 13 August 2006 the second defendant addressed a letter to the lenders which reads, in part, that:

“We are satisfied that the suspensive conditions as detailed in the aforementioned agreements have been fulfilled and accordingly, in accordance with the provisions of the said agreement, we have released the deposit to Bluecore”.

- [11] On 12 October 2006 the second defendant paid the proceeds from the loan amounts in the total amount of R60 million to Bluecore and in turn Bluecore ceded the amount to the first defendant.
- [12] During 2015 the lenders ceded their right, title and interest into any claims they may have against the second defendant to the fifth plaintiff, Ismasys (Pty) Ltd.
- [13] Summons was issued on 23 February 2016 and served on the first and second defendants on 3 March 2016 and 23 February 2016, respectively.
- [14] Relying on the provisions of s 26(1) of the Insolvency Act² the first to fourth plaintiffs are seeking the setting aside the transfer of the capital amount Bluecore transferred to the first defendant, on the ground that it is a disposition without value.
- [15] The claim by the fifth plaintiff as against the second defendant is based on the following grounds:

² Section 26(1) of the Insolvency Act reads as follows: "Every disposition of property not made for value may be set aside by the Court if such disposition was made by an insolvent— (a) more than two years before the sequestration of his estate, and it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets; (b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities: Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess.

15.1 that the second defendant in transferring the sum of R60 million to the first defendant was in breach of clause 5 of the sale agreement in contravention s 26(1)(a) of the Alienation of Land Act³.

15.2 that the second defendant failed in its duty to the plaintiff and the lenders to ensure that the proceeds of the loan were not paid out contrary to the statutory provisions and the agreements.

[16] The defendants have raised the special plea of prescription, namely, that the plaintiffs' claims have prescribed and sought the dismissal of the plaintiffs' claims.

[17] The first defendant's special plea reads, in part, as follows:

- "12. The first to fourth plaintiffs were appointed liquidators of Bluecore on 29 June 2010 ("the liquidators").
13. The first to fourth plaintiffs, as liquidators, had knowledge of the identity of the first and second defendants and the facts from which the alleged disposition claim arose or should have acquired such knowledge by the exercise of reasonable care, as is provided for by section 12(3) of the Prescription Act, 68 of 1969.
14. The liquidators did in fact acquire knowledge of the disposition in or during 2010.
15. Summons in this matter was served on the first defendant on 3 March 2016, being more than 5½ years since the appointment of the liquidators.
16. In the premises, the plaintiffs' claims have prescribed".

³ Act 68 of 1981. Section 26(1)(a) of the Alienation of Land Act reads as follows: "(1) No person shall by virtue of a deed of alienation relating to an erf or a unit receive any consideration until—(a) such erf or unit is registrable".

[18] In its special plea the second defendant alleges that:

- “1. In terms of section 11(b) of the Prescription Act, 68 of 1969 (the “Prescription Act”), the applicable prescription period for the plaintiffs’ claims (the “Claims”) against the second defendant is three years.
2. In terms of section 12(1) of the Prescription Act, the prescription period in respect of the Claims commenced on 13 October 2006 when the second defendant paid the claim amount to the first defendant without the suspensive conditions referred to in paragraph 16 of the particulars of claim having been fulfilled.
3. The creditors concerned had knowledge of the identity of the second defendant and of the facts from which their debt arises on 13 October 2006, alternatively could they have acquired this knowledge by the aforesaid date by exercising reasonable care.
4. In the premises the Claims against the second defendant became prescribed on 12 October 2009.
5. Plaintiff’s summons was served on the second defendant on 23 February 2016, after the Claims against the second defendant had become prescribed”.

[19] The relevant provisions of the Prescription Act⁴ (“the Act”) read as follows:

“10 Extinction of debts by prescription

- (1) 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.

...

11 Periods of prescription of debts

1. The periods of prescription of debts shall be the following:

⁴ Act 68 of 1969.

...

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.

12 When prescription begins to run

(1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.

...

(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: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

[20] It is common cause that the defendants bear the onus of proving that the claims against them have prescribed.

[21] In *Makate v Vodacom (Pty) Ltd*⁵, the Constitutional Court held that the term 'debt' means an "an obligation to pay money, deliver goods, or render services".

[22] A debt prescribes, in this case, after a period of three years⁶. Further, s 12 of the Act provides that the period of prescription is calculated and starts to run from the date on which the debt becomes due. In *Duet & Magnum Financial Services CC (in liquidation) v Koster*⁷ the court held, in the case of a company liquidation, that prescription starts to run no later than the date upon which a liquidator is appointed.

⁵ 2016 (4) SA 121 (CC).

⁶ Section 10(1) read with section 11(d).

⁷ 2010 (4) SA 499 (SCA).

[23] With reference to s 12(3) of the Act, in *Links v Member of the Executive Council, Department of Health, Northern Cape Province*⁸ the court held that the onus is on a defendant to prove that the claimant “had knowledge of all material facts from which the debt arose or which he needed to know in order to institute action”.

[24] The issue to be determined is when prescription began to run.

[25] It is the plaintiffs’ contention that their claims have not prescribed in that the debt only became due when summons was issued. It was submitted that the lenders only became aware of the facts giving rise to their claim during November 2013 and it is at that stage that prescription began to run. It was further submitted that even though the lenders were notified of the disposition on 13 August 2006, it is unreasonable to have expected the lenders at that stage to have examined their loan and sale agreements and to make enquiries about the payment.

[26] The first defendant correctly contends, contrary to the plaintiffs’ view, that the liquidators are the actual ‘plaintiffs’⁹. In *Reynolds and Others NNO v Standard Bank of South Africa*¹⁰ the court stated that:

⁸ 2016(4) SA 414 (CC) at para [24].

⁹ Section 32 (1)(a) provides that: “Proceedings to recover the value of property or a right in terms of section 25(4), to set aside any disposition of property under section 26, 29, 30 or 31, or for the recovery of compensation or a penalty under section 31, may be taken by the trustee”.

¹⁰ 2011 (3) SA 660 (W).

“[13] In the present case, and because of the provisions of s 32(1) and 32(3) of the Insolvency Act, it is correct to describe the plaintiffs as merely ‘nominal plaintiffs’. They are the plaintiffs because they are the only parties entitled to embark on the litigation concerned. The fact that a creditor is given to fund and direct such litigation because of the provisions of s 32(1)(b), when the plaintiffs are not prepared to do so, does not detract from the fact that it is the plaintiffs to whom payment will have to be made if the litigation is successful, and who will be liable for costs if it fails – hence the requirement of an indemnity as stated in s 32(1)(b)”.

[27] On behalf of the first defendant it was submitted that since the plaintiffs were appointed as liquidators on 29 June 2010, they should have acquired knowledge of the disposition during 2010. Since summons was served on the first defendant on 3 March 2016, it is the first defendant’s contention that the plaintiffs’ claim prescribed three years after the liquidators were appointed.

[28] On behalf of the second defendant it was submitted that the plaintiffs’ claim has prescribed since the plaintiffs had knowledge of the dispositions. According to the second defendant, since the lenders were informed by the first defendant on 13 August 2006 that it was paying over the capital amount to Bluecore on the incorrect assumption that the specified suspensive conditions have been fulfilled, prescription began to run from the date the lenders acquired knowledge of the disposition. Since summons was served on the second defendant on 23 February 2016, it is the second defendant’s contention that the plaintiffs’ claim prescribed on 12 October 2009.

[29] In the alternative, it was submitted on behalf of the second defendant that the lenders were aware that Bluecore was wound-up on 16 March 2010, the plaintiff

failed to act reasonably by not inquiring about the facts surrounding the disposition.

[30] It is common cause that Bluecore was finally wound-up on 16 March 2010 and that the liquidators were appointed on 29 June 2010. Following the *dictum* in the *Kotze* matter (*supra*), the plaintiffs acquired the right to institute action to set aside the disposition without value on 29 June 2010. Therefore, the plaintiffs' claim prescribed three years from that date as envisaged in terms of s 10(1) read with s 11(d) of the Act. In view of the fact that summons was only served on the first and second defendants on 3 March 2016 and 23 February 2016, respectively, the three-year prescription period had by the time service of the summons was effected, expired. Further, in view of the fact that Bluecore was finally wound-up on 16 March 2010, and as correctly pointed out by counsel for the second defendant, the lenders would ordinarily have been informed about Bluecore's liquidation. Taking into account that the loan agreement provides that in the event of the liquidation of Bluecore the capital amounts loaned to Bluecore should be repaid to the lenders, by exercising reasonable care, the lenders would have acquired knowledge of the facts surrounding the disposition and could have acted upon it.

[31] I am satisfied that the defendants have shown sufficient cause why their special plea of prescription should be upheld and for the plaintiffs' action be dismissed.

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

1. The first and second defendants' special plea of prescription is upheld.

2. The plaintiff's claim against the defendants is dismissed with costs, including costs of Senior Counsel.



NP MNGQIBISA-THUSI
Judge of the High Court

Appearances

For Plaintiffs: Adv MH Van Twisk (instructed by DLBM Attorneys Inc)

For First Defendant: Adv A E Bham SC (instructed by ENS AFRICA)

For Second Defendant: Adv BH Swart SC (instructed by MR WIM CILLIERS)