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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D4595/2024

In the matter between:

HORATIUS FYNN

FIRST APPLICANT

GAYDA CARA FYNN

SECOND APPLICANT

and

SUBHASH MAHARAJ AND COMPANY

FIRST RESPONDENT

MARIO CLYDE WATSON

SECOND RESPONDENT

TARYN RO-ANNE GIELINK

THIRD RESPONDENT

ENVER DEVON GIELINK

FOURTH RESPONDENT

ORDER

-
1. The application is dismissed with costs, to be taxed on Scale A.

JUDGMENT

Shapiro AJ

[1] The first to third respondents (“the sellers”) were the registered owners

of a property located at 7[...] O[...] G[...], Austerville, Durban. In 2012, the parties concluded a written deed of alienation in terms of which the respondents (“the sellers”) agreed to sell the property to the applicants (“the Fynns”) for R910 000. In terms of the agreement, the Fynns were obliged to pay a deposit of R250 000, and to pay the balance of the purchase price by means of monthly instalments of not less than R5 802.00. These payments were to be made directly into the third respondent's bond account held with Standard Bank, commencing on 1 April 2012, and subject to the condition that all amounts (the full purchase price) be paid by no later than 1 April 2019.

[2] The first respondent was the conveyancer duly appointed to attend to the transfer of ownership of the property to the Fynns. On or about 19 September 2012, the Fynns paid an amount of R200 000 towards the deposit to the first respondent, acting in its capacity as conveyancer. The balance of the deposit was paid directly by the Fynns to the sellers. It is not disputed that the first respondent subsequently paid the deposit amount of R200 000 to the sellers on or about 25 September 2012.

[3] On any version, the agreement between the parties has been cancelled and the Fynns called upon the first respondent to refund the deposit, together with interest. The first respondent alleges, however, that the Fynns expressly instructed it to pay the deposit to the sellers, which it did. On this basis, it denies any liability to the Fynns for the repayment of the deposit.

[4] The Fynns launched an application seeking orders directing the first respondent to repay the amount of R200 000, plus interest and costs.

[5] The Fynns allege that they only became aware the first respondent's conduct in paying the R200 000 to the sellers in May 2022, when they visited the first respondent's offices. The first respondent denies this, alleging that the date of May 2022 is a construct by the Fynns in an attempt to avoid the issue of prescription.

[6] In this regard, the first respondent states the following in its answering

affidavit:

“It is not difficult to work out why the fabrication¹ has been cobbled up as otherwise any claim for the return of the R200,000 would be stillborn. So too is the suggestion that the Applicants only became aware in May 2022 of the payment of R200 000.00 to the Sellers. This, as any lawyer would know, is to overcome the defence of prescription, which this claim, false as it is, has to overcome.”

[7] The Fynns argue that the defence of prescription has not been properly raised and, as such, cannot be relied upon. They argue that because the first respondent has failed to set out any details about when the applicants' claim arose and when it prescribed.

[8] In this regard, I was referred to the judgment of *Gericke v Sack*² as authority for the proposition that the first respondent was obliged to state the date on which the “debt” became due and when, it contended, the matter prescribed before the defence could be raised or considered.

[9] I do not agree with this interpretation. The *Gericke*³ judgment affirms the principle that the party raising prescription bears the onus of establishing the defence. This includes the obligation to establish both the date on which the debt arose (or became due) and the date of completion of the period of prescription.

[10] It was incumbent upon the first respondent to establish the defence of prescription by proving when prescription commenced and when the debt prescribed. However, it is unhelpful to elevate form over substance. Although the defence of prescription was raised tersely, it was nevertheless expressly and pertinently raised by the first respondent. When the answering

¹ The first respondent misunderstood the Fynns' challenge to their signature on an Irrevocable Authority to pay the deposit to the sellers. They did not deny their signature. They denied intending the Authority to operate immediately and alleged that it was intended to operate at transfer only.

² *Gericke v Sack* 1978 (1) SA 821 (A) at 827H-828C.

