



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.



SIGNATURE

DATE: 10 May 2024

Case No. 2019/33708

In the matter between:

KMN

Plaintiff

and

NCZ

First Defendant

MZ

Second Defendant

JUDGMENT

WILSON J:

- 1 The plaintiff, KMN, is 87 years old. She lives with her daughter, N, and two of her grandchildren, Z and L, in the Jabavu area of Soweto. Until late 2013, KMN lived in Zakariyya Park. She lived there with Z, but Z spent much of her time away from home at boarding school. During that year, KMN developed a heart condition. She began to feel severe but intermittent chest pain. The pain

turned out to be the result of fluid build-up in KMN's chest which was itself the result of a tear in one of the blood vessels leading to her heart. Understandably, KMN worried that her condition was serious. She feared that, if the worst were to happen, she would die alone in her home, with no-one to help her seek medical attention or attend to her in her final moments.

- 2 For this reason, KMN decided to sell her house in Zakariyya Park, and to move in with another of her granddaughters, the first defendant, NCZ. NCZ and her husband, the second defendant, MZ, purchased a large house in Kibler Park so as to accommodate KMN, L and Z together with their own family.
- 3 KMN's house in Zakariyya Park was sold to a colleague of NCZ. The purchase price was just under R440 000. The proceeds of the sale were deposited into KMN's bank account on 16 September 2013. On 27 September 2013, NCZ and MZ bought a house in Protea Glen. On 1 October 2013, a banker's cheque in the sum of R430 000 – that is, nearly all of the money raised on the sale of KMN's Zakariyya Park house – was drawn on KMN's account, and deposited into NCZ's account at Standard Bank in Southgate.
- 4 The nature and purpose of that transaction is the central issue in this case. KMN says that NCZ was given the money in order to purchase the Protea Glen house on KMN's behalf. KMN said that she intended to purchase the Protea Glen property with the proceeds of the sale of her Zakariyya Park house. She intended to use the rent from the property to supplement her income and support her grandchildren, particularly Z. NCZ says that the money was a gift to her from KMN, with which NCZ and MZ decided to purchase the house in Protea Glen as an investment.

- 5 KMN says that, throughout her stay with the defendants at the Kibler Park property, she received deposits into her account for the rent received in respect of the Protea Glen property. KMN also says that she made various payments meant to improve the property, principally by the addition of a perimeter wall, and the construction of outside rooms for tenants to occupy.
- 6 KMN recovered from her heart condition and lived with the defendants for around three years. Towards the end of 2016, KMN and NCZ quarreled over what KMN says was NCZ's enmity towards Z, who had come to live at the Kibler Park property with KMN. It was said that Z was thrown out of the Kibler Park house, and that this precipitated KMN's departure too. KMN says that it was during the course of one of these quarrels that NCZ revealed to her that the Protea Glen house was not in fact registered in KMN's name, but had been transferred to the defendants.
- 7 NCZ denies that there was any such conflict. She specifically denies that she asked Z to leave the Kibler Park property. She said that KMN's decision to move out of the Kibler Park house was amicably reached, and that KMN assured her that there was no ill-will between the two women.
- 8 KMN then moved to the Jabavu house, where she resides with N, Z and L. N gave evidence that she launched an investigation into the claim that the Protea Glen house was not registered in KMN's name. She approached the registrar of deeds. On 20 July 2017, the registrar issued a copy of the title deed held over the Protea Glen house. That document was placed before me by agreement between the parties. It shows that the Protea Glen house was registered in the defendants' names on 7 February 2014. The document also

confirms the date of the sale of the property and the date on which a copy of the deed was issued in response to N's enquires.

- 9 The defendants sold the Protea Glen house sometime after N obtained proof that the house was registered in their name.
- 10 On 3 October 2019, KMN instituted a trial action in this court in which she made three separate claims. In claim A, she claimed R580 000 (being the value of the Protea Glen house when the defendants sold it). In claim B, she asked for a further R275 000 (being the amount the defendants were said to have received in rent on the Protea Glen house). In claim C, she seeks R264 000 that she says she would have received in rent on the Protea Glen property between 1 July 2018 and 1 July 2020 had the Protea Glen house been registered in her name, and had the defendants not sold it.
- 11 In her particulars of claim, KMN says that the property was sold for R580 000 on 18 July 2018. In his evidence, MZ confirmed that the Protea Glen property was sold after the dispute between the parties about its ownership arose. However, no evidence was led to confirm the purchase price or the date of the sale. In addition, KMN led no evidence of the amounts of rent actually collected from tenants at the Protea Glen property. For these reasons, much of claim A, and all of claims B and C, is stillborn. Mr. Mulaudzi, who appeared for KMN before me, conceded as much in argument.
- 12 What remains of the case is whether KMN is entitled to the return of the R430 000 advanced to NCZ on 1 October 2013. If, on a balance of probabilities, the amount was advanced to NCZ as a gift, then I must dismiss the claim. If, however, the probabilities disclose that the amount was in fact advanced to

fund the purchase of the Protea Glen house, which was then to be transferred into KMN's name, then I must give judgment for KMN in the sum of R430 000.

- 13 Before evaluating where those probabilities lie, I must first address a special plea of prescription raised on the defendants' behalf.

Prescription

- 14 An ordinary debt prescribes three years after the creditor acquires knowledge of the identity of the debtor and the facts giving rise to the debt. A debtor wishing to rely on a special plea of prescription must allege and prove the date on which the creditor acquired knowledge of the debtor's identity and knowledge of the facts from which the debt arose. In a three-line special plea, the defendants do no more than allege that KMN's claim arose on 1 October 2013; that the KMN's summons was issued on 25 September 2019 and that six years elapsed between those two dates. That was plainly insufficient.
- 15 It seems to me that KMN acquired knowledge of the facts from which the debt she claims arose when she found out that the defendants had bought the Protea Glen house for themselves, and not for her. The defendants did not say exactly when they told KMN that they had purchased the house. Nor did they lead evidence of precisely when KMN must have realised that she was not the owner.
- 16 However, on KMN's pleaded case, KMN found out that she was not the owner of the Protea Glen house when she obtained the title deed to the property in July 2017. It is true that, on the evidence, NCZ had told KMN that the Protea House was not hers during an argument in 2016, but I do not think that

exchange could have given rise to the “knowledge” required to set prescription running. It seems to me that KMN could have had no more than a suspicion, albeit perhaps a very strong one, that she was not the owner of the Protea Glen house before she actually saw the title deed. Given that KMN could not have seen the title deed before it was issued to N in July 2017, that is when KMN must have known that the money she advanced to NCZ had not been used to purchase a house in KMN’s name.

17 For that reason, the special plea must fail, because KMN acquired knowledge of the facts from which the debt arose no earlier than July 2017. KMN’s claim was instituted within three years of that date.

18 It is of course possible that KMN knew all along that the defendants had bought the house for themselves, because KMN intended the money she advanced to be a gift to them. In that event, however, the claim fails on the merits, because the debt never arose in the first place, and it could not as a result have prescribed.

19 I now turn to the issue of whether the debt KMN claims ever in fact arose.

The parties’ competing versions

20 Only KMN and NCZ themselves could give any direct evidence of the parties’ intentions when the R430 000 cheque was drawn on KMN’s account and deposited into NCZ’s account. KMN and NCZ each gave diametrically opposed accounts of those intentions. KMN said that she gave control of her account to NCZ with instructions to use the proceeds of the sale of the Zakariyya Park house to purchase a property in KMN’s name. The purpose of

the purchase was to augment KMN's income and allow her to support Z. KMN said that she did in fact receive payments into her account from NCZ marked "Rental Protea Glen".

