<u>IN THE HIGH COURT OF SOUTH AFRICA</u>

(NORTH GAUTENG HIGH COURT)

Case number 20762/2006

Date: 19 June 2009

In the matter between:

EDNA BONFIGLIO	Plaintiff
and	
ATB CHARTERED ACCOUNTANTS (SA)	Defendant

JUDGMENT

<u>Pretorius J.</u>

In this instance the parties agreed that the issues relating to prescription of the plaintiffs claim - as pleaded in the defendants special plea, read with the plaintiff's replication should conveniently be decided separately from the remaining issues in terms of rule 33 (4) of the Uniform Rules of Court

This court has only to decide whether prescription has taken place. Therefore the defendant bears the onus of proving that the plaintiffs claim became prescribed prior to service of the summons commencing action against the defendant It was agreed that the defendant has the duty To begin

The plaintiff is a private individual and the defendant is ATB Chartered Accountants (SA) On 5 April 2002 at Polokwane the plaintiff entered into an oral agreement with the defendant, represented by Mr Martin Venter The defendant undertook to act on behalf of the plaintiff to sell her 100% members interest and loan account in the close corporation known as M KLisser CC to Mr Raath. a client of The defendant Both the plaintiff and Mr Raath were the defendant's clients at the time.

On 5 April 2002 the plaintiff sold M Klisser CC to Mr JW Raath in terms of a written agreement of sale Mr Raath was introduced to the plaintiff by the defendant, represented by Mr Venter.

The defendant, represented by Mr Venter, drafted the written agreement of sale of the business The plaintiff entered into the agreement on advice from Mr Venter, representing the plaintiff and the defendant. The defendant is now being sued for breach of contract in terms of the oral agreement and alternatively for breach of its duty of care towards the plaintiff

As a consequence of the breach by the defendant of its contractual obligation in terms of the agreement, alternatively the breach of its duty of care towards her the plaintiff sold the business to Mr Raath, notwithstanding the fact That he, Mr Raath, was apparently not in a financially sound position to purchase the business, and did not provide security

The main complaint is that the defendant advised the plaintiff to sell the business to Mr Raath without ensuring that Mr Raath had money or could provide security for the purchase price

Summons was issued against Mr Raath on 19 March 2003. claiming the purchase price, interest and costs. Summary judgment was granted on 22 May 2003 A warrant of execution was granted on 26 June 2003.

The sheriff's return stated that on 7 July 2003 the warrant of execution was served on the wife of Mr Raath which resulted m a *nulla bona* return.

Mr Martin Venter testified that he is a chartered accountant and a partner in the defendant. The practice is in Polokwane. He has been practicing as chartered accountant since 1975

He was the auditor for the closed company, M M Khsser CC, as well as for Mr Raath and the plaintiff He had advised the plaintiff to sell the business or to close it as since 1999 it was not showing any profit.

Mr Raath was one of his clients Mr Raath enquired from him whether he knew of a business which he. Mr Raath, could purchase. The witness introduced Mr Raath to the plaintiff in September 2000 Subsequently the plaintiff agreed to sell the business to Mr Raath. Mr Venter then drafted a written agreement which was signed by both parties on 5 April 2002. The first payment according to the agreement, was due on 30 April 2002 The member's interest was transferred to Mr Raath and the CK2 form was changed to reflect Mr Raath as the new owner.

According to the terms of the contract Mr Raath had to pay instalments of R10, 000-00 per month from 30 April 2002 On 7 October 2002 Mr Raath was requested to sign an admission of guilt after defaulting on some of the instalments and being requested to do so after an agreement had been reached between the parties

Mr Besterthen cross-examined The witness as follows:

> *"As ek dit aan u stel dat die eiseres eers ttaar* fer/jes *gety het wat befref die koopprys toe sy mnr Raath nie kon uitwtn of nie kon uitskud nte, nie die geld by horn kon verhaai nie, sal u daarmee saamstem? Dis wanneer die verlies mgetree het — Ja.*
>
> *Stem fy saam? — Ja*
>
> *En dit het gebeur op 8 Julie 2003 wat sy nou 'n nulla bona -retaas gekry het, of haar prokureur het dit ontvang vanafdie balju — Dss korrek.*
>
> *En voor dit was daar geen sprake van entge verfies wat betref hierdie koopprys me? — Korrek "*

That was the only cross-examination of this witness

Mr Steyn. on behalf of the defendant, tried to rehabilitate the cross- examination of the witness during re-exa mi nation and tried to contain the damage he perceived to have been inflicted to the defendant's case Mr Venter then testified in contrast to his previous evidence, that he would have shown that the asset in the plaintiffs estate was nil on 28 February 2003

This evidence concluded the defendant's case

Mr Nel gave evidence on behalf of the plaintiff He is the attorney of record for the plaintiff who is currently 82 years old. She was 75 years of age at the time when she and the defendant entered into the agreement.

