IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.

DATE 3/03/2015. SIGNATURE

CASE NO: 39602/2013

DATE: 4/3/15

IN THE MATTER BETWEEN:

LISBON ESTATES (PTY) LTD (IN LIQUIDATION)	**FIRST PLAINTIFF**
THEODOR WILHELM VAN DEN HEEVER N.O.	**SECOND PLAINTIFF**
SEIPATI JANE SEGOLELA N.O.	**THIRD PLAINTIFF**
AND	
TRYPHINAH MOKOENA N.O.	**FIRST DEFENDANT**
NOMSA NUHLAWURI MANYIKE N.O.	**SECOND DEFENDANT**
MADODA ISAAC TJIE N.O.	**THIRD DEFENDANT**
TOBANI MICHAEL KHOZA N.O.	**FOURTH DEFENDANT**
SIPHO DAVID MATHEBULA N.O.	**FIFTH DEFENDANT**

JUDGMENT

KOLLAPEN J:

1. The plaintiffs have instituted action by way of summons seeking payment of the sum of R8 million arising out of what they contend was the

misappropriation, at the instance of the defendants, of a mango crop they owned on a farm situated on the remaining extent of Farm Lisbon 297, Mpumalanga.

2. The defendants have defended the matter and have filed a special plea as well as a plea on the merits. The special plea is a plea of prescription.

3. At the commencement of the trial the parties sought an order in terms of Rule 33(4) of the Uniform Rules of Court seeking a separation in respect of the determination of the special plea from all of the other issues in dispute. The Court, satisfied that it was expedient to do so in the interests of possibly curtailing the duration of the trial, made such an order and the determination of all the other matters in dispute, save for the special plea, was postponed *sine die*.

4. The second plaintiff, Mr Theodor van den Heever, testified on behalf of the plaintiffs while Ms Badenhorst testified in the defendant's case.

<u>THE FACTUAL BACKGROUND</u>

5. The first plaintiff is in final liquidation and the second and third plaintiffs are its duly appointed liquidators. The final order of liquidation was granted on the 3rd of March 2009 preceded by a provisional order on the 11th of December 2008. The second and third plaintiffs were appointed as liquidators on the 21st of September 2009.

6. All the defendants are cited as trustees of the Nhlangwini Trust ('the Trust') which is the owner of the property known as Farm Lisbon. In August 2004 the first plaintiff, then known as Gazankulu Vrugteboerdery (Pty) Ltd, concluded a

lease agreement in terms of which the first plaintiff leased the farm from the Trust for the purpose of conducting farming operations.

7. The farm was used for the cultivation of mangos and the case for the plaintiff is that during the 2008/9 season, it was the owner of a mango crop worth no less than R8 million to which it was entitled and was ready to harvest for its benefit. The plaintiff alleges that the Trust instructed various people to harvest and sell the mango crop and that it has, on account of this misappropriation of the crop, suffered damages in the sum of R8 million, being the value of the crop.

8. The parties are in agreement that prescription commenced to run from the 21st of September 2009 when the second and third plaintiffs were appointed as liquidators and that summons in this matter was served on the 2nd of July 2013, which on the face of it, is outside the three year period.

9. Mr Van den Heever testified that after the provisional order of liquidation, he visited the farm and interacted and engaged with amongst others, Frank Mhlongo, Doctor Sibuyi and one Jones, all of whom he believed were trustees of the Trust at the time and during his visits he observed the harvesting of the mangos. After his final appointment he convened an inquiry at the Tzaneen Magistrates' Court for the interrogation of Mr Mhlongo and Mr Sibuyi which occurred around May 2010. It is not in dispute that Mhlongo, Sibuyi and eight others were the trustees of the Trust during that time. They were however replaced by the first to the fifth defendants on the 3rd of February 2011.

10. It was not clear from the evidence of Mr van den Heever what transpired after the 2nd of May 2010 until February 2012 when summons was issued against Mhlongo and nine others, all cited as trustees of the Trust, for the recovery of the R8 million. Mr Van den Heever testified that he understood from his interactions with Mhlongo and Sibuyi that they were the trustees, they

represented the Trust, and that regard being had to the make-up of the Trust, they would always be trustees.

11. When the Trust was summoned in February 2012, Mr van den Heever used information that was on file relating to the liquidation of the first plaintiff in order to identify the trustees of the Trust. He described it as information sourced from Absa Bank. It was not a letter of authority and he accepted that given that the provisional order was made in December 2008, the information would have been from around that time period.

12. After service of summons, default judgment and a *nulla bona* obtained, sequestration proceedings commenced against the ten trustees cited in the action. This occurred in June 2012.

13. In the period July 2012 to September 2012 Mr van den Heever held various meetings with the representatives of the community with a view to resolving the dispute and met in particular with Mr Isaac Tjie, the third defendant in this action. He states that he was never told that there was a change in the composition of the trustees although he formed the clear impression at the time of these meetings that there was strife and division in the Trust and that different groups were seeking to secure appointments with the Master as trustees.

14. The default judgment obtained against the trustees was abandoned in July 2013 and the provisional sequestration order was set aside without opposition. A new summons was prepared, issued and served on the 27th of June 2013 and it is the subject of the current action.

15. Mr van den Heever's stance was that acting in good faith he was under the impression that the trustees who were cited in the 2012 action were the appointed trustees and in support of this he stated that Mr Mhlongo and Mr

Sibuyi, whom he dealt with, appeared on the list of trustees he had sourced from the liquidation file.

16. In cross-examination he conceded that no inquiry was made at the office of the Master of the High Court to obtain current information prior to the issue of the 2012 summons and that while it was preferable and important to have done so, he was brought under the impression that there was no change in the composition of the trustees. In this regard he had no interaction with Mhlongo or Sibuyi after May 2010 and he made an assumption from the Absa Bank document he found on file that the trustees in 2012 when summons was being prepared, were the same as those reflected on that document. As stated earlier it is not clear what document was being referred to but it must have been a document from at least 2008.

17. Ms Badenhorst testified that she worked at the office of the Master of the High Court in Pretoria for some years and while no longer employed there, she continues to work with and interact with that office. She states that the procedure for obtaining a copy of a letter of authority in a Trust is relatively simple. A written request with reasons is submitted to the Master and the copy of the Letter of Authority is then provided after payment of a fee for copying. The process takes about three days from request to receipt of the document requested.

ANALYSIS

18. The crisp issue for determination in the adjudication of the special plea is whether regard being had to Section 12(3) of the Prescription Act 68 of 1969, it could be said that reasonable care had been exercised by the plaintiffs to establish the identity of the defendants. Section 12(3) provides as follows:

> *"(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."*

19. The defendants have also raised two other issues which may require determination depending on how the above issue is resolved. They are briefly that in terms of Rule 14, the Trust could have been sued as a firm. Secondly, that even if the incorrect defendants were cited in the 2012 action, an amendment was possible to cure the defect.

20. On what is before me and regard being had to the factual sequence, which is substantially not in dispute, can it be said that the plaintiffs exercised reasonable care in their attempts to identify the debtors?
In ***GERICKE v SACK* 1978 (1) SA 821 (AD)** the Court said:

> 'In order to determine the meaning which the Legislature intended to give to the words "identity of the debtor" in section 12(3) of the Prescription Act, 68 of 1969, they should be read in the context in which they are used in the Act. In order to establish such identity, regard will have to be had to the particular circumstances of each case, but for practical purposes there should be sufficient information for the process-server to be able to identify the debtor by name and address.'

21. In ***GUNASE v ANIRUDH* 2012 (2) SA 398 (SCA)** the Court expressed itself as follows:

> 'Section 12(3) imposes a duty on the creditor to exercise reasonable care to obtain knowledge of the identity of the debtor and the facts from which the debt arises. A creditor is not allowed to postpone the

commencement of the running of prescription by his failure to take necessary steps. In *Burley Appliances Ltd v Grobbelaar NO and Others* 2004 (1) SA 602 (C) at 607G Nel J said that-

> 'the declarator is contrary to the established principle that a creditor cannot by supine inaction arbitrarily and at will postpone the commencement of prescription'.

See also *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another (2)* 2005 (6) SA 23 (C) para 26; and *Uitenhage Municipality v Molloy* 1998 (2) SA 735 (SCA) at 742A-C

In *Drennan Maud & Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) at 209F-G Oliver JA said:

> 'Section 12(3) of the Act provides that a creditor shall be deemed to have the required knowledge "if he could have acquired it by exercising reasonable care". In my view the requirement "exercising reasonable care" requires diligence not only in the ascertainment of the facts underlying the debt, but also in relation to the evaluation and significance of those facts. This means that the creditor is deemed to have the requisite knowledge if a reasonable person in his position would have deduced the identity of the debtor and the facts from which the debt arises'

In *Leketi v Tladi NO and Others* [2010] 3 All SA 519 (SCA) para 18 Mthiyane JA said:

> 'It seems to me that the adverse operation of s 12(3) is not dependent upon a creditor's subjective evaluation of the presence or absence of "knowledge" or minimum facts sufficient for the institution of a claim. In terms of s 12(3) of the Prescription Act, the "deemed knowledge"

imputed to the "creditor" requires the application of an objective standard rather than a subjective one. In order to determine whether the appellant exercised "reasonable care", his conduct must be tested by reference to the steps which a reasonable person in his or her position would have taken to acquire knowledge of the "fraud" on the part of Albert'

22. Clearly on the uncontested evidence, the information with regard to the identity of the debtor (the Trust) was available at the office of the Master and I did not understand Mr van den Heever, a liquidator of some standing and with considerable experience, to say he was unaware of this. A reasonable person in the position of the plaintiff would have accessed that information using the available procedures and that would have ensured that the identification of the debtor(s) to be sued was ascertained with certainty and accuracy.

23. Whatever Mr van den Heever may have believed at the time is hardly relevant given the view expressed by MTHIYANE JA in ***LEKETI*** (supra) that the deemed knowledge is to be assessed objectively and not subjectively .

24. In my view it could hardly be said that any steps worthy of mention were taken to identify the debtor. The reliance on a 2008 document to issue summons in 2012 was unreasonable and accordingly I must conclude that it could hardly be said that the plaintiff exercised reasonable care in the circumstances of the matter.

25. In the circumstances the special plea must be upheld.

ORDER

26. I make the follow order:

    i. The special plea is upheld with costs.
    ii. The action is dismissed with costs.

N KOLLAPEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

36902/2013

HEARD ON: 10 FEBRUARY 2015

FOR THE PLAINTIFFS: Adv P.F. Rossouw AND Adv. B. HUTCHINSON

INSTRUCTED BY: DE VRIES INCORPORATED (ref: A Bonnet/BH/Lvdn/D&T67/0001)

FOR THE DEFENDANTS: ADV. A P J ELS

INSTRUCTED BY: WIEKUS DU TOIT ATTORNEYS (ref: du Toit/N9/13)