³ *Ibid.*

affidavit is read holistically and in context,⁴ the basis upon the first respondent relies for this defence is sufficiently articulated.

[11] In arriving at this conclusion, I am mindful of the fact that in applications the affidavits served both as pleadings and evidence.⁵

[12] I conclude that the defence of prescription is available to the first respondent, subject to its discharge of the necessary onus of proof.

[13] In the recent judgement of *Mason N O v Mason and Another*,⁶ the court restated the test for determining when prescription starts to run, as contemplated in s 12 of the Prescription Act 68 of 1969 (“the Prescription Act”):

“[14] The legal principles that apply to the prescription issue are trite. Under s 12(1) of the Prescription Act 68 of 1969 (the Act), prescription commences to run as soon as a debt is due. This is subject to two riders in s 12(3). First, the section creates the exception that a debt will not be deemed to be due until the creditor has knowledge of the identity of the debtor and the facts from which the debt arises. The second is the proviso to this exception, namely that ‘a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care’. The onus lies on the party raising the special plea of prescription to prove the defence, including the facts on which the exception in s 12(3) is based.

[15] It is settled that prescription will commence when the creditor has the minimum facts necessary to institute action. Prescription will not be delayed because she or he does not yet have the evidence to prove the case comfortably. As far as the knowledge contemplated in s 12(3) is concerned, this may be either actual knowledge, or constructive knowledge under that section’s deeming proviso. A creditor whose passivity, or supine inaction, accounts for their lack of actual knowledge may nonetheless be held to have

⁴ I deal with the relevant facts later in this judgment.

⁵ *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA) para 13.

⁶ *Mason N O v Mason and Another* [2025] ZASCA 44 paras 14-15.

had the requisite constructive knowledge under the proviso if, by acting diligently, they reasonably could have acquired the facts necessary to institute action.”

[14] The starting point in the enquiry is an identification of the Fynns’ cause of action which forms the basis of their claim for repayment of the R200 000 that they paid to the first respondent as a deposit.

[15] Mr *Chetty*, who appeared on behalf of the Fynns, correctly submitted that their claim was contractual: the Fynns alleged that the sellers breached the agreement by failing to make the required the monthly bond instalment payments to Standard Bank, thereby falling into arrears and permitting the property to be foreclosed upon. This breach, according to the Fynns, entitled them to place the sellers in breach and to cancel the agreement.

[16] These allegations were also expressed in the Fynns’ Notice of Breach sent to the sellers on 7 July 2022.

[17] In their founding affidavit, the Fynns further alleged that they became aware of the sellers’ default in respect of the monthly bond instalments when a summons was served at the property at the instance of Standard Bank “sometime in August 2020”.

[18] In that summons, Standard Bank sought a money judgment against the sellers and an order authorising the foreclosure of the property.

[19] In its answering affidavit, the first respondent’s deponent alleged that, during the conversation with the Fynns on 27 May 2022, they informed him that they had unsuccessfully attempted to interdict the proceedings instituted by Standard Bank in 2020, including efforts to prevent the foreclosure of the property.

[20] In their replying affidavit, the Fynns did not engage with this allegation. Instead, they relied on the following blanket statement: "The rest of the First

Respondent's affidavit is denied to the extent that it does not accord with what is said in this affidavit and in my founding affidavit".⁷

[21] In circumstances where it is common cause that the Fynns and Mr Maharaj of the first respondent had a conversation on 27 May 2022, and in the absence of any dispute about the contents of that conversation, I must accept that the Fynns informed him, in May 2022, about their unsuccessful 2020 High Court application to forestall the looming foreclosure of the property by Standard Bank.

[22] It seems to me that by late 2020, the Fynns had sought and obtained legal advice about their remedies arising out of the alleged breach by the sellers of their obligations to both Standard Bank and themselves.⁸

[23] Put differently, and by the last quarter of 2020, the Fynns had learned the facts upon which they subsequently based their right to cancel the agreement:⁹ namely the failure of the sellers to pay all amounts due to Standard Bank and the resulting exposure of the property to foreclosure.

[24] Accordingly, and by that stage, the Fynns had acquired the facts necessary to institute proceedings to claim repayment of the deposit, or, at the very least, they could reasonably have acquired the necessary facts by the last quarter of 2020. Therefore, in terms of s 12(1) of the Prescription Act, prescription accordingly commenced to run at some point between August 2020 and the end of that year. This is when the "debt" fell due. For the purposes of this judgment, I do not need to determine a specific date in that period.

[25] The present application was served on 24 April 2024, which is more

⁷ If the Fynns were going to deny telling the first respondent about the abortive 2020 application, they were obliged to engage with this allegation directly in reply: See *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) para 13.

⁸ The Fynns did not allege that they represented themselves in the 2020 application – and it is safe to conclude that they engaged legal representatives to do so on their behalves.

⁹ The first respondent alleged, without proof, that the sellers had cancelled the agreement some years previously. I have ignored these allegations.

than three years after the "debt" fell due. It therefore follows that the Fynns' claim against the first respondent, which flows from their right to cancel the agreement and claim repayment in terms of clause 6.4 of the agreement, became extinguished by prescription, between August and the end of December 2023, in terms of s 11(d) read with s 12(1) of the Prescription Act.

[26] Therefore, the application falls to be dismissed on this basis.

[27] Mr *Chetty*, on behalf of the Fynns, sought to argue that there was a difference between the Fynns' right to cancel the agreement and to claim repayment of the deposit from the sellers on the one hand, and their purported right to recover the deposit directly from the first respondent's trust account, on the other.

[28] I do not accept that there is any appreciable difference. The Fynns' right to claim repayment of their deposit from the first respondent's trust account (assuming it remained there) was predicated on the assertion that they had lawfully cancelled the agreement. Absent a valid cancellation, no entitlement to a refund of the deposit could arise.

[29] Moreover, it was not disputed that the deposit had been paid to the sellers in 2012, and therefore it was no longer standing to the credit of the Fynns in the first respondent's trust account after that date. In any event, the Fynns did not seek an order directing repayment from the first respondent's trust account.¹⁰ Rather, they sought a judgment sounding in money against the first respondent on the basis that, following the cancellation of the agreement, the first respondent was liable to refund the deposit – without specifying the source from which the first respondent was to fund that payment.

[30] In the circumstances of this case, the initial destination of the R200 000 is immaterial to the prescription enquiry and does not affect the claim or revive it, if it has otherwise prescribed.

¹⁰ Something that they could not have done in the circumstances of this case, as it would have resulted in an impermissible trust account deficit.

[31] However, and if I am wrong in concluding that the Fynns' claim has prescribed, there exists an alternative ground upon which the application must fail .

[32] The Fynns have sought final relief on application in circumstances where they were aware of the first respondent's version before the application was launched.

[33] It is settled law that motion proceedings are not to be used to resolve factual issues because applications are not designed to determine probabilities. Where disputes of fact arise on the affidavits, a final order may be granted only if the facts alleged in the applicants' affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such an order".¹¹

[34] In terms of clauses 4.1.1 and 14.1 of the agreement, the Fynns were obliged to pay a deposit of R250 000 to the first respondent, who could not pay those funds to the sellers until transfer of the property had been registered.

[35] The Fynns admit signing the Irrevocable Authority which authorised the first respondent to pay "the deposit" of R200 000 to the sellers. They deny, however, that they intended to authorise it to pay those amounts before the date of transfer.

[36] In contrast, the first respondent's deponent alleges that he was specifically instructed by the Fynns to pay the deposit to the sellers. He states that this is the reason that he drew up the Irrevocable Authority for them to sign and that the first respondent only paid the amount once such authorisation had been obtained .¹²

¹¹ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26.

¹² In my view, it seems somewhat peculiar that the Fynns would sign an Irrevocable Authority to pay the deposit to the sellers seven years before transfer of the property was anticipated.

[37] It is noteworthy that the Irrevocable Authority makes no provision for the payment of any interest that may have accrued in respect of the deposit. This is understandable if the authority had been given prior to a payment being made shortly after the deposit had been paid to the first respondent.