On 3 May 2002 Mr Nel. on behalf of the plaintiff, wrote a letter to the defendant setting out the plaintiff's concerns regarding the payment of the purchase price by Mr Raath On 17 July 2002 he addressed a letter to Mr Raath demanding payment as agreed to by the parties This was followed by a letter to the defendant on 7 August 2002 setting out.

> *"We also have instruction to inform you at this early stage, trial our client wit! hold you liable for at! damages and losses she may suffer as a result of the transaction she entered into with Mr J W D Raath on your advice, and particularly as a result of the "offer to purchase"you drew up and assisted our client in signing "*

This was met by a letter from Mr Venter dated 8 August 2002 on behalf of the defendant, where Mr Venter stated:

> ***"Mnr. Nel, ek wil dtt duidetik aan u stel dat ek dink u voortydige optrede en wyse van hantering van die saak die oorsaak is van die gemors waarin dit ontaard net met moonttike veriiese vir beide my kliente, Mev, BonFiglio en Mnr. Raath.*** *U is en was nog noost ten voile ingelig oor die hole agtergrond van die saak me en net my tydens ons gesprek me die Hans gegee om dii te stel nie maar wat my betref total voortydig opgetree U sat u hennner dat ek my ook teen u voorgestelde optrede ustgespreek het ten tydevan die gesprek tussen Mev. Bonfiglio, u en myself* "(own emphasis)

On 7 October 2002 Mr Raath signed an acknowledgement of debt and undertook to repay the plaintiff an amount of R8000 00 per month from 31 October 2002. Mr Raath paid the first R3000 00 instalment as agreed. This fact was conveyed to the defendant by letter on 11 November 2002

During December 2002 Mr Raath defaulted again. On 1 April 2002 Mr Raath's attorneys informed the witness that M Klissers & Co [Ply) Ltd had been liquidated

Summons was issued against Mr Raath as a result of which summary judgment was granted on 22 May 2003. A warrant of execution was then applied for on 23 May 2003 and was issued on 26 June 2003 This resulted in a *nulla bona* return on 8 July 2003, as Mr Raath had no movable or immovable property to attach.

On 20 June 2006 a letter of demand was sent to the defendant on behalf of the plaintiff

During cross-examination Mr Nel testified that during May 2002 there was no indication as to the financial position of Mr Raath. There was no indication up until August 2002 that the plaintiff would suffer damages at all. He realized that Jt was possible for Mr Raath to make good his promises and to pay the full amount

According to the witness this was confirmed by the letter from the defendant on a August 2002 as set out above.

The witness reiterated that no steps could be taken before il had not been ascertained whether Mr Raath could pay. Mr Raath had to be excussed before the plaintiff could claim from the defendant as the plaintiff had no knowledge of Mr Raath's financial position The letter from the defendant dated 8 August 2002 could not alert the plaintiff that Mr Raath could not pay

On 22 January 2003 a further letter of demand was sent to Mr Raath and on 1 April 2003 the plaintiff was informed that the company (apparently the closed company had been converted to a company) had been liquidated The only way that the plaintiff could claim from Mr Raath was to issue summons. Mr Nel could not claim on behalf of the plaintiff before the legal process had been completed, which was only when a *nulla bona* return was received on 8 July 2002 According to the witness that was the first time that the plaintiff knew with certainty that Mr Raath had no assets and the plaintiff could institute action against the defendant.

The two dates which the defendant relies on are 5 April 2002 - the date the agreement was entered into, and 21 August 2002 when a letter was sent to Mr Raath demanding payment to prove the commencement of prescription

It is common cause **that** the plaintiff instituted action on 30 June 2006 Section **12** (1) of the Prescription Act 68 of 1969 provides

"(1 Subject to the provisions of subsections (2},(3,)and(4). prescription shall commence to run ***as soon as the debt is due".***

In **Truterand Another v Deysel 2006** (4) **SA 168 (SCA)** at 174 C - D van Heerden J A found:

> *" ..the term 'debt due' means a debt including a delictual debt, which is owing and payable A debt is due in thts sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or,* ***in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim,*** *"(my emphasis)*

In **Deloitte Haskins & Sells v Bowthorpe HeUerman Deutsch 1991 {1) 5A 525 AD**

at p 532 van Heerden JA held

"This means that there has to be a debt immediately claimable by the creditor or, stated in another way. that there has to be a debt in respect of which the debtor is under an obligation to perform immediately " and

"It follows that prescription cannot begin to run against a creditoi before his cause of action is fully I accrued, le before he is able to pursue his claim"

LAWSA {first reissue) volume 21 par 142 on p 55 deals with the commencement of extinctive prescription as follows

