

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO:2019/38139

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

.....
JC UYS SC

12 NOVEMBER 2024

In the matter between:

MONA SOLOMON DZIMBA

First Applicant

JANE DZIMBA

Second Applicant

And

COMPANY UNIQUE FINANCE (PTY) LIMITED

First Respondent

CUF PROPERTY MANAGEMENT SERVICES (PTY) LIMITED

Second Respondent

BOOYSEN, SYDNEY REAN

Third Respondent

HOPKINS, THEO

Fourth Respondent

VAN STADEN, JACOB MOSTERT SAAYMAN

Fifth Respondent

JUDGMENT

UYS AJ

[1] Applicants in their notice of motion dated 28 October 2019¹ seek:

[1.1] declaratory relief to the effect that:

[1.1.1] the deed of sale of Erf 1[...] S[...], Extension 1, also known as 1[...] G[...] C[...], S[...], registered under title deed number T10845/2016², concluded between First and Second Respondent during 2016 be declared void *ab initio*, invalid and/or unlawful and be set aside; and

[1.1.2] the cancellation of an instalment sale agreement between First and Second Applicants and First Respondent on 22 April 2015 be declared null and void and/or unlawful;

[1.2] orders directing:

[1.2.1] the Seventh Respondent to cancel title deed T10845/2016 in respect of the property as well as all rights accorded to Second Respondent by virtue of the title deed, this in terms of Section 6(1) of the Deeds Registries Act;³

[1.2.2] the Seventh Respondent to revive registration of ownership of the property to First Respondent under title deed T42904/2007 in terms of Section 6(2) of the Deeds Act; and

¹ CaseLines pages 001-3 to 001-7

² referred to herein as "*the property*"

³ Act 47 of 1937, referred to herein as the "*Deeds Act*"

[1.2.3] directing First Respondent to transfer ownership of the property to “the Applicant” in terms of Section 17(c) of the Alienation of Land Act⁴; and

[1.3] First to Sixth Respondents to be ordered to pay the costs of the application.

[2] Mention should at this early juncture in this judgment be made to the fact that the matter was to be heard on 13 August 2024 and when so called on that day, Mr Mdabe appeared for the Applicants and Mr Coleman appeared for the First to Fifth Respondents. The matter was stood down on that day to the 15th of August 2024 14:00 for argument as there had not been compliance by Applicants with certain of my directives when allocations were made by me (concerning provision of a full set of applicable papers) and furthermore I only had access as at 13 August 2024 to a duplicate file of the matter on CaseLines which did not contain all of the papers such as *inter alia* Applicants’ heads of argument, practice notes, etc.⁵

[3] During the early evening of Wednesday, 14 August 2024, a notice of removal of the matter was caused to be uploaded to CaseLines on behalf of the Applicants, this not only without consent of the Respondents but similarly without the court’s consent.

[4] When the matter was ultimately called by me on Thursday, 15 August 2024, at 14:00⁶ there was no appearance on behalf of the Applicants and upon having heard argument from Mr Coleman⁷, I commenced handing down a default judgment herein.

[5] At approximately 14:20 a gentleman entered the courtroom and upon enquiries made by me as to his surname and reason for his presence, he indicated to be Mr Nyathi, an attorney who was at court essentially to appear on behalf of the Applicants, but for the purpose of ensuring that the matter was not proceeding in consequence of the notice of removal filed.

⁴ Act 68 of 1981, referred to herein as the “*Alienation of Land Act*”

⁵ All of this was rectified later that day (13 August 2024)

⁶ such date and time agreed with the parties’ respective representatives, inclusive of Mr Mdabe on Tuesday, 13 August 2024

⁷ who confirmed that he tried contacting Mr Mdabe telephonically without success

[6] I enquired from Mr Nyathi as to the whereabouts of Mr Mdabe and was advised by him that after uploading the notice of removal, Mr Mdabe became “*busy with other things*” and unavailable for appearance in this matter. Mr Nyathi also confirmed that Mr Mdabe was neither ill nor otherwise incapacitated.

[7] The portion of the judgment already handed down by me at that juncture was recalled and I invited Mr Nyathi to address me on the validity and/or effectiveness of the notice of removal and similarly afforded Mr Coleman on behalf of the Respondents an opportunity to address me thereon.

[8] Having heard the respective representations in respect of such purported removal, I refused removal of the matter from the roll, upon which Mr Nyathi requested that the matter be postponed. Submissions were made by Mr Nyathi as well as Mr Coleman in respect of such application for postponement which I refused with an *ex tempore* judgment handed down by me in that regard at that time.

[9] Following the aforesaid dismissal of the application for postponement, Mr Nyathi, after having considered the various available options available to him, indicated that as he was in no position to argue the matter, but having knowledge of the fact that comprehensive heads of argument had been filed in the matter on behalf of the Applicants⁸, he would stand by the affidavits of Applicants and the heads of argument so filed on behalf of the Applicants and on the basis thereof, asked for the relief sought by Applicants to be granted.

[10] A multitude of authorities were referred to and submissions made in the parties’ respective heads of argument and during argument. The fact of certain such authorities and submissions not specifically being referenced herein, is not to be regarded as an indication that it was not considered. To the contrary, same had been given due consideration, specifically also mindful of the fact that Mr Nyathi, at the hearing, indicated that he simply stood by the extensive heads of argument filed on behalf of Applicants herein.

⁸ heads of argument of approximately 40 pages compiled and submitted herein by Mr Thulani Nkosi instructed by Mdabe Hlongwa Attorneys, CaseLines pages 005-17 to 005-57

[11] The essence of Applicants' case is that Applicants signed and concluded what Applicants allege to have been an instalment sale agreement with an entity known as Meadow Star Investment (Pty) Limited⁹ on 8 April 2003 which, pursuant to the voluntary liquidation of Meadow Star in 2007, was ceded to First Respondent on 23 August 2007.¹⁰

[12] Applicants further allege that as a result of "*my*"¹¹ '*purported or alleged*' breach, the agreement was cancelled and the property was sold to CUF Property Management (Pty) Limited (CUF) and transferred to the latter on 21 February 2016".¹²

[13] Applicants further state their case to be that the cancellation of the agreement between itself and First Respondent was null and void and invalid as Applicants had paid the purchase price and was entitled to have the property registered in "*my*" name.¹³

[14] Applicants also allege that the sale agreement with Second Respondent was null and void as "*I*"¹⁴ purchased the property without there having been any legal basis for the cancellation of the agreement between "*myself*"¹⁵ and Meadow Star or First Respondent.¹⁶

[15] It is common cause on Applicants' papers that the property was sold to Second Respondent pursuant to the cancellation of the agreement between Applicants and First Respondent.¹⁷

[16] Later in Applicants' founding affidavit, Applicants allege not to have seen the cancellation letter of 22 April 2015 by First Respondent, but a copy thereof is attached to

⁹ referred to herein as "*Meadow Star*"

¹⁰ founding affidavit, paragraph 1, CaseLines pages 002-9

¹¹ in paragraph 4 of the founding affidavit it is stated that "*I am the Applicant in this matter, I concluded and signed ...*" this despite there being two Applicants in the matter

¹² founding affidavit, paragraph 1, CaseLines page 002-10

¹³ founding affidavit, paragraph 11.1, CaseLines page 002-13. It is assumed that the intended reference was to both Applicants

¹⁴ seemingly an intended reference to Applicants

¹⁵ it is assumed to be and intended as a reference to Applicants

¹⁶ founding affidavit, paragraph 11.2, CaseLines page 002-14

¹⁷ founding affidavit, paragraph 13, CaseLines page 002-14; reference in that paragraph made of the agreement between "*myself and Company Unique Finance*", however, for purposes hereof and mindful of the relief sought by Applicants, it is assumed that the agreement was so entered into between Applicants and First Respondent

Applicants' founding affidavit as Annexure "SMD11"¹⁸ without an explanation (other than an oblique reference to statements requested in 2016 by SERI) as to how Applicants came to be in possession of this cancellation letter.

[16.1] With regard to this letter, Applicants stated that the content reflected an incorrect calculation of the account and that the amount was in violation of the *in duplum* rule.

[16.2] Furthermore, Applicants allege the agreement had already been fulfilled "by 2015" as the debt was allegedly settled.

[16.3] The Applicants also made reference to certain statutory provisions and furthermore alleged that there had been invalidity and unlawful conduct in the cancellation and in the transfers as same violated Applicant's rights in terms of Section 26(1) of the Constitution of the Republic of South Africa¹⁹.

[17] On behalf of First to Fifth Respondents, a defence is raised that the current relief sought by Applicants cannot be granted as Applicants, as at August 2016, had knowledge of the fact that the subject property, being the essence in respect of which all of the relief is now sought, was sold and transferred to Second Respondent, with Applicants having been aware of the sale and the transfer of such subject property from First Respondent to Second Respondent and Second Respondent's consequential ownership thereof, at the latest by 11 August 2016 when an application was launched and served on Applicants seeking the eviction of Applicants from the property.²⁰

[18] In consequence of the aforesaid allegations by First to Fifth Respondents²¹, Respondents submit that Applicants' claims (debts sought to be enforced) in this application have prescribed.²²

[19] In addition, it is further raised by Respondents that the essential issue in this matter, to wit ownership of the property, is *res judicata* following upon the judgment granted for the

