

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case Nr: 5469/2007

In the case of:-

ANDERSON ANGELINA

Plaintiff

and

ELMER JUNIUS BREDEKAMP N.O.

Defendant

*(In his capacity as executor of the estate
of the late Violet du Plessis)*

CORAM:

MURRAY, AJ

JUDGMENT BY:

MURRAY, AJ

HEARD ON:

14 & 15 OCTOBER 2014

DELIVERED:

8 JANUARY 2014

- [1] This judgment pertains to the Special Plea of prescription which by agreement is adjudicated separately. The quantum and merits stand over for later adjudication.

[2] In brief, the Plaintiff received, in terms of a Deed of Gift (“the Deed”) two erven as a gift from her late mother (“the mother”) on 26 September 1994. The erven formed part of Sub-division 7 of the consolidated farm Louterwater No 77 in the district of Parys which was registered in the mother’s name. The Plaintiff built a house on the said erven in 1995 and effected further improvements to it in 1998 and 2002, but since the Deed contradicted the provisions of the *Subdivision of Agricultural Land Act, 70 of 1970*, (“the Act”), Louterwater was never sub-divided in order to transport the erven to the Plaintiff. (See: **Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others¹**).

[3] The Plaintiff now offers restitution of her occupancy of the erven and claims from the deceased estate in an enrichment action payment of R548 527.00, being the value of the fixed improvements she had made to the land in the *bona fide* belief that the Deed was valid and that she was to be the sole heir of the undivided property. Her step-brother (“the brother”), the executor of her mother’s estate, and in terms of the mother’s last Will the sole heir, occupies the Plaintiff’s house and avers in a Special Plea on behalf of the estate that her claim has prescribed.

[4] The enrichment action stems from a long history of family discord. The mother executed a series of Wills since 1989 and her beneficiaries and

¹ [2008] JOL 22099 (CC) paras [13], [97] and [103] and footnotes 5, 87s.

heirs varied from Will to Will. Originally, in 1989, she bequeathed the property *“in two equal shares”* to her two children, the Plaintiff and the brother. In a new Will on 6 May 1998 she left the entire property to the Plaintiff; in 2004 she left the entire property to the brother on condition that the Plaintiff be allowed to remain in her own house for as long as she wished to, and in her last Will in 2005 she simply left everything to the brother. She passed away in 2011 at the age of 93, having been under curatorship since 2008, and the brother now farms the still undivided property,

[5] The brother came to live with the mother at some unknown date and around 2002 the relationship between the mother, the Plaintiff and the brother soured to such an extent that in 2004 the brother sealed off the gate to the farm with red tape and refused the Plaintiff access to her own house. For a while thereafter the relationship between the Plaintiff and the brother improved, but in 2006 the brother secured the gate with a new lock, finally locking out the Plaintiff. After several unsuccessful attempts to have the erven transferred to her name, the Plaintiff on 15 November 2007 instituted action against the mother for R 1 500 000.00, alleged to be the value of the two erven including the house.

[6] In the original Plea in January 2008 the Defendant pleaded that the Plaintiff's house was an unlawful structure because it was built without

the consent of the Rand Water Board (“Rand Water”) and averred that, since the last improvements were finalised by 31 December 1997, the Plaintiff’s claim had prescribed by 31 December 2000. The Defendant expressly denied that the Deed did not comply with the provisions of the Act and specifically pleaded that if it were found not to comply, such non-compliance did not make it invalid.

[7] On 25 April 2013, however, in an abrupt about-face in the Amended Plea the Defendant specifically pleaded that the Deed was indeed void and invalid *ab initio* because of its failure to comply with the Act. The Deed was no longer alleged to be invalid because of the Plaintiff’s failure to obtain the necessary consent from Rand Water. The Defendant instead averred that the Plaintiff was not *bona fide* in that she knew before building the house in 1995 that the land could not be subdivided without the Minister’s consent and that she nevertheless built the house on the mother’s land without such consent.

[8] On 24 July 2013 the Plaintiff amended her Particulars of Claim. She then claimed from the deceased estate on the basis of enrichment R917 385.00, alleged to be the building costs of the house. On 9 October 2014 she filed a Further Amended Particulars of Claim in which she claimed only R 548 527.00, alleged to be the costs of the improvements alone. She also averred, *inter alia*, that she was

informed of the invalidity of the Deed in 2006 only, after the brother had finally locked her out of her house, and that she had always acted in the *bona fide* belief that she was to be the sole heir anyway.

[9] The Defendant on 15 October 2014, the second day of the trial, filed a further amendment to the Special Plea contained in its 2013 Amended Plea. It pleaded in the alternative that further improvements to the Plaintiff's house were finalised by 31 December 2002 and that her claim would therefore have prescribed by 31 December 2005. In the further alternative the Defendant pleaded that, should it be found that the Plaintiff's claim had been suspended because of the provisions of section 12(3) of the Prescription Act, 68 of 1969 ("the Prescription Act"), prescription started running when the Plaintiff on 15 July 2004 instructed her attorneys to enforce the Deed.

[10] In the said 2004 letter of demand the Plaintiff's attorneys claimed in the alternative to signing of the transfer documents, payment of the market value of the house. The Defendant averred that the demand for payment could only have been necessary if the Deed were invalid. The Defendant therefore alleged that on that date the Plaintiff knew that the Deed was invalid or had constructive knowledge of the facts necessary to sustain her cause of action. In its view her claim therefore prescribed

on 15 July 2007, four months before her summons was served on 15 November 2007.

[11] In **Macleod v Kweyiya**² the Supreme Court of Appeal confirmed that a defendant bears the full evidentiary burden to prove a plea of prescription, including the date on which a plaintiff obtained actual or constructive knowledge of the debt. The Defendant therefore bears the onus of proving one of the three prescription dates listed in the Amended Special Plea, namely 31 December 2000; 31 December 2005, or 15 July 2007. The Plaintiff denies that her claim has prescribed and claims to have had knowledge of all the material facts necessary to sustain her cause of action only in 2006 when an attorney advised her of the invalidity of the Deed.

[12] It is trite that in terms of s 11(d) read with s 12(1) of the Prescription Act civil debts prescribe three years from the date on which the debt is due, provided that the debt is immediately claimable and the various components of the cause of action have fully accrued.³

[13] In certain circumstances s 12(3) of the Prescription Act delays prescription, however. As confirmed in **ATB Chartered Accountants**

² 2013 (6) SA 1 (SCA) at paras [9] – [10] and [13] at 6A – 7D and 7J – 8D.

³ Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd 1991 (1) SA 525 (A) at 532G – I and Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A) at 838 – 839.

(SA) v Bonfiglio⁴ in terms of s 12(3) of the Prescription Act a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and 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.

[14] In the present case the identity of the debtor (the mother) was always known. The dispute is about the date on which the facts sustaining the Plaintiff's cause of action were known or could have been known with the exercise of reasonable care, i.e. when everything has happened which could entitle the Plaintiff to institute action and to pursue her claim.⁵ What does need to be determined *in casu* therefore is the date on which the Plaintiff acquired, or could reasonably have acquired with reasonable care knowledge of the facts from which the debt arose.

[15] The Supreme Court of Appeal has determined that what is required for prescription to start running, is knowledge of the minimum facts necessary to institute action.⁶ It has also determined that in order to successfully invoke s 12(3) of the Prescription Act either actual or constructive knowledge of such facts must be proved.⁷ Constructive knowledge is established if the creditor could reasonably have acquired

⁴ [2011] 2 ALL SA 132 (SCA) at p. 133

⁵ ATB Chartered Accountants, *supra*, at p. 136 and Truter and Another v Deyssel [2006] JOL 16961 (SCA) at para [16]

⁶ Claassen v Bester, 2012 (2) SA 404 (SCA), at paras [14] and [15]

⁷ Macleod v Kweyiya, 2013 (6) SA 1 (SCA) at para [9]

knowledge of the identity of the debtor and the facts on which the debt arises by exercising reasonable care. The Defendant in the present matter is clearly relying on constructive knowledge.

[16] The test for such constructive knowledge is what a reasonable person in the Plaintiff's position would have done to acquire the necessary knowledge.⁸ In order to delay prescription in terms of s 12(3) the Plaintiff is therefore expected to act reasonably and with the diligence of a reasonable person in acquiring the said knowledge. It has been held that she *"cannot simply sit back and by supine inaction arbitrarily and at will postpone the commencement of prescription"*.⁹

[17] In **Claasen v Bester**¹⁰ the Court held, furthermore, that the invalidity of a provision was a conclusion of law and not a fact and that knowledge of legal conclusion, i.e. that the known facts constitute invalidity, was not required for prescription to commence¹¹. It would suffice if the Plaintiff had knowledge of the minimum facts which were necessary to institute action¹² and which could sustain such conclusion.

[18] In view of the above, it was argued for the Defendant that the advice given to the Plaintiff by her attorneys in 2006, namely that the Deed was

⁸ Drennan Maud & Partners v Pennington Town Board 1998 (3) SA 200 (SCA) at 209F – G.

⁹ Uitenhage Municipality v Molloy 1998 (2) SA 735 (SCA) at 742A – C.

¹⁰ 2012 (2) SA 404 (SCA) at paras [1], [3] and [12] – [16] at 405F – G, 405I – 406B and 407I – 408I.

¹¹ Truter and Another v Deyssel 2006(4) SA 168 (SCA) at para [20]

¹² Minister of Finance and Others v Gore NO 2007 (1) SA 111 (SCA) at para [17]

invalid because of non-compliance with the Act, was merely a legal conclusion and not a fact, and that prescription was not delayed until she actually had knowledge of such legal conclusion. On that basis, it was argued, she had knowledge or at the very least constructive knowledge, of the material facts necessary to issue summons on 15 July 2004 and that, therefore, her claim prescribed on 15 July 2007.

[19] To determine whether that is indeed so, one needs to examine the circumstances in which the Plaintiff found herself at that time to determine if she did what a reasonable person with her characteristics in her circumstances would or should have done to obtain such knowledge, keeping in mind that in Administrator, Cape v Olpin¹³ it was emphasised that s 2(2)(c) of the Prescription Act required only “*the exercise of reasonable care*” in acquiring the necessary knowledge, “*not heroic deeds or exceptional diligence or prudence in an extreme degree on the part of the creditor...*”.

[20] It may be so that prescription would not have been delayed until she was informed that the Deed was invalid, or until she had knowledge of the full extent of her legal rights¹⁴ but she would still need to have had knowledge of all the facts that would have led to such a conclusion and

¹³ 1996 (1) 569 (C) at 577H

¹⁴ Truter and Another v Deyssel [2006] JOL 16961 (SCA) at para [18]

that she would have had to prove, if traversed, in order to support her right to judgment in her favour.¹⁵

[21] The Plaintiff's summons was served on 15 November 2007. The question before the court is thus whether the Plaintiff had actual or deemed knowledge of "*the facts from which the debt arises*", i.e. that there was no Ministerial permission for sub-division and that she was therefore not entitled to sub-division and transport in terms of the Deed, prior to 15 November 2004.

[22] It was argued on behalf of the Plaintiff that what the proviso to section 12(3) of the Prescription Act seeks to prevent is negligent, not innocent, inaction and that she was not guilty of negligent inaction. It is trite that the object of s 12(3) is to ensure that it is negligent rather than innocent inaction that is penalized.¹⁶ In **Brand v Williams**¹⁷ it was stated that:

"The main object of extinctive prescription is no doubt to create legal certainty and finality between the parties after a lapse of time. But prescription does not simply serve as a blunt instrument to achieve finality regardless of the circumstances of the creditor.¹⁸
... This is recognised in s 12(3) ..."

[23] The constructive knowledge contemplated in s 12(3) has been held to be established if it can be shown that the creditor could reasonably

¹⁵ Truter v Deyssel, *supra*, at para [19].

¹⁶ M M Loubser: Extinctive Prescription, 1996, at pp. 105 and 107..

¹⁷ 1988 (3) SA 908 (C) at 9138C (As quoted in Kriel v Meyer & others [2011] JOL 28018 (E))

¹⁸ MM Loubser: "Toward a Theory of Extinctive Prescription" (1988) 105 SALJ 34 at 53..

have acquired knowledge of the identity of the debtor and the facts on which the debt arises by exercising reasonable care. In the present case the identity of the debtor has never been a problem: it was always the mother or her estate. What does need to be determined *in casu* is the date on which the Plaintiff either acquired, or could reasonably have acquired with reasonable care knowledge of the facts on which the debt arose.

[24] What is reasonable must be determined according to the Court in **McLeod v Kweyiya**¹⁹ with reference to the particular circumstances in which the Plaintiff found herself. Such circumstances and the reasonableness of the Plaintiff's conduct need to be determined from the evidence. In the instant case only the brother and the Plaintiff testified and their evidence therefore needs to be examined.

[25] The brother focused on the defence in the original Plea, namely the Plaintiff's alleged failure to obtain permission from the Rand Water Board before building her house in 1995. On his version she has known since then that the Deed was invalid. He averred that he and the Plaintiff each received two erven in terms of similar Deeds of Gift in 1994 and that they visited Rand Water together to determine what was needed to build on the erven which were adjacent to the Vaal River.

¹⁹ *Supra*, at paras [13]

According to him, a certain Mr du Plessis informed them that the Deeds 'were of no use' and that a second house could not to be built on the farm.

[26] When he took the Plaintiff's building plans to the Department of Health in Parys, hoping to get their approval instead, he was told that, even though there was nothing wrong with the plans, the Plaintiff would still need Rand Water's permission. According to him the Plaintiff in 1995 went ahead and built the house anyway, even extending it in 1997 and 2002, while she knew that the Deed was invalid for lack of Rand Water's permission.

[27] He averred that in 2003 a dispute arose between the Plaintiff, the mother and himself regarding some fence which the Plaintiff allegedly tried to move to increase the size of her property. Though by then he was living with his mother, he professed to have known nothing about his mother's alleged intention to sell the farm until he took her to an attorney to write to the Plaintiff regarding *inter alia* the fence and the latter's continued attempts to persuade the mother to sell the property. He maintained that he had discovered in the Plaintiff's house a document which showed that she had contracted a surveyor to divide the property in two in 1997 already.

[28] In cross-examination when asked if he agreed that the Rand Water permission had nothing to do with sub-division, he merely said it was not within his knowledge and repeated that Rand Water had informed them that it would be unlawful to build there. Though the Defendant's present case is that the Deed was invalid because of non-compliance with the Act, not because of a lack of permission from Rand Water, and that its invalidity prevented sub-division of the farm, he did not address that issue at all, but merely insisted that the Plaintiff has known since 1994 that the Deed was invalid. The averment in the Amended Plea that the Plaintiff was not *bona fide* because she knew before building the house that she would need the Minister's permission was merely averred in a bald statement.

[29] In cross-examination he also had to concede that he had no knowledge of the circumstances surrounding the 1997 surveyor-document, and that he could not deny that it could have been drafted to facilitate potential future sub-division as alleged. He merely insisted that the plan was drafted without his and the mother's knowledge. He had to concede, furthermore, that he did not know when exactly the Plaintiff's attorney advised her of the invalidity of the Deed or when the Plaintiff first knew of the Will of 6 May 1998.

[30] The Plaintiff testified that she only learnt of the invalidity of the Deed from an attorney, one Mr de Wet, in 2006. Before then, she was unaware that she could not obtain transport in terms of the Deed and she was unaware of the need to obtain the Minister's consent for subdivision. She denied that she had accompanied the brother to Rand Water and averred that she and her mother spoke to a Mr Hogue by telephone and that the mother was informed by him that there could not be two houses on the farm. She maintained that her mother then told him that it was her land and that she gave the Plaintiff permission to build on it.

[31] She testified, furthermore, that she drew the information regarding the requirements for building in that area from the Internet, contrary to the brother's averment that Mr du Plessis gave her the relevant document. She testified that she did obtain Rand Water's permission, as shown by the 1994 "*approved regarding health issues*" stamp on the plans included in the trial bundle and that she reconfirmed the said approval with Mr Hogue just a month before the trial. She maintained that the house was 80 meters above the flood line and that she therefore needed no other permission from Rand Water.

[32] Regarding the Defendant's contention that she should have had constructive notice of all the facts necessary to sustain her cause of

action in July 2004 when she instructed her attorneys to enforce registration of the erven or pay her the value of the improvements on the land, she explained that at that time she only gave the instructions to stop her brother from harassing her by locking her out of her own house. The demand for payment was added only to give her mother an alternative option, although she knew that her mother would rather give her the erven than the money. She insisted that the money was not claimed on the basis of enrichment but simply to provide for potential loss if transport should be refused and the house were allowed to stay empty and be ransacked.

[33] She testified that she never received any reply to or feedback on that 2004 letter. She did not follow up on the attorneys' threat of legal action as there was no need to do so since the relationship between her and her brother had improved to the extent that he no longer denied her access to her own house. And she still had the *bona fide* belief that she was to inherit the entire property when her mother died.

[34] In 2006, however, when the brother finally locked her out by changing the lock on the entrance gate, she consulted a new attorney, one Mr de Wet. He was the one who informed her that the Deed was invalid for non-compliance with the Act and told her that she could not rely on it for sub-division. Mrs Muller, her next attorney confirmed the said invalidity

of the Deed and in May 2006 told her that the Minister's permission was necessary for sub-division of the property. On her instructions Mrs Muller approached the mother in writing to request transport of the Plaintiff's erven, offering to draft the sub-division documents and obtain the Minister's consent. The Power of Attorney which she annexed, was faulty, however, since it purported to authorise transportation of the entire undivided property instead of the two erven only. When the request for transport and the alternative prayer for payment of the value of the house were refused, an enrichment action was instituted on 15 November 2007.

- [35] The Plaintiff insisted that she had built the house and effected the improvements in the *bona fide* belief that the Deed was valid and that she was to be the eventual heir of the entire undivided property which is why she made no effort to secure the sub-division of her erven before her brother locked her out of the property. She had no reason to doubt her mother's promise never to change the 1998 Will and to cut out the erven or compensate the Plaintiff if she would sell the farm.²⁰ That she only learnt that she was no longer the heir shortly after her mother's death in 2011 was not disputed. She explained, furthermore, that the claim which she submitted against the deceased estate in 2011 and which was based on the invalid 1994 Deed was so submitted because

²⁰ McLeod v Kweyiya, *supra*, at para [14].

she believed that the executor of the estate had the power to authorise the transportation of her two erven.

[36] Regarding the surveyor's document the brother found in her home, she explained that in 1997 a surveyor from Bloemfontein, one Mr du Plessis, visited the farm to do a survey for a proposed road. Since at that time the mother still talked about selling the farm, the Plaintiff asked him whether it would be possible to "*cut out*" her two erven and register them in her name if her mother should decide to sell and asked him to draft a plan for such a potential 'cut' in order to facilitate the registration of the erven in her name should a sale indeed occur.

[37] In view thereof that the evidence of the two witnesses in this matter is mutually destructive, the Court should ideally follow the approach adopted in **Kriel v Meyer and Others**²¹, namely to come to a conclusion on the disputed issues by making findings on the credibility of the various factual witnesses; their reliability; and the probabilities.

[38] In the circumstances of this matter, a credibility finding is rather difficult. Neither of the two witnesses made a particularly positive impression on the court. The acrimonious nature of the feud between them over the mother's property was very much in evidence in the accusations they

²¹ [2011] JOL 28018 (E) at p 18 and further

directed at each other. Both of them obviously have a vested interest in the outcome of the trial and both have reason and a motive to lie. While the brother appeared cold and calculated and remained totally expressionless throughout his testimony, the Plaintiff was very emotional, obviously extremely angry, and was quite agitated and at times almost incoherent. A further complication is that the relevant events span a period of 20 years which might be a perfectly good explanation for apparent inconsistencies in their evidence. All of the above made it extremely hard to distinguish between fact and fabrication.

[39] In my view, this is a typical case in which the problem is what weight to attach to the various factors. Although appearance and demeanour are obviously very important considerations in evaluating credibility, it is “*notoriously fallible as a decisive ground for decision*” and it is seldom be possible, as in the instant case, to draw a conclusion regarding their credibility simply by comparing the appearance and demeanour of one witness with that of the other²². See, for example, **S v Momokela**²³:

“After all it is common experience that the “demeanour” alone of a witness is but an unsafe guide in ascertaining the truth, because the nervousness of an honest witness may create a bad impression whereas the brazen and bold liar may easily deceive the observer into believing that he is telling the truth. In addition to the demeanour of the witness one should be guided by the probability of

²² Schmidt: Bewysreg, 4de uitgawe, at p. 106

²³ 1936 OPD 23 24

his story, the reasonableness of his conduct, the manner in which he emerges from the test of his memory, the consistency of his statements and the interest he may have in the matter under enquiry.”

[40] The Court had to keep in mind the warning that the danger of being misled was real since a liar may have a smooth tongue while a credible witness may appear hesitant and unsure, and that for that reason our courts pay more attention to objective factors such as the probabilities of the witness’s story measured against the facts in total; the absence or presence of prejudice or bias, corroborating elements, and so forth.²⁴

[41] The Plaintiff’s emotions appeared sincere, especially her spontaneous reaction when asked if she was jealous of her brother for being the sole heir: *“Nee, ek gun dit vir hom. Hy het al baie swaar gekry.”* (“No, he is welcome to it. He has had a very hard life.”). This ties in with her testimony that she had told her mother that she need not inherit anything apart from the two erven. I did not get the impression that she was attempting to lie, but rather that she believed in what she was trying to get across. She could explain apparent contradictions such as her averment that the note regarding “Annexure ‘C’” on her document *‘looked like’* her handwriting while she later said she did not know who wrote it. I accept, furthermore, that the passing of 20 years must

²⁴ Schmidt, *supra*, at p. 106.

certainly have had some influence on her memory of the finer details of some events. Of the material issues she seemed sure.

[42] She was not shaken in cross examination about the allegation that she was present during the Rand Water visit. She was not shaken, either, about her testimony that she only learnt in 2006 that the Minister's permission was necessary and that sub-division in terms of the Deed was impossible. She explained the steps she took in the past 20 years to protect her right to the erven that her mother "gave and bequeathed to her" in the Deed, and 'guaranteed' in the 1998 Will, when neither she nor her mother knew that the Deed was invalid.

[43] On her version in 2004 she still had the *bona fide* belief that she had a valid claim to the erven and the right of occupancy thereof in terms of the Deed. Her evidence that she was at stage still under the *bona fide* impression that in terms of the 1998 Will she would be the sole heir to the entire property upon her mother's death, was not contradicted. The mother was already 86 years old and had by then changed her mind about selling the property, so there was no need to obtain transfer other than to put a legal stop to her brother's obstructive behaviour. When the relationship with him normalised, the reason to obtain transfer also fell away. Until she was finally locked out of her own house in 2006, it was not necessary to institute an enrichment claim. When it was clear

that the brother meant to lock her out permanently, she went to see the two attorneys who advised her of the Deed's invalidity and of the need for Ministerial permission, and who subsequently issued summons on her behalf.

[44] All in all, it appears to me that the Plaintiff's evidence ties in with the totality of the circumstances known to the Court and that there is nothing inherently improbable about her version. I cannot find that she failed to act reasonably to obtain the necessary knowledge to institute action and therefore agree with Counsel for the Plaintiff that there is no indication that, in the circumstances of this case, she acted negligently or without due diligence to obtain knowledge of whatever facts were necessary to be established to prove her claim. She can certainly not be accused of ineptitude, indifference or inertia in obtaining the necessary knowledge.²⁵

[45] The brother's evidence was much more limited. There were no obvious contradictions in his evidence, but that might be because it was restricted primarily to the circumstances surrounding the building of the Plaintiff's house between 1995 and 2002. It seems improbable, as argued on behalf of the Plaintiff, that the Plaintiff would have gone to all the expense not only to build the house but also to improve and extend

²⁵ Loubser, *supra*, at p.106

it if she had known all along, as the brother averred, that the property could not be sub-divided. In cross-examination the brother had to concede that he did not know when exactly the Plaintiff was informed by her attorneys that the Deed was invalid or when she knew about the provisions of the 1998 Will.

[46] In the light of the peculiarities of this case and of the difficulties set out above, I am of the view that the probabilities of the Plaintiff's evidence when measured against all the facts of this case need to weigh stronger than the impression that she made in court. I cannot find that there are inherent improbabilities in her version that are so material that they are fatal to her averment that prescription has not obliterated her claim.

[47] In the final instance one has to decide, then, whether the Defendant has succeeded in discharging his onus to prove prescription in the circumstances of this case. The burden would have shifted to the Plaintiff only if the Defendant had established a *prima facie* case, not because the date the necessary knowledge was acquired may have fallen within the exclusive knowledge of the Plaintiff

[48] In my view the Defendant failed to prove the exact date on which the Plaintiff did or could have acquired knowledge of the necessary facts to prove her case. And there is no evidence, other than the brother's bald

averment, that she knew before 2006 of the lack of the Minister's permission and the Deed's non-compliance with the Act, and definitely not that the brother would move into her house and take over the property to her detriment and her mother's enrichment.

[48] I therefore find that the Plaintiff's claim has not prescribed and that the Special Plea should therefore be dismissed. There is no reason why costs should not follow the outcome.

WHEREFORE THE FOLLOWING ORDER IS MADE:

1. The Special Plea of prescription is dismissed with costs.

H MURRAY, AJ

On behalf of the Plaintiff:

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