21 NCZ says that she never had control over KMN's account. NCZ gave evidence that, in late 2013, KMN thought that she did not have long to live, that she regarded NCZ as her favourite granddaughter, and that she wanted to gift the proceeds of the sale of her Zakariyya Park house to NCZ before she died. In order to do this, NCZ says that she and KMN went personally to the First National Bank at Southgate, where KMN authorised the banker's cheque for R430 000 to be drawn on her account. Both women then took the banker's cheque to the Standard Bank at Southgate, where the cheque was deposited into NCZ's account. The banker's cheque, which was placed before me as an exhibit, confirms that, whatever the parties' true intent, the transaction was processed by means of a banker's cheque deposited into NCZ's account.

22 KMN denies that she ever went to the bank with NCZ, and maintains that she left the transaction in NCZ's hands. KMN was clear and consistent in her evidence that the purpose of the transaction was to purchase a house for herself, not to make a gift over to the defendants.

23 Accordingly, I have before me two mutually destructive versions. There was nothing inherently unsatisfactory about either witness's version. Ms. Leeuw, who appeared for NCZ, argued that there was something to be made of the fact that KMN had said in her particulars of claim that she wrote a cheque in NCZ's favour, whereas the truth was that a banker's cheque was drawn on her account. I do not accept this. The inconsistency between KMN's pleaded

version and the common cause fact that the transaction was executed by way of a banker's cheque is insignificant. It also seems to me that not much can be made of the parties' disagreement about whether KMN was present when the cheque was drawn on 1 October 2013. If, as KMN claims, NCZ had control of the account, KMN would not have needed to be present.

- 24 I have nothing before me, other than the parties' say-so, about who had control of KMN's account. Perhaps KMN should have produced some evidence that the account was controlled by NCZ, but there is nothing inherently improbable about the version that she had handed her financial affairs over to NCZ in order to ensure the purchase of the Protea Glen house. The parties agree that, at the time the purchase went through, KMN was seriously ill, and that she was in and out of hospital. In those circumstances, it seems odd that KMN would have bothered herself with overseeing the transaction if she could have authorised NCZ to do so.

The documentary evidence

- 25 If I had only the mutually destructive evidence of KMN and NCZ before me, I would have been bound to absolve NCZ from the instance. There would have been nothing to choose between the two versions. However, KMN discovered a selection of her own bank statements between September 2013 and September 2017, which, in my view, tip the probabilities in her favour.
- 26 These statements were alluded to in KMN's discovery affidavit, but only actually disclosed to the defendants during the trial. Ms. Leeuw objected to the late discovery, but was unable to argue that the evidence was not material or reliable on its face. Nor did Ms. Leeuw apply for a postponement to deal

with the contents of the bank statements. She merely asked that I stand the trial down to allow her to consult on the contents of the statements. I stood the trial down for a short while as requested.

27 What the bank statements show is critical to the central issue. There are two sets of relevant transactions. The first set of transactions is a series of deposits marked “Rental Protea Glen”. The first such deposit was dated 1 April 2014. The last was dated 1 November 2016. The deposits were irregular, and the amount of each deposit varies between a few hundred rand and R3000. The deposits started seven months after the purchase of the Protea Glen property and ended at around the time KMN moved out of the Kibler Park property. The second set of transactions were purchases made out of the account at “Norman’s Hardware” (R4673 on 12 April 2014 and R540 on 17 April 2014) and “Cashbuild Protea Glen” (R437 on 25 April 2014).

28 Ultimately, neither of the defendants was able to provide a satisfactory explanation of why NCZ had consistently deposited amounts for “rent” into KMN’s account over a period of three and a half years. I was originally puzzled by the irregularity of the dates of the deposits and the fluctuation in the amounts deposited. However, MZ confirmed in his evidence that the defendants struggled to find suitable tenants (there were at least three sets of tenants over the period), and that the tenants did not always pay what they owed, or at all.

29 NCZ confirmed that she made the payments to KMN. She explained that she only meant to mark the first payment as “rent”. This was done, NCZ said, to show KMN what she had done with the R430 000 gift. Each subsequent

payment was marked as rent but was only really meant as “pocket money” for KMN. NCZ said that the reference was never changed because she did not know how to change it.