[38] There was obviously subsequent communication between the Fynns and the sellers after the agreement was concluded that led them to pay the balance of the deposit of R50 000 directly to the sellers rather than through the first respondent.

[39] Further, the Fynns had already agreed to make payment of the monthly instalments, due in respect of the purchase price, directly to the sellers as well.

[40] Given these considerations, it is not implausible or uncreditworthy that the Fynns would have instructed the first respondent to pay the R200 000 of the deposit to the sellers as well.

[41] As I am unable to reject the first respondent's version, I may only grant a final order in favour of the Fynns if the facts alleged by the first respondent justify such an order.

[42] Clearly, the facts alleged by the first respondent do not justify the order sought.

[43] Mr *Chetty* argued that the payment made by the first respondent to the sellers was unlawful and contravened s 26(1) of the Alienation of Land Act 68 of 1981 ("ALA") because there was a statutory bar against the sellers receiving any consideration in respect of the sale until the agreement had been recorded by the Registrar of Deeds in terms of s 20 of the ALA.

[44] Mr *Chetty* called in aid the decision of the Constitutional Court in

Amardien,¹³ to argue that the payment was unlawful, and that the first respondent could not then have relied on the Fynns' authority to pay the deposit to the sellers.

[45] Section 26(1) of the ALA states:

“(1) No person shall by virtue of a deed of alienation relating to an erf or a unit receive any consideration until-

(a) such erf or unit is registrable; and

(b) in case the deed of alienation is a contract required to be recorded in terms of section 20, such recording has been effected.”

[46] *Amardien*¹⁴ does indeed hold that s 26(1) of the ALA provides “a clear textual statutory bar to the seller receiving payments (consideration) in the event of non-recordal of an agreement, but in the form of criminal liability”.

[47] However, this does not assist the Fynns. I say this for two principal reasons: firstly, the sanction is criminal - it exposes the seller to prosecution. It does not oblige the seller to repay amounts that may have been received from a purchaser. Secondly, s 26(1) of the ALA prohibits the seller from enforcing a right to claim payment “by virtue of a deed of alienation”. That is, the seller cannot demand payment in terms of the contract until there has been compliance with the ALA.

[48] This does not mean that the parties are prohibited from concluding a separate agreement, outside the deed of alienation, in terms of which a purchaser elects to pay all or a portion of the purchase price to the seller. Section 26(1) of the ALA simply precludes the seller from demanding that payment prematurely.

[49] In the present matter, this is what the Fynns agreed to do – at the very least, they agreed to pay the sellers R50 000 of the deposit. That payment was made by choice.

¹³ *Amardien and Others v Registrar of Deeds and Others* 2019 (3) SA 341 (CC).

¹⁴ *Ibid* para 38.

[50] The first respondent, following a clear instruction to pay the deposit to the sellers, did not act unlawfully in doing so. If there was any contravention of s 26(1) of the ALA, it was arguably by the sellers in receiving the money¹⁵ – and the Fynns do not appear to have taken any steps against the sellers in this regard.

[51] Therefore, and had the Fynns' claim not prescribed, it would nevertheless have been dismissed.

[52] Whilst I accept that the Fynns are a retired couple and that a costs order would inflict some hardship upon them, there is no reason why the costs should not follow the result. The Fynns elected to launch the application, knowing not only what the first respondent's version was but also in circumstances where their claim clearly had prescribed.

[53] There is therefore no reason why the first respondent should be mulcted with its costs.

Order

[54] In the circumstances, I make the following order:

The application is dismissed with costs, to be taxed on scale A.

SHAPIRO AJ

Appearances

Counsel for Applicants: Mr T Chetty (attorney)

Instructed by: Theyagaraj Chetty Attorneys

¹⁵ Further, the Fynns have not claimed that the first respondent acted negligently and caused them to suffer damages by paying out the deposit when he should have known he was not permitted to do so, or even because of a breach of mandate. Their claim remains contractual.

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Date Judgment Delivered: 5 May 2025