IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MTHATHA)

CASE NO: 1227/2022

In the matter between:

SINDISWA PATRICIA JONAS N.O. Plaintiff

and

WALTER SISULU UNIVERSITY Defendant

JUDGMENT

RUSI J

[1] The plaintiff, in her capacity as the executrix of the estate of the late Mzimkhulu Charles Jonas (the deceased), instituted a damages claim against the defendant on 18 March 2022, under case number 1227/2022 , for the sum of R154 581 693.00 (one hundred and fifty-four million, five hundred and eighty-one

thousand, six hundred and ninety-three rand), