FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 4621/2006

In the case between:

TSUI VINCENT MATSEPE (N.O)	1st Plaintiff
JEANINE ELIZABETH SAFFY (N.O)	2nd Plaintiff
CORNELIUS JOHANNES VENTER (N.O)	3rd Plaintiff

and

ANNA KATRINA JACOMINA STRYDOM	1st Defendant
GIDEON JOUBERT DU PLESSIS	2nd Defendant
MARIUS STRYDOM	3rd Defendant

JUDGEMENT: MOCUMIE, J

DELIVERED ON: 25 MARCH 2010

MOCUMIE J

INTRODUCTION

[1] The three plaintiffs, two attorneys and a clerk in an attorneys' firm, were appointed curators by the Master of the Free State High Court on 09 November 2005 in the insolvent estate of Mr Anton Herbst Taute ("Taute"). Taute used to be the sole

trustee of Greef Boerdery Trust ("Greef Trust") IT 2076/98, which was finally sequestrated on 08 September 2005.

[2] The three defendants are sued in their capacity as trustees of Riverside Beleggings Trust ("Riverside Trust") IT 263/73 for an amount of R164 160, 00 plus interest, in essence for goods sold and delivered.

[3] The plaintiffs claim that in Bloemfontein, during November 2001, Greef Trust represented by JC Greef, and Riverdale Trust, represented by C M Strydom (apparently third defendant), entered into an oral agreement later, confirmed in writing. The salient alternatively the tacit, further alternatively the implied terms whereof were the following:

3.1 Greef Trust sold to Riverside 48 head of cattle for an amount of R164 160, 00 inclusive of Value Added Tax (VAT);

3.2 It was the responsibility of Greef Trust to transport the livestock from Bloemfontein to Aliwal North on 06 November 2001, whereupon the defendants will pay

Greef Trust the purchase price within a reasonable time.

[4] The defendants have entered a special plea of prescription, but have pleaded in the alternative on the merits denying any indebtedness to the plaintiff. According to them:

4.1 An agreement was entered between them and JC Greef in terms of which JC Greef would purchase certain shares (the number and value are not given) from the defendants. The transaction, according to the plea, is *"gedateer 03 August 2001 en in terme waarvan betaling in kontant moes plaasvind, nie later as 90 dae na ondertekening van die gesegde ooreenkoms."*

4.2 On or about 06 November 2001 at Bloemfontein, JC Greef delivered forty eight head of cattle to the defendants as part-payment of the purchase price of the said shares. The value of the stock was by agreement fixed at R164 160, 00 (inclusive of VAT).

[5] Further alternatively it is the defendants' plea that in the event that the Court find that a sale transaction indeed exists between Greef Trust and themselves, then they plead that:

5.1 The forty head of cattle were in fact sold to them for the stated price and that the defendants accepted delivery thereof;

5.2 However, the defendants are not indebted to Greef Trust by virtue of the fact that the Removal Permit/Sale Certificate ("vervoerpermit/ verkoopsbewys") annexed to "Defendants' Plea" marked Annexure "A" serves as a receipt and proof of payment for the livestock as well as authority for the loading and removal of the cattle.

[6] In the light of the defendants pleas it is therefore advisable that Annexure "A" be reflected as it stands:

"**A**"

<u>VERVOERPERMIT/AANKOOPBEWYS</u>

UITGEREIK AAN

<u>RIVERSIDE BELEGGINGS TRUST</u>

(KOPER)

Hiermee verklaar ek **<u>GREEF BOERDERY TRUST</u>** die ondergetekende, woonagtig te **<u>CORNELIA</u>** distrik

BLOEMFONTEIN, die verkoop van die ondergemelde vee aan die kopers daarvan.

BESKRYWING	**GETAL**	**PRYS**
1. Beeste	48	R 144 000-00
2. Skape	____	R ___________
3. Varke	____	R____________
4. Pluimvee	____	R____________
	BTW 14%	R 20 160-00
TOTAAL	_____	**R 164 160-00**

Bogemelde vee sal vervoer word vanaf **BLOEMFONTEIN** na **ALIWAL-NOORD** per vragmotor op 06/11/2001.

Die registrasienommer van die voertuig is as volg **CFD 561 FS**

Ek verklaar voorts dat hierdie sertifikaat sal dien as ~~kwitansie vir die betaling van die vee asook~~ magtiging tot die laai en verwydering van gemelde vee.

BTW is ingesluit/~~uitgesluit~~ by die totale prys van die vee.

Aldus gedoen en geteken te **BLOEMFONTEIN** hierdie **6** dag van **NOVEMBER 2001**.

___signed______________

VERKOPER

BTW NR 4470178536."

[7] The defendants' special plea is simply this:

7.1 The plaintiffs' claim is based on a contract which was concluded on 06 November 2001. The concomitance thereof is that plaintiffs' claim against the defendants became due and payable with effect from 06 November 2001;

7.2 The plaintiffs' summons was issued on 03 November 2006 and served on the defendants "synde op `n datum [not mentioned] meer as drie jaar" after the plaintiffs' claim fell due;

7.3 In the premises the defendants plead that in terms of s11 of the Prescription Act, 68 of 1969, the plaintiffs' claim became prescribed, and pray for the dismissal of the action with costs.

[8] Plaintiffs replicated that the running of the prescription was specifically interrupted by the defendants' CM Strydom on or about February 2001 when he acknowledged liability in his representative capacity, on behalf of Riverside Trust. In addition the plaintiffs make the averment that they only became aware of the circumstances and the facts under which the cause of action arose in the conference during

which the insolvency enquiry was conducted on about 13 June 2006. Further to the above they reasonably only became aware of the identity of the debtor after the sequestration of Greef Trust, more specifically upon their appointment as trustees of the insolvent estate on 09 November 2006. They therefore pray for the dismissal of the special plea with costs.

[9] In their answer to the Request for Further Particulars the defendants acknowledged that the plaintiffs had sold shares to J C Greeff in Bains Lodge (Pty) Ltd Nr 97/18699/07 and Oak Leaves Investment (Pty) Ltd No 97/11348/07 but denied that such sale of shares extinguished the debt of the sale of the forty eight head of cattle to Greeff Trust. The plaintiffs relied on the record of evidence adduced during the enquiry in terms of s 65 of the Insolvency Act, Act 24 of 1936, wherein it was alleged that C M Strydom, the aforesaid trustee and authorised representative of Riverside Trust, purportedly acknowledged liability and tendered a set-off against the money owed by the Greeff Trust to Bainsvlei Trust.

[10] The parties agreed to the separation of issues in terms of Rule 33(4) of the Superior Courts Practice and formulated the issues in terms of which the Court was required to determine the special plea of prescription along the lines pleaded by the parties as set out above. The rest of the other issues were to be determined subsequently. This agreement was made an order of this Court.

[11] It is a principle of our law that the party that raises the plea of prescription must show that the claim is prescribed. But if in reply to the plea the party against whom the special plea defence is raised alleges that prescription was interrupted the onus shifts to that party to show that it was so interrupted. See **Absa Bank v De Villiers** 2001 (1) SA 481 (SCA) at 486 - 487. **Gericke v Sack** 1978 (1) SA 821 (A) at 825E; **Pentz v Government of the RSA** 1983 (3) SA 584(A); **Amler's Precedents of Pleadings** 6th ed, 294-295.

[12] The period of prescription in a case such as this one is three years and begins to run as soon as the debt is due, in terms

of s 11 of the Prescription Act. The running of that period is interrupted by the service of any process whereby the creditor claims payment of the debt in terms of s 15 of the Prescription Act. See **Gericke v Sack** *supra* at 825E; **Pentz v Government of the RSA** at 593E-F *supra*.

[13] The plaintiffs led the evidence of the third plaintiff, Cornelius Johannes Venter ("Venter"), to show that the period of prescription in this case was interrupted. From his evidence and the pleadings it has become common cause that Greeff Trust was finally sequestrated on 8 September 2005; that the plaintiffs were appointed as trustees on 28 July 2005; that the first creditors' meeting was held on 18 January 2006; that the second meeting was held on 20 March 2006 and postponed to 13 June 2006. During the second meeting C M Strydom gave information that led to the institution of these proceedings. The summons was served on the first and third defendant (M Strydom) on 8 November 2006 and on the second defendant (G J du Plessis) on 10 November 2006.

[14] Section 15(1) of the Prescription Act provides that:

> "15 **Judicial interruption of prescription**
>
> (1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment.
>
> (2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted…"

[15] What this means is that the debt in this case became due on 06 November 2001. The period of prescription started to run on that date and would ordinarily have expired on 06 November 2004 in terms of s11 of the Prescription Act.

