

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE



Case No: 978/2015

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

[Handwritten signature and date 27/6/19 over the form]

In the matter between:

PHAHLANA HUNADI QUANTITY SURVEYORS CC

APPLICANT

AND

MAJELATITJENG CONDRAD DANKURU

1st RESPONDENT

MATSHIDISO VICTORIA DANKURU

2ND RESPONDENT

HANSTOCK VAN DEN HEEVER ATTORNEYS

3RD RESPONDENT

LOURENS S LEE ATTORNEYS

4TH RESPONDENT

JEFF MATHABATHA INCORPORATED

5TH RESPONDENT

THE REGISTRAR OF DEEDS

6TH RESPONDENT

JUDGMENT

MULLER J:

- [1] The applicant launched motion proceedings on 11 May 2015. It is prudent before the background facts are set out to refer to the relief claimed by the applicant.
- [2]. The applicant claims, first of all, for a declaratory order that it was the first to acquire the property from the first and second respondents in terms of a deed of sale dated 7 July 2005. Secondly, a declaratory order is claimed that it had paid the amount of R70 000.00 towards the full purchase price on 7 July to the first and second respondents inclusive of the costs of preparation of the deed of sale as well as the costs of transfer and the costs incidental to the registration of transfer of the property in the name of the applicant. Thirdly, an order that the first and second respondents forthwith pass transfer of the property to the applicant is sought. Fourthly, the applicant seeks an order that the first and second respondents repay the amount of R41 143.20 being an overpayment made to the respondents as well as interest on the amount at a rate of 15, 5% per annum calculated from 7 May 2005 together with the costs of the application.¹
- [3] On 26 July 2016 the court ordered the joinder of the fourth, fifth and sixth respondents to the proceedings.² At the same time an order was also made that pending the finalization of the application, the property may not be transferred to a third party.

¹ Interim relief is also claimed but it is unnecessary to refer to that relief for the purposes of this judgment.

² The fourth respondent is Lourens S Lee Attorneys. The fifth respondent is Jeff Mathabata Incorporated Attorneys and the sixth respondent is the Registrar of Deeds.

- [4] The application is opposed by the first and second respondents. In their answering affidavit every conceivable defence is raised against the claims of the applicant which included of a plea of prescription.
- [5] The application was set down for hearing on 21 February 2019. On that day counsel appeared and handed up to the court a letter from advocate PW Makhambeni, who confirmed that he is briefed in the application and that the date was arranged with him but that he was unable to attend due to his non availability as he was detained in the Mpumulanga Local Division at Middelburg. The application was postponed until 25 March 2019 to enable him to appear and argue the application. The court was also informed that the parties reached an agreement that the defence of prescription will be dealt with on 25 March 2019. The costs were reserved and notice was given to advocate Makhambeni to advance reasons on 25 March 2019 why he should not personally be held liable for the wasted costs of 21 February 2019.
- [6] Before argument commenced an order was made in terms of rule 33(4) that the question of prescription be adjudicated first as a matter of convenience before any other issue.
- [7] I now turn to the facts. The applicant is Phalana Hunadi Quantity Surveyors CC a Close Corporation. It entered into a written contract of sale on 7 July 2005 with Mr and Mrs Dankuru³ the owners of Erf 70 situated in Lebowakgomo.⁴
- [8] The relevant portions of the deed of sale read as follows:

³ Mr MC Dankuru is the first respondent and Mrs MV Dankuru is the second respondent. The third respondent is Henstock Van den Heever Attorneys.

⁴ Hereinafter "the property".

*"2. The Seller hereby sells the property to the Purchaser who hereby purchases same for the sum of **R25 000.00 (TWENTY-FIVE THOUSAND RAND)***

2.1. The sum of R25000.00 shall be paid to the conveyancer on date of registration of transfer."

"3.1. Possession of the property shall be given to and taken by the Purchaser on DATE OF REGISTRATION from which date the property shall be held by the Purchaser at his own risk and expense and from which date the Purchaser shall be liable for all rates and taxes and other charges levied in respect of the property. The purchaser shall on demand refund to the Seller any rates and taxes pre-paid beyond the date of possession."

"5.1. Transfer of the property shall be effected by the Sellers's Conveyancers as soon as possible, after the Purchaser shall have complied with his obligations in terms of the agreement

5.2. The costs of and incidental to the registration of transfer of the property into the name of the Purchaser and the costs of preparation of this agreement shall be borne and paid by the Purchaser."

[9] The fourth respondent, Lourens S Lee Attorneys, was appointed as the seller's conveyancer in terms of the deed of sale. And on the same date the deponent to the founding affidavit deposited, on behalf of the applicant, R70 000.00 into the account of the first respondent, as payment of the purchase price and the other costs.

[10] The deponent notified the fourth respondent on 21 July 2005 that the applicant had already made payment of an amount of the purchase price and costs in the amount of R70 000.00 to the first and second respondents and supplied him with written the proof of payment. The fourth respondent rendered an account to the applicant (backdated to 7 July 2005) in the amount of R3 856.80 in respect of the

transfer costs, preparation of the deed of sale and other costs incidental to the transfer of the property.

[11] The applicant contends that payment of the amount of R70 000.00, into the account of the first and second respondent, was an overpayment in the amount of R41 143.20, as no legal basis for their entitlement to the amount existed. In short, the applicant claims that the first and second respondents were enriched at the expense of the applicant.

[12] During September 2005 the applicant was informed by the fourth respondent that the transfer and registration of the property was delayed until further notice, due to a moratorium imposed by the Lepelle-Nkumpi Local Municipality which was undergoing a land audit.

[13] Three years later on 21 September 2008 the deponent attended the offices of the fourth respondent once again. He was then informed that the fourth respondent experienced difficulties to transfer the property because the first and second respondent attempted to sell the property to a third party, the identity of which was not disclosed to the applicant.

[14] The deponent proceeded on the very same date to instruct attorney Jeff Mathabatha Incorporated, (the fifth respondent) to put the first and second respondent on terms to take the necessary steps to transfer and register the property in the name of the applicant. The fifth respondent addressed a letter dated 18 September 2008, to the fourth respondent. (I will assume that the date of 21 September 2008, above, is incorrect and should be 12 September 2008 as stated in the letter of the fifth respondent, to which I shall turn presently. Nothing turns on that date).

[15] Although the deponent is silent on this important event in the founding affidavit, paragraph 4 of the letter addressed to the fourth respondent made reference to the first respondent attending at the offices of the fifth respondent together with the deponent. The relevant paragraph states:

“On the 18th instant our client and Mr Dankuru called into our office and Mr Dankuru promised that he will instruct you to transfer the said property into our client's name.”

[16] Nothing came of the request in the letter. However, the fourth respondent, on 3 November 2008 wrote a letter in the following terms:

“Hereby our office undertakes to pay the amount of R70 000.00 into your bank account on date of registration, on condition that all simultaneous transactions will register successfully and that the guarantees in our favour will pay out successfully.”

[17] The contents of the letter is simply nonsensical if measured against the facts and the history of the matter. There was neither an obligation derived from the deed of sale for insistence on a guarantee from the applicant to secure the purchase price, nor was it necessary. The purchase price and costs had already being paid on the date the deed of sale was concluded, the written proof of which was supplied to the fourth respondent. The deed of sale was never amended by the parties.

[18] On 25 May 2015 the applicant attended the offices of the third respondent. The first respondent was also called to attend. He was, however, not prepared to discuss the matter but informed the applicant that he had sold the property to the applicant for R700 000.00 and that the amount had not been paid. He refused to partake in the discussions. This change of tack by the first respondent is surprising. He cannot be taken seriously without production of a written deed of sale evidencing that he had sold the property for R700 000.00 to the applicant.

[19] The first and second respondent in their answering affidavit aver that the obligation to transfer the property into the name of the applicant is a debt as envisaged by the Prescription Act.⁵ The applicant settled all the transfer costs on 7 July 2005 and acquired the right to transfer of the property on that date. The application to effect transfer of the property was launched on 11 May 2015 which is more than three years after that date upon which the debt became due. The claim therefore has been extinguished by means of prescription.

[20] The applicant answered the allegations in its replying affidavit by stating that it complied with its obligations on 7 July 2005 by making payment of the purchase price plus an advance of R45 000.00 to cover the estimated costs of transfer and the costs of preparation of the deed of sale. The applicant performed its reciprocal contractual obligation and it is for the respondents still to perform their reciprocal part of the contract. It is contended by the applicant that it is not open to the respondents to rely on prescription.

[21] The version of the applicant is not seriously disputed by the first and second respondents, and, is therefore, accepted as the correct exposition of the events for the purposes of the decision whether the claims of the applicant have prescribed.

[22] It is clear from a simple reading of clause 2 of the deed of sale that the agreed purchase price was R25 000.00, which was payable to the fourth respondent, as the appointed conveyancer, on the date of registration of the transfer of the property into the name of the applicant.

⁵ Act 68 of 1969.

- [23] Clause 5.2 stipulates that the costs of the registration and incidental costs are payable on demand. The demand was made by way of the account in the amount of R3 856.80 rendered to the applicant by the fourth respondent. The amount of R70 000.00 was paid to the first and second respondents which included both the amount in respect of the account rendered and the purchase price.
- [24] Performance, admittedly, was not strictly in terms of the contract, but the first and second respondents accepted payment of the purchase price and costs in the amount of R70 000.00, instead of insisting on the purchase price be paid to the conveyancer on date of transfer as stipulated. The first and second respondents, therefore, waived that term in the deed of sale. The result is that the applicant duly performed all its obligations in terms of the deed of sale.
- [25] There is no doubt that an overpayment in respect of the purchase price and the attended costs had been made by the applicant in terms whereof the first and second respondents were unjustly enriched.
- [26] In *Van Staden v Fourie* ⁶ the Appellate Division referred with approval to the following statements in respect of prescription of the right to reclaim an overpayment.

“By terugvorderingsregte loop verjaring van die dag waarop die terugvorderaar presteer het – sy terugvorderingsreg ontstaan immers op daardie dag.”

Ter staving van hierdie stelling verwys die geleerde skrywers na ‘n aantal beslissings van ons Howe. In *The Liquidators of the Paarl Bank v Roux and Others* (1891) 8 SC 205 het dit gegaan oor die verjaring van ‘n *condictio indebiti*. Op 208 sê De Villiers HR:

⁶ 1989 (3) SA 200 (A) 215B-D.

‘...(H)having paid out the money under this mistake of fact, she is entitled to the *condictio indebiti*. But the further question arises, when would her cause of action accrue?...Her cause of action would arise immediately after she had paid the money – so soon she was entitled to get it back.’”

[27] The next aspect which must be addressed is whether the claim for repayment and the claim for transfer of the property into the name of the applicant is a “debt” as envisaged by section 10(1) of the Prescription Act which provides that:

“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.”⁷

[28] The term “debt” is not defined in the Prescription Act but it was given the meaning ascribed by the Shorter Oxford Dictionary⁸ to wit:

“1. Something owed or due; something (as money, goods or service) which one person is under the obligation to pay or render to another.

2. A liability or obligation to pay or render something; the condition of being so obligated.”

[29] The Constitutional Court preferred a narrow interpretation of the term “debt” and held that it does not include every obligation to do or to refrain from doing something apart from payment or delivery, as was held in *Desai NO v Desai and Others*.⁹

[30] A personal right accrued to the applicant by virtue of fact that the applicant has made a payment which was not owing to the first and second respondents to claim repayment of the said amount. The obligation to repay the amount of R41

⁷ s 11 (d) provides that: “The period of suspension of debts shall be the following: (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.”

⁸ *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) 340 (A) 334E-G; *Makate v Vodacom Ltd* 2016 (4) SA 121 CC para 85.

⁹ 1996 (1) SA 141 (A) 146I.

143.00 which was overpaid is a "debt" as envisaged by the Prescription Act which became immediately due and payable by the first and second respondent on 7 July 2005. Prescription began to run as soon as the debt is due.¹⁰ The claim for repayment which is in essence an enrichment claim, on the facts, has prescribed on 7 July 2008.

[31] If the contents of the letter written by the fifth respondent is taken on face value the first respondent, on 18 September 2008, acknowledged that the first and second respondents are obliged to effect transfer of the property into the name of the applicant.

[32] Section 14 of the Prescription Act reads:

"(1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor

(2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or any time thereafter the parties postpone the due date of the debt, from the date upon which the debt again becomes due."

[33] The evidence contained in the letter is inconclusive to hold that the first respondent acknowledged that they are indebted to the applicant in the amount of R41 143. 20. But even if it is accepted that the acknowledgement interrupted the running of prescription, the running of prescription, would have commenced afresh from 18 September 2008 for a period of 3 years. The debt would have prescribed on 19 September 2011 under such circumstance.

¹⁰ s 12 of the Prescription Act. *Benson v Walters* 1984 (1) SA 73 (A); *Santam Ltd v Ethwar* 1999 (2) SA 244 (SCA).

[34] A valid contract of sale is concluded:

"When parties who have the requisite intention agree together that the one will make something available to the other in return for the payment of a price the contract is a sale"¹¹

[35] The right on the one hand to claim transfer of the property and the obligation to transfer the property, on the other, has arisen *ex contractu* on the date that the applicant complied with its obligation to pay the purchase price and costs. On that date a right of action accrued to the applicant to claim specific performance.¹²

[36] The first and second respondent is obliged to render the property in terms of the contract of sale to the applicant. There is no doubt that a claim for the purchase price constitutes a debt for the same reason that a claim for specific performance of the purchase price constitutes a "debt." A claim for transfer of the property, is in my judgment a "debt" as envisaged by the Prescription Act.¹³

[37] The right to claim transfer of the property, has prescribed on 7 July 2008. The acknowledgement by first respondent on 18 September 2008 that the property be transferred to the applicant was made after the claim has prescribed, but in any event, if I am wrong, the acknowledgement had the effect of interrupting prescription. The running of prescription, therefore, started afresh on 19 September 2008 and ran until 19 September 2011 when the claim prescribed, yet again.

¹¹ Kerr AJ *The Law of Sale and Lease* 3rd ed LexisNexis Durban (2004) 3.

¹² *Drennan Maud & Partners v Town Board of the Township Pennington* 1998 (3) SA 200 SCA 212F-J.

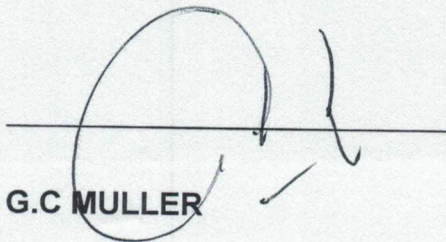
¹³ *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA) par 19; *Frieslaar NO v Ackerman* (1242/2016) [2017] ZASCA 3 (2 February 2018) par 21.

[38] The declaratory orders claimed are premised on the sustainability of the claims for repayment of the amount of R41 143.20 and transfer of the property into the name of the applicant, both of which have prescribed. It is unfortunate, but the applicant has itself to blame for the state of affairs. Its dilatoriness to institute proceedings promptly is the cause of its misfortune.

[39] The point *in limine* that the claims of the applicant have prescribed, is upheld

ORDER.

The application is dismissed with costs, such costs to include the reserved costs.

A handwritten signature in blue ink, consisting of a large, stylized 'G' followed by 'C' and 'MULLER', is written over a horizontal line.

G.C MULLER

JUDGE OF THE HIGH COURT, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

DATE OF HEARING	:	25 March 2019
DATE OF JUDGEMENT	:	27 March 2019
APPLICANT	:	Adv PW Makhambeni
RESPONDENT	:	Mr SN Mokone