¹⁸ CaseLines 002-134

¹⁹ 1996, referred to herein as the "*Constitution*". See paragraph 50.3 of Applicants' founding affidavit, CaseLines page 002-34 seemingly to be read with paragraph 41 at CaseLines 001-25 to 001-26 as well as paragraphs 42, 44 and 45 at CaseLines 002-26 to 002-27

²⁰ answering affidavit, paragraphs 11 and 12, CaseLines page 003-8

²¹ for ease of reference simply herein referred to as the "*Respondents*" with the understanding that same excludes Sixth Respondent who has passed away as well as Seventh Respondent

²² answering affidavit, paragraph 13, CaseLines page 003-8

eviction of Applicants from the property, so granted on 27 July 2017 with the reasons therefor handed down on or about 11 August 2017.²³

[20] The facts in this matter are alleged by Respondents to be that :

[20.1] a lease agreement was entered into in respect of the property between Meadow Star and the First Applicant which lease agreement contained an option to purchase the subject property;²⁴

[20.2] on 28 November 2004, Applicants concluded an agreement of purchase and sale of immovable property with Meadow Star in respect of the property;²⁵

[20.3] the sale agreement of 28 November 2004 novated the earlier lease agreement concluded on 8 April 2003;²⁶

[20.4] the sale agreement was ceded to First Respondent during August 2007 and as Applicants failed to make punctual payment of monthly payments, Applicants were placed in *mora* on 22 April 2015;²⁷

[20.5] as Applicants failed to remedy their breach, First Respondent cancelled the sale agreement on 25 June 2015 and duly advised Applicants of such cancellation;²⁸

[20.6] pursuant to the cancellation of the sale agreement, First Respondent sold the property to Second Respondent in terms of the sale agreement attached to the founding affidavit as Annexure “SMD13” dated 28 January 2016;²⁹

[20.7] upon gaining knowledge of the cancellation of the sale agreement and should Applicants have deemed same to constitute a repudiation of the agreement, an election ought to have been made to either accept or reject such repudiation, which election was never conveyed to First or Second

²³ Annexure “E” to Respondents’ answering affidavit, CaseLines page 003-30 to 003-40

²⁴ answering affidavit, paragraph 17.2, CaseLines page 003-10

²⁵ answering affidavit, paragraph 17.3, CaseLines page 003-10 read with Annexure “H”, CaseLines page 003-116 to 003-124

²⁶ answering affidavit, paragraph 17.3, CaseLines page 003-10

²⁷ answering affidavit, paragraph 17.4, CaseLines page 003-11; see also Annexure “I”, CaseLines page 003-128 which is to be read with Annexure “SMD11”, CaseLines page 002-134

²⁸ answering affidavit, paragraph 17.5, CaseLines page 003-11 read with Annexure “J”, CaseLines page 003-131 to 132

²⁹ answering affidavit, paragraph 17.6, CaseLines page 003-11 read with Annexure “SMD13” to Applicants’ founding affidavit commencing at CaseLines page 002-137

Respondents and in absence thereof, there had been a waiver of a right to challenge the cancellation.³⁰

[20.8] The eviction application already referenced above then followed.

[21] It is to be specifically stated that from the reasons issued pertaining to the eviction order granted³¹ it follows that consequent upon the granting of an *ex parte* order pertaining to service of the eviction application (so brought in terms of Section 4(2) of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act³²), such application was enrolled on the 30th of September 2016, with First Applicant at that juncture having appeared personally whereafter the matter was postponed to November 2016 to afford Applicant an opportunity to procure legal representation.³³

[22] From the above, it follows that at the latest 30 September 2016 (when First Applicant appeared personally in court), First Applicant so appeared as a result of the eviction application so served on at least First Applicant and Applicants having had knowledge of those proceedings.

[23] The eviction application and the founding affidavit in respect thereof formed part of the annexures to Respondents' answering affidavit and from the founding affidavit in the eviction proceedings it follows that, at the very least, the following information was within the knowledge of Applicant by, at the very latest, 30 September 2016, to wit that:

[23.1] Second Respondent (herein) was stated to be the "*lawful registered owner*" of the property;

[23.2] the ownership of Second Respondent (herein) of such property was evidenced by a WinDeed property search obtained from the Deeds Office and the title deed T10845/2016, both attached as annexures to that affidavit;³⁴

³⁰ paragraph 17.7 of Respondents' answering affidavit, CaseLines page 003-12

³¹ Annexure "E", CaseLines page 003-30 to 003-40

³² 19 of 1998, referred to herein as the "*PIE Act*"

³³ paragraph 5 of the said reasons, see footnote 31 above

³⁴ paragraph 431 with sub-paragraphs thereto of the founding affidavit in the eviction application, CaseLines page 003-47; The details of both the seller and purchaser appear in the Deed of Transfer T10845/2016 that formed an attachment to the founding affidavit in the eviction proceedings; CaseLines pages 003-61 to 005-64

- [23.3] First Applicant (herein) was stated to reside at the property, but refuses to vacate the property;³⁵
- [23.4] First Applicant (herein) was alleged to be in unlawful occupation of the property, alleged to occupy the property without the express or tacit consent of the lawful owner, having no other right to occupy the property and not entitled in law to remain in occupation of the property;³⁶
- [23.5] the property was purchased by Second Respondent (herein) from Company Unique Finance (Pty) Limited (First Respondent herein) on 28 January 2016;³⁷
- [23.6] pursuant to the property being sold to Second Respondent (herein) and the subsequent transfer of the property *inter alia* First Applicant (herein) was still in occupation of the property;³⁸
- [23.7] there existed no lease agreement or other right to occupation between the Applicants (herein) and the Second Respondents (herein) entitling the Applicants (herein) to remain in occupation of the property and that as far as Second Respondent (herein) was aware no lease agreement existed between the previous owner (First Respondent herein) and the Applicants (herein);³⁹
- [23.8] First and Second Applicants (herein)⁴⁰ were the owners of the property until it was repossessed by First Respondent (herein).⁴¹

[24] With their replying affidavit, the Applicants filed a “*notice of motion*” seeking that Sections 10(1) and 10(2) and 11(a) to (d) of the Prescription Act⁴² be found constitutionally invalid insofar as it prevents the Section 11(d) creditors from claiming a debt after 3 years of a claim becoming due, because the provisions are in violation of such creditor’s right in terms of Sections 9(1), 10, 25(5) and (6), 26(1) and (2) and 34 of the Constitution as well as

³⁵ paragraphs 5, 5.1 and 5.2 of the founding affidavit, CaseLines page 003-47

³⁶ paragraph 11 with sub-paragraphs thereto, CaseLines pages 003-48 to 003-49

³⁷ founding affidavit in the eviction application, paragraph 13, CaseLines page 003-49

³⁸ founding affidavit in the eviction application, paragraph 15, CaseLines page 003-50

³⁹ paragraph 16 of the founding affidavit in the eviction application, CaseLines page 003-50

⁴⁰ seemingly a reference to First and Second Applicants in the application currently to be adjudicated upon by me

⁴¹ paragraph 18 of the founding affidavit in the eviction application, CaseLines page 003-50

⁴² 68 of 59, referred to herein as the “*Prescription Act*”

for condonation of the late filing of Applicants' replying affidavit.⁴³ Condonation of such late filing of the replying affidavit was not raised as an issue, but is granted to the extent necessary.

[25] In the said "*notice of motion*" it is stated that the affidavit of First Applicant with the annexures thereto will be used in support of the application⁴⁴ and it is presumed that it is the replying affidavit filed in the proceedings upon which Applicants seek to rely for such relief sought in what it calls a "*notice of motion*".

[26] On or about 27 February 2020, Applicants, with the filing of their replying affidavit, also caused a notice in terms of Rule 16A to be issued pertaining to the alleged unconstitutionality of the aforesaid sections of the Prescription Act.⁴⁵ It does not follow from the papers herein that the said notice was duly displayed by the registrar of this court as required, but for purposes hereof, it is assumed that it had so been done.

[27] Applicants in their replying affidavit *inter alia* allege that:

[27.1] the allegations contained in Respondents' answering affidavit are "... *partly false, incomplete at some point and do not give a true reflection of the actual position.*"⁴⁶; and

[27.2] during the time of the eviction proceedings and specifically when the SERI report was being compiled and filed, Applicants had not been provided with the agreement of sale and statements of account in that First Applicant "... *was advised by Chance Nthombeni, Portia, Sibiya and Theo Hopkins, who are, or were at the employment of the Second Respondent, that the agreements were burnt in a fire.*"⁴⁷ These allegations were not contained in Applicants' founding affidavit, but were raised in Applicants' replying affidavit.

⁴³ CaseLines pages 004-3 to 004-4

⁴⁴ CaseLines page 004-4; The status of such "*notice of motion*" pertaining to the relief other than condonation is uncertain, but it will be adjudicated upon nonetheless, subject to what is stated below in respect of a new case sought to be made out in reply to which Respondents had not had the opportunity to respond

⁴⁵ CaseLines pages 020-1 to 020-4

⁴⁶ Applicants' replying affidavit, paragraph 3, CaseLines page 004-8

⁴⁷ Applicants' replying affidavit, paragraph 7, CaseLines page 004-10

[28] Applicants do, however, admit remembering “... *signing both the 2003 and later, the 2004 agreement* ...”⁴⁸. Applicants continue and then allege in this regard that “*he*” was only now seeing the 2004 agreement for the first time after having signed it and then reiterates the earlier allegation (which is nowhere to be found in the founding affidavit which is also the case with remembering the signing of an agreement in 2003 and 2004) of same having been deliberately concealed from him and with him having been misled with it stated that it was burnt in a fire.⁴⁹

[29] Pertaining to the prescription issue raised, Applicants *inter alia* allege that the filing of a notice of appeal in the eviction proceedings as early as 31 August 2017, constituted a process “... *of securing his debt*”.⁵⁰ In their replying affidavit, the Applicants in addition state the following: “*Given that the eviction proceedings are under an appeal, the matter is sub judice, prescription was interrupted the moment we defended the eviction proceedings.*”⁵¹

[30] It essentially does not require stating, but for purpose of clarity, it is legally untenable to seek to argue that either opposing an eviction application or noting an appeal against an eviction order could have interrupted prescription in accordance with the Prescription Act⁵² in respect of Applicants’ relief sought in this current application.

[31] The debts essentially claimed by Applicants in their current notice of motion have not been claimed through either opposing (unsuccessfully so) the eviction proceedings nor by applying for leave to appeal such eviction order. Opposition to and/or application for leave to appeal in the eviction proceedings did not amount to “*service on the debtor of any process whereby the creditor claims payment of the debt*”⁵³

[32] It has been alleged by Applicants that the application for leave to appeal against such judgment is still pending which, given the lapse of 8 years since so granted, remained

⁴⁸ Applicants’ replying affidavit, paragraph 11, CaseLines page 004-11 to 004-12

⁴⁹ Applicants’ replying affidavit, paragraph 12, CaseLines page 004-12 read with paragraph 14, CaseLines 004-12

⁵⁰ Applicants’ replying affidavit, paragraph 65, CaseLines page 004-31

⁵¹ Applicants’ replying affidavit, paragraph 66, CaseLines page 004-32

⁵² see Section 15 of the Prescription Act which provides:

“(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 of the debt.*”

⁵³ See footnote 52 above

unexplained in Applicants' affidavits other than allegations to the effect that after the application for leave to appeal was struck off the roll due to the failure of Mr Mdabe to have appeared⁵⁴ an application was served and filed on 9 May 2018 for same to be reinstated.⁵⁵ This some two years later.

[33] No indication is provided as to what occurred in respect of that reinstatement application over the past 6 years.

[34] Despite the plethora of denials contained in Applicants' replying affidavit, it is to be noted that Applicants have admitted that they concluded an agreement of purchase of sale of the property on 28 November 2004, that a true copy of that agreement was attached to Respondents' answering affidavit as Annexure "H" and that such agreement novated the lease agreement that was concluded on 8 April 2003.⁵⁶

[35] Applicants deny cession of the sale agreement to First Respondent, that their payments made were sporadic, that they were placed in *mora*, that Applicants failed to remedy their breach and that a copy of the cancellation letter was forwarded to it pursuant to First Respondent's cancellation of the sale agreement.⁵⁷

[36] From the aforesaid, it follows that numerous disputes of fact exist on the papers, particularly pertaining to the factual background detailed in Respondents' answering affidavit when read with the facts stipulated in Applicants' replying affidavit.

[37] There was no request by Applicants, mindful of these factual disputes, for the matter to be referred to oral evidence or to trial. In the result, the so-called *Plascon-Evans* rule⁵⁸ finds application which was aptly summarised as follows in *National Director of Public Prosecutions v Zuma*⁵⁹:

⁵⁴ Applicants' replying affidavit, paragraph 19, CaseLines page 004-14

⁵⁵ Applicants' replying affidavit, paragraph 21, CaseLines page 004-14

⁵⁶ Answering affidavit, paragraph 17.3, CaseLines page 003-10 read with replying affidavit, paragraph 68, CaseLines page 004-33

⁵⁷ Answering affidavit, paragraphs 17.4 and 17.5, CaseLines page 003-11 read with replying affidavit, paragraphs 69 and 70, CaseLines pages 004-33 and 004-34

⁵⁸ *Plascon-Evans Paints Transvaal Limited v Van Riebeeck Paints (Pty) Limited* 1984 (3) 623 (AD) at 634E to 635C

⁵⁹ 2009 (2) SA 277 (SCA) at paragraph [26]

*“Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant’s ... affidavits, which have been admitted by the respondent ..., together with the facts alleged by the latter, justify such order. It may be different if the respondent’s version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.”*⁶⁰

[38] It cannot be said that Respondents’ version consists of bald or uncreditworthy denials, that it raises fictitious disputes of fact or is palpably implausible, far-fetched or that it is clearly untenable to the extent that the court is justified in rejecting them merely on the papers.

[39] Given the aforesaid, the relief sought as set out in Applicants’ notice of motion can only be granted if the facts averred in Applicants’ affidavits which had been admitted by the Respondents, read with the facts alleged by the Respondents, justify the granting thereof.

[40] Respondents, apart from their opposition pertaining to the merits of Applicants’ claim and denial of Applicants’ entitlement thereto, raised two additional issues, to wit *res judicata* and that the relief now sought by Applicants, thus such debts, have become prescribed.

[41] With regard to the question of *res judicata*, it has been held that for a defence of *res judicata* to be successfully raised, it is not an immutable requirement that the same thing must be claimed.⁶¹

⁶⁰ see also *Wightman t/a JW Construction v Headfour (Pty) Limited and Another* 2008 (3) SA 371 (SCA) at paragraph [13]

⁶¹ *Janse van Rensburg and Others NNO v Steenkamp and Another, Janse van Rensburg and Others NNO v Myburgh and Others* 2010 (1) SA 649 (SCA) at paragraph [20]

[42] In *Smith v Porritt and Others*⁶² the law pertaining to *res judicata* was summarised and it was *inter alia* held that:

“Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (idem actor) and that the same issue (eadem quaestio) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed.”

[43] I am in agreement with Mr Coleman who appeared on behalf of the Respondents that in granting the eviction order, at the very least by necessary inference, a finding of ownership of the property (being that of Second Respondent herein) or conversely the non-entitlement of Applicants to have occupied the property resulting from their non-ownership of the property followed.

[44] The relief that is currently sought by Applicants herein is, however, now an attack on that very ownership of the property and specifically the lawfulness thereof, which includes a prayer for the cancellation of the title deed under which Second Respondent holds such property. Careful perusal of the reasons handed down on 11 August 2017 in the eviction proceedings⁶³, is in my view indicative thereof that it cannot in this instance be held that it is the same issue (*eadem quaestio*) of lawful ownership that is now to be determined herein and which was essentially inferred in the eviction proceedings.

[45] In the result I find that Respondents’ defence of *res judicata* must fail.

[46] Prior to dealing with the issue of prescription, the application for declaration of unconstitutionality of Sections 10(1) and 10(2) and 11(a) to (d) of the Prescription Act, alternatively declaring it constitutionally invalid to the extent that it prevents Section 11(d) creditors from claiming a debt after 3 years of the claim becoming due resulting from the provisions alleged to be in violation of such creditor’s right in terms of Section 9(1), 10, 25(5) and (6), 26(1) and (2) and 34 of the Constitution needs to be briefly addressed.

⁶² 2008 (6) SA 303 (SCA) at paragraph [10]

⁶³ CaseLines pages 003-30 to 003-40

[47] The Constitutional Court has on numerous occasions considered, upheld and applied the provisions contained in the Prescription Act, the time periods detailed therein and confirmed the consequences arising therefrom.

[48] In *Road Accident Fund and Another v Mdeyide*⁶⁴ it was reiterated that under the rule of law, the fundamental right of access to courts is essential for constitutional democracy and it is for this very reason that the right of access to courts is protected in the Constitution.⁶⁵

[49] The court in *Mdeyide*, notwithstanding the above, continued and held that:

*“[2] In the interests of social certainty and the quality of adjudication, it is important, though, that legal disputes be finalised timeously. The realities of time and human fallibility require that disputes be brought before a court as soon as reasonably possible. Claims thus lapse, or prescribe, after a certain period of time. If a claim is not instituted within a fixed time, a litigant may be barred from having a dispute decided by a court. This has been recognised in our legal system — and others — for centuries.”*⁶⁶

[50] In *Mdeyide* the court also stipulated that it (the Constitutional Court):

“...has repeatedly emphasised the vital role time limits play in bringing certainty and stability to social and legal affairs, and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the potential to be drawn out for indefinite periods of time, bringing about prolonged uncertainty to the parties to the dispute. The quality of adjudication by courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be available to testify, or their recollection of events may have faded. The quality of adjudication is central to the rule of law. For the law to be respected, decisions of courts must be

⁶⁴ 2011 (2) SA 26 (CC) (herein referred to as “*Mdeyide*”

⁶⁵ *Mdeyide* at paragraph [1]

⁶⁶ The court in *Mdeyide* confirmed that “*prescription is provided for by the Prescription Act ...*”

given as soon as possible after the events giving rise to disputes, and must follow from sound reasoning, based on the best available evidence.”⁶⁷

[51] No proper grounds have been raised by Applicants that can sustain a finding that Sections 10(1) and (2) and 11(a) to (d) of the Prescription Act are constitutionally invalid insofar as it prevents the Section 11(d) creditors from claiming a debt after 3 years of the claim becoming due because the provisions are allegedly in violation of such creditor’s rights in terms of Sections 9(1), 10, 25(5) and (6), 26(1) and (2), and 34 of the Constitution.

[52] There is also another reason why such relief sought by the Applicants pertaining to the unconstitutionality or constitutional invalidity of certain sections of the Prescription Act, cannot be entertained herein. That flows from the provisions contained under Rule 10A of the Uniform Rules of this court which provides that:

“10A. (1) If in any proceedings before the court, the validity of a law is challenged, whether in whole or in part and whether on constitutional grounds or otherwise, the party challenging the validity of the law must join the provincial or national executive authorities responsible for the administration of the law in the proceedings.”

[53] The Applicants have failed to comply with the provisions of Rule 10A in this regard.⁶⁸

[54] Applicants’ application filed through its later “*notice of motion*” (to the extent that it has any validity at all) and its defence against the prescription raised, founded upon the

⁶⁷ see also *Le Roux and Another v Johannes G Coetzee & Seuns and Another* 2024 (4) SA 1 (CC) at paragraphs [29] to [34]; *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC) at paragraphs [46], [48], [50], [63] and [84]

⁶⁸ In *Van der Merwe v Road Accident Fund (Women’s Legal Centre Trust as amicus curiae)* 2006 (4) SA 230 (CC) at 241 E-G, the Constitutional Court explained the reasoning as follows:

“On a number of occasions this Court has emphasised that when the constitutional validity of an Act of Parliament is impugned the Minister responsible for its administration must be a party to the proceedings inasmuch as his or her views and evidence tendered ought to be heard and considered. Rudimentary fairness in litigation dictates so. There is another important reason. When the constitutional validity of legislation is in issue, considerations of public interest and of separation of powers surface. Ordinarily courts should not pronounce on the validity of impugned legislation without the benefit of hearing the State organ concerned on the purpose pursued by the legislation, its legitimacy, the factual context, the impact of its application, and the justification, if any, for limiting an entrenched right. The views of the State organ concerned are also important when considering whether, and on what conditions, to suspend any declaration of invalidity.”

alleged constitutional invalidity and/or those particular sections, to wit Sections 10(1) and (2) and 11(a) to (d), being unconstitutional to the extent that it prevents Section 11(d) creditors from claiming a debt after 3 years of the claim becoming due as those provisions are alleged to be in violation of such creditor's right in terms of Sections 9(1), 10, 25(5) and (6) and 26(1) and (2), and 34 of the Constitution, cannot be upheld and is notwithstanding non-compliance with the provisions of Rule 10A of the Uniform Rules of Court found to be without merit and dismissed.

[55] A further issue raised by the Respondents as a defence is that the claims (debts as per the relief sought) of Applicants have prescribed in accordance with the provisions of the Prescription Act under circumstances where:

[55.1] the purchase agreement that forms the basis of Applicants' application (so Respondents allege) was cancelled on 22 April 2015⁶⁹;

[55.2] Applicants were aware or should have been aware since 11 August 2016 that the property was transferred into the name of Second Respondent⁷⁰; and

[55.3] it being alleged to have been common cause that Applicant was in arrears and did not pay in terms of the agreement.⁷¹

[56] I am in agreement with Respondents that to a large degree and pertaining to the second agreement, which Applicants, as aforesaid, admitted to have signed, Applicants sought to make out a case in its replying affidavit which is not permissible and not to be entertained.⁷² Such reliance by Applicants has, however, even if it were to be considered, no real effect or import herein given what is stipulated below.

[57] The bare minimum information that Applicants knew at the very latest as at 30 September 2016 has already been stated above.⁷³

⁶⁹ Respondents' heads of argument, paragraph 2.2; Respondents' answering affidavit, paragraph 17.4 at CaseLines page 003-11

⁷⁰ Respondents' heads of argument, paragraph 2.2.2

⁷¹ Respondents' heads of argument, paragraph 2.2.3. It is not stipulated by Respondents on what basis it is stated to be common cause that Applicants were in arrears and did not pay in terms of the agreement

⁷² *Titty's Bar and Bottle Store v ABS Bottle Garage (Pty) Limited and Others* 1974 (4) SA 362 (T) at 368 H; *York Timbers (Pty) Limited v National Director of Public Prosecutions* 2015 (3) SA 122 (GP) and *Dladla and Others v City of Johannesburg and Another* 2014 (6) SA 516 (GJ) at paragraph [12]

⁷³ see paragraph [23] above with sub-paragraphs thereto

[58] It has been held by the Supreme Court of Appeal that the transfer of land constitutes a debt falling within the ambit of Section 11(d) of the Prescription Act and in respect whereof a 3 year prescriptive period finds application.⁷⁴

[59] The word “*debt*” has not been defined in the Prescription Act, but it has been held that the word “*debt*” does not refer to the narrower concept of a cause of action, but rather to the broader concept of right of action or what has come to be known as the creditor’s “*claim*”.⁷⁵

[60] In *Minister of Finance v Gore*⁷⁶ the court reiterated that:

*“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’.”*⁷⁷ (own emphasis)

[61] Pertaining to a claim flowing from a breach of contract, it follows that prescription starts running as from the date of breach (or repudiation) of contract, irrespective of the election made by the assumed innocent party to such contract.

[62] On a proper characterisation of the relief sought by Applicants, it follows that such relief falls within the definition of a debt, in its slightly broader sense, but furthermore within the ambit of Section 11(d) of the Prescription Act and in respect of which a 3 year prescription period finds application.⁷⁸

⁷⁴ *Desai NO v Desai* 1996 (1) SA 141 (A) at 146 H to 147 I

⁷⁵ *Duvenhage v Eerste Nasionale Bank van SA Beperk* [2005] 4 All SA 46 (N) at 57 and *Apalamah v Santam Insurance Co Limited* 1975 (2) SA 229 (D) at 232 E-F

⁷⁶ 2007 (1) SA 111 (SCA) at 119 J – 120 A

⁷⁷ This passage was again quoted with approval in *WK Construction (Pty) Limited v Moores Rowland* [2022] ZASCA 44 (SCA) at paragraph [33]

⁷⁸ See *ABSA Bank Limited v Keet* 2015 (4) SA 474 (SCA) at paragraph [12]; *Tsie v Brenner and Others* 2024 JDR 1130 GJ at paragraph [32] where the court held:

“The fact that the right concerns an incorporeal movable that finds expression in the members interest of a close corporation does not alter the fact that the contractual obligation to effect transfer, assuming for a moment the applicant is correct in his interpretation, constitutes a ‘debt’ within the meaning of the Prescription Act.”

[63] In its replying affidavit, Applicants sought to rely on the provisions of Sections 12(2) and 12(3) of the Prescription Act and which provides as follows:

“(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(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.”

[64] The high water mark of Applicants’ evidence upon which Applicants’ reliance on Sections 12(2) and 12(3) of the Prescription Act is founded, are that despite it being admitted that seemingly at least First Applicant remembered signing both the 2003 and 2004 agreements, Applicants only saw same for the first time as attachment to Respondents’ answering affidavits.⁷⁹

[65] Applicants allege that the sale agreements existed : *“... and were deliberately concealed from me, because they misled me and said it was burnt in a fire.”*⁸⁰

[66] It is not insignificant to note that nowhere in Applicants’ founding affidavit itself was mention made that, upon request for provision of statements and/or agreements, Applicants were advised of same having been burnt in a fire or more importantly that the existence of any agreements or statements had been deliberately concealed from Applicants.

[67] Applicants clearly, at the very latest as at 30 September 2016 had knowledge of at least the *“... minimum facts that [were] necessary to institute action”*, to wit the identity of the current registered owner of the property (as same was not only alleged in the founding affidavit within the eviction application⁸¹, but in fact the title deed was attached to those

⁷⁹ replying affidavit, paragraphs 11 and 14, CaseLines pages 004-11 to 12

⁸⁰ replying affidavit, paragraph 12, CaseLines pages 004-12 read with paragraph 7, CaseLines page 004-10 and paragraph 10, CaseLines page 004-11

⁸¹ see paragraph 4.3 of the founding affidavit in the eviction application, CaseLines page 003-46

papers⁸²) the identity of not only the then owner of the property, being Second Respondent herein, but also the seller of the property, being First Respondent herein, that Applicants were alleged to have been in unlawful occupation of the property as well as Applicants' own knowledge of the agreements concluded in respect of the property and payments made by Applicants.

[68] Given the aforesaid, Applicants' reliance on Sections 12(2) and 12(3) as to the commencement of prescription having been delayed, is without merit, mindful of the information available to Applicants at that juncture. Applicants have not provided any indication of any further steps taken immediately upon receipt of the eviction application to obtain further documentation and/or information other than that stipulated above, which has already been found wanting.

[69] The current application was launched on 29 October 2019, thus more than 3 years after Applicants had sufficient knowledge of their right of action (or claim) yet they failed to launch the application timeously. I thus find that Applicants' right of action (claims) in respect of the relief sought in their notice of motion has prescribed.

[70] In the result I grant the following orders:

1. Applicants' application dated 28 October 2019 is dismissed with costs, such costs to include costs of counsel on scale C.
2. Applicants' application dated 27 February 2020 (filed with its replying affidavit) is, save for paragraph 2 thereof, dismissed with costs, such costs to include costs of counsel on scale C.

J C UYS SC

Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 15 August 2024

Judgment: 12 November 2024

⁸² see Annexure "C" to the founding affidavit in the eviction application at CaseLines page 003-60 to 64

Appearances

For Applicants: Mr Nyathi

On instructions:

For First to Fifth Respondents: Adv E Coleman

On instructions: Michelle Neethling Attorneys