[16] Advocate Zietsman, on behalf of the plaintiffs, submitted that as set out in the trial bundle handed in as exhibit A1-A33 Venter sat in the s65 enquiry and heard Strydom testify that a set-off agreement was concluded between him, on behalf of Bainsvlei Trust and J C Greeff representing Greeff Trust, during January 2003. He submitted further that that set-off

was an acknowledgement of liability by Strydom to the insolvent estate of Greeff Boerdery Trust. He argued that the plaintiffs only gained knowledge of this acknowledgement of liability in June 2006. The period of prescription, so he contended, started running at the very least in February 2003. This means that the period of prescription could only have expired in February 2006. It is important to remember the remarks, which I share, of the Court in **Agyrakis and Another v Gunn and Another** 1963(1) SA 602 (T) at 604D-F which are apposite in the circumstances of this case:

> "It should be noted in passing that at a meeting of creditors there are no defined issues such as are found in judicial proceedings. Witnesses are interrogated to gain information which the creditors and trustees do not posses or cannot effectively establish. The enquiry is for the purpose of discovery."

[17] There are no defined examples of set-offs in our law. Each case must be determined on its own facts. **(MM Loubser, Extinctive Prescription).** Set-off comes into operation when two parties are mutually indebted to each other and both

debts are liquidated and fully due. The one debt extinguishes the other *pro tanto* as effectually as if payment had been made and can be regarded as a payment *brevi manu*. **(Amler's Precedents of Pleadings, 312).** The Appellate Division in **Agnew v Union & South West African Insurance Co Ltd** 1977 (1) SA 617(A) at 623A-C set out the following requirements in order for the plaintiffs to prove that the defendants acknowledged liability:

17.1 There must be an acknowledgement of an existing debt and liability thereof-**Cohen & Sons v Dormehi** 1945 (1) PHF1; **Petzer v Redford (Pty) Ltd** 1953 (4) SA 314(N) at 317-318; **Markham v SA Finance & Industrial Insurance** 1962 (3) SA 669 (AD) at 676F; and

17.2 The acknowledgement must be to pay what is due**. (Wessels, Law of Contract in South Africa, 2nd ed, Vol 2, para 2836.)**

[18] From a perusal of the record of the s65 enquiry, exhibit A1-A33 of the trial bundle, there is no evidence that Strydom acknowledged liability on the same cause of action as the

plaintiffs' claim that serves before this Court. In fact in his own words Strydom took it for granted that because J C Greeff owed him such a large sum of money it follows that the forty eight head of cattle would compensate him for what was due to him. To compound matters Strydom could hardly remember when such set-off was proposed or accepted. At some point he could not distinguish one entity (Bains Lodge/Greeff Boerdery Trust/Greeff Holdings Company) from the other. Yet he was the person who purportedly represented Riverside Trust during the set-off negotiations. This is what was said at some point during the enquiry (See page 116, lines 2 to 22 of exhibit A1-A33):

"**V**: Ja u sien wat my problem is, kyk, u het nou nie 'n kontrak met Greeff Boerdery Trust gehad nie, u het 'n kontrak met Greeff Holdings Trust gehad.Aanvanklik met die Greeff Holdings Trust, ja, met die Greef Holdings Trust die heeltyd, deurentyd

A: Kyk, dit is moontlik, maar ek meen… (tussenbei).

V: Maar hierdie is nou die Greeff Boerdery Trust se beeste.Dit is hoekom ek u vra, u kan mos nou nie met die Greeff Boerdery Trust se beeste.Dit is hoekom ek u vra, u kan mos nie met die Greeff Boerdery Trust skuldvergelyking toepas nie. Hulle het mos nou niks te doen met die Greeff Holdings Trust se skuld nie.

A: Nee, kyk, hy is darem die direkteur van daardie… (tussenbei).

<u>V:</u> Wel, hy het dieselfde trustee.

<u>A:</u> Dit is dieselfde trustee, dit is dieselfde begunstigdes.

<u>V:</u> So dit is hoekom u besluit het om dit so te doen.

<u>A:</u> Die een kan maar vir die ander een in 'n noodtoestand mos maar 'n bietjie hulp gee.

<u>V:</u> Ons weet nou die Greeff Holdings Trust volgens u het die skuld gehad en aan die ander kant het die Riverside

<u>A:</u> Beleggingstrust aan Greeff Boerdery Trust die skuld gehad. ---Kyk, ek weet nie hoe dit-hierdie goed is gedoen onder die prokureurs u weet… (tussenbei)."

[19] In my view even if a set-off agreement was reached it would have been invalid because different parties to those involved in the current action are involved. Nevertheless there was also no acknowledgement of indebtedness, let alone an unequivocal one. Exhibit A1-A33 explicitly shows that the agreement allegedly entered into, the sale of shares, was between Bainsvlei Lodges Beperk and Greeff Holdings Trust which are two different entities to Riverside Trust and Greeff Trust which concluded the sale agreement of the forty eight head of cattle. See **MM Loubser, Extinctive Prescription, 146-147.** For that matter the evidence led at the insolvency

interrogation during which the set-off was allegedly disclosed cannot on its own prove the facts in dispute. See **Du Plessis No v Oosthuizen; Du Plessis No v Van Zyl** 1995 (3) SA 604 (O); **Du Plessis No v Oosthuizen en 'n Ander** 1999 (2) SA 191(O); **Debbo v Claude Whitecross Garage** 1962(2) SA 177(E) at 179E-F.

[20] What I deduce from the facts before me is that when the Master appointed the plaintiffs as trustees in November 2005 and when the final sequestration was granted in September 2005 and further when the summons was served on two of the defendants on 8 and 10 November 2006 the claim had already prescribed in November 2004.

[21] Having concluded that the evidence before this Court does not show any set-off, tacit or express, the only question that remains for determination is whether the plaintiffs had knowledge of the facts from which the debt arose before the claim prescribed and whether that knowledge had not come too late in the day, when the period had effluxed. In terms of s12 (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 of the facts from which such debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it through exercising reasonable care."

[22] The Supreme Court of Appeal has recently stated in **Minister of Finance and Another v Gore No** 2007 (1) SA 111 (SCA) at 119J-121A (para 17 – 19):

"[17] This Court has, in a series of decisions, emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case 'comfortably'.

The defendants relied on these authorities to contend that Rabie knew, at the latest, by the latter half of 1995, that Louw and Scholtz had defrauded 3D-ID out of its tender. They pointed out that Rabie insistently asserted under oath, starting with his replying affidavit in the review (October 1994), and repeated in his Anton Piller (January 1995) and liquidation affidavits (April 1995), that fraud *tainted the tender process. The allegations of fraud then made found expression, later, in the particulars of claim.*

[18] Rabie certainly did cry fraud soon after 3D-ID lost the tender. But what did he know when he did so? The defendants' argument seems to us to mistake the nature of 'knowledge' that is required to trigger the running of prescriptive time. Mere opinion or supposition is not enough: there must be justified, true belief. Belief, on its own, is insufficient. Belief that happens to be true (as Rabie had) is also insufficient. For there to be knowledge, the belief must be justified.

[19] It is well established in our law that:

(a) Knowledge is not confined to the mental state of awareness of facts that is produced by personally witnessing or participating in events, or by being the direct recipient of first-hand evidence about them.

(b) It extends to a conviction or belief that is engendered by or inferred from attendant circumstances.

(c) On the other hand, mere suspicion not amounting to conviction or belief justifiably inferred from attendant circumstances does not amount to knowledge.

(R v Patz 1946 AD 845 at 857, Patterton v Minister van Bantoe-administrasie en –ontwikkeling 1974 (3) SA 684 (C) at 687A-B)

It follows that belief that is without apparent warrant is not knowledge; nor is assertion and unjustified suspicion, however passionately harboured; still less, is vehemently controverted allegation or subjective conviction." (Foot notes omitted).

[23] In the result, in the light thereof that the prescription was not interrupted before the lapse of three years from 06 November 2001, the claim became prescribed on 06 November 2004 in view of J C Greef's failure to institute action. The appointment of the plaintiffs as trustees is irrelevant and immaterial as their knowledge or lack thereof cannot resuscitate a cause of action that is time-barred. The special plea must succeed.

ORDER:

I make the following order:

The special plea is upheld with costs.

B.C. MOCUMIE, J

On behalf of the applicant:	Adv. P. Zietsman, SC Instructed by: Naudes BLOEMFONTEIN
On behalf of the respondent:	Adv. S. Reinders Instructed by: Krohn & Kie BLOEMFONTEIN

/BCM