30 I find this explanation improbable, and I reject it. It is unlikely that NCZ would have marked the first deposit as “rent” merely to inform KMN of what she had done with the amount NCZ says was gifted to her. KMN was living with NCZ at the time. Plainly, NCZ did not have to communicate with KMN by labelling deposits into KMN’s bank account. NCZ could have simply informed KMN of what she had done with the “gift”.

31 NCZ’s explanation for never changing the beneficiary reference on the deposit is equally uncreditworthy. NCZ could clearly have changed the reference if she wanted to. She gave evidence that she has three bank accounts and that she herself used to work at a major commercial bank. The idea that she would not have known how to change a simple beneficiary reference is untenable.

32 That leaves KMN’s purchases at the two hardware stores in the months following the purchase of the Protea Glen house. The defendants could not explain these purchases, even though KMN was living with them at the time. It would be unusual for KMN to purchase hardware for a house she did not own, and there is no apparent reason, other than to assist in the renovation of the Protea Glen property, that KMN would make any purchases at a hardware store at around that time.

33 It seems to me that the probable explanation of these facts is that the defendants purchased the Protea Glen property in their own name, but let KMN believe that they had purchased it for her, as NCZ had been instructed

to do. KMN was gravely ill and of advanced age. The defendants did not expect KMN to live very long. The evidence is that KMN had at least three children and several grandchildren, each with a potential claim over her estate. Putting the Protea Glen house in the defendants' names would allow them to prevent any of KMN's other relatives from making a claim on it after KMN's death.

34 NCZ claimed that KMN had made a will in which she left NCZ her entire estate. KMN disputed this, but the will was in any event never produced. It seems likely that the will, if it ever existed, did not in fact give NCZ a secure grip on KMN's estate. The fact that the house was sold soon after the dispute about it arose is also consistent with the proposition that the defendants felt entitled to the proceeds of the sale of the Zakariyya Park property, whatever KMN's wishes were.

35 There is also Z's evidence that, at around the time the Protea Glen house was purchased, KMN said that the purchase had been made to help support Z. Z's evidence is obviously hearsay of the fact of the purchase of the house, but it is not hearsay of the fact of Z's conversation with KMN. While of very little weight on its own, Z's unprompted recollection of KMN's account of the reason for the purchase of the Protea Glen house is consistent with KMN's own account, and the documentary evidence in KMN's bank statements.

36 The fact of Z's recollection was not challenged in cross-examination. Nor was it suggested that Z had any ulterior motive for corroborating KMN's version. Z in fact struck me as quite distressed that she was giving evidence at all, and appeared to me at pains to avoid impeaching either KMN or the defendants.

Order

37 For all these reasons, I am satisfied, on a balance of probabilities, that KMN did not intend the R430 000 deposited into NCZ's bank account on 1 October 2013 as a gift. She rather intended that the defendants would use it to purchase a house in her name as an investment for her, and for Z. By transferring that house into their own names, the defendants misappropriated that money, and breached the mandate KMN gave them.

38 It follows that KMN is entitled to be refunded the money she gave NCZ, with interest, to run from the date on which the summons was served on the defendants.

39 Accordingly -

39.1 The special plea is dismissed.

39.2 I give judgment for the plaintiff on claim A, in the sum of R430 000, plus interest at prescribed rate, to run from 3 October 2019 until the judgment is satisfied.

39.3 The defendants are absolved from the instance on claims B and C.

39.4 The defendants are directed, jointly and severally, the one paying the other to be absolved, to pay the plaintiff's costs of suit.



S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 10 May 2024.

HEARD ON: 30 April, 2 and 3 May 2024

DECIDED ON: 10 May 2024

For the Plaintiff: L Mulaudzi
Instructed by PK Nhlapo Inc

For the Defendants: L Leeuw
Instructed by LS Mashifane Attorneys