"Extinctive prescription commences to run as soon as the debt is due. In the absence of a definition of the term "debt", the courts have held that it must be given a wide and general meaning So. for the purposes of section 12(1) of Prescription Act of 1969, the word "debt" includes any liability arising from and being due (debitum) or owing under a contract but obviously includes delictual debts.'

and on p.56:

"To put the matter another way, it has been held that a debt is only due when the creditor's cause of action is complete ***This notion involves two things, namely that the creditor is in a position to claim payment forthwith, and that the debtor does not have a defence to the claim for immediate payment The casue of action must, of course, be complete at the stage when a summons is issued in respect thereof. The cause of action must similarly be complete at least when summons is served."***

(own emphasis)

There can thus be no cause of action for purposes of a delictual action or for breach of contract until the occurrence of the last of the *facta probanda* - which in this case is the *nulla bona* return of service. This was the first time that it was clear that there would be no money forthcoming from Mr Raath.

The debt for damages arising from breach of contract becomes due when loss to the plaintiffs patrimony occurs.

Section 12(1) of the Act is subject to section 12(3) of the Act which provides:

"(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."

The relevant dates in this matter are 5 April 2002 the dale the plaintiff sold her 100% member's interest and loan account in M Khsser CC The purchase price of R325 000-00 was payable in monthly instalments from 30 April 2002 Mr Raath made certain payments and defaulted on several payments, which resulted in letters of demand being sent to Mr Raath.

Mr Steyn, for the defendant, argued that the date of calculating the commencement of prescription should be 5 April 2002, The date the plaintiff sold her interest in M Klisser CC o Mr Raath

It is, however, clear from the letter of The defendant dated 8 August 2002, that the defendant would have regarded any action against the defendant at an earlier stage as premature It is set out very clearly by Mr Venter that any action against him at that stage would be premature This was confirmed by him under cross-examination as he stated very clearly that the loss to the plaintiffs estate only occurred when the *nulla bona* return of service was received, which was on 8 July 2003.

Mr Steyn's further argument is that the plaintiff should have gathered That the purchaser's financial position was precanous and that the date of commencement of prescription should, in the alternative be 23 August 2002, the date that a letter of demand was sent to the purchaser.

This date cannot be entertained as the date of commencement of prescription, as there were further negotiations between the altorney of the plaintiff and the purchaser, Mr Raath. The plaintiffs attorneys advrsed the purchasers attorneys on 29 October 2002 as follows

> *"You informed us that your client is busy with tenders and contracts that will enable him to make payment of either the full amount outstanding or larger amounts as from January 2003. Your client must provide full financial information, as indicted in the undertaking, with a view of increasing his instalments "*

At this stage it could not have been clear to the plaintiff that Mr Raath would not pay the purchase price She *was* re-assured by this information, as this correspondence was followed by the agreed payment on 31 October 2002. The summons against the defendant was issued on 30 June 2006 The *nulla bona* return was obtained on 7 July 2006

The complete cause of action thus only arose on 8 July 2006. whether on the basis of damages due to breach of contract or breach of duty of care towards the plaintiff

In **Nedcor** Bank Bpk **v Regering van die** Republiek **van Suid**-Afrika **2001(1) SA**

987 on 995 Schultz JA found.

> 79/ *Wat die Wet nastreef. is 'n guide middeweg tussen die onbiilikhesd. aan die een kant, dat 'n potensi&te skuldenaar 'n ewigheid na die pJaasvind van die gewraakte gebeure sktelik met hofverngtinge bedreig word en die onbitlikheid, aan die ander kant. dat 'n potensiOte skutdeiser sy aanspraak op regshuip bloot vanwes tydsverloop verbeur waar hy sender emge verwyt aan sy kant. me oor die nodige intigting besktk om sodanige hofverrigtinge inmiddels van stapel te stuur me."*

I have considered all the evidence carefully. I must find that the answers which Mr Venter gave under cross-examination was answers by an educated witness who was testifying of facts of which he had specific knowledge and pertained to his expertise regarding financial matters No amount of trying to rehabilitate his answers by reexamination can nullify his original responses.

Having regard to counsels' arguments, considering the authorities and weighing the evidence the court has to find that the debt claimed by the plaintiff against the defendant became due on 8 July 2003 for purposes of section 12(1) of the Prescription Act 68 of 1969 Therefore the claim against the defendant has not prescribed.

The following order is made

The defendant's special plea *of* prescription is dismissed with costs

C Pretorius

Judge of the High Court

Case number 20762/2006

Heard on	23 April 2009
For the Applicant	TWG Besler
Instructed by	Corris Nel
For the Respondent	HH Steyn
Instructed by	Espag Magwai
Date of Judgment	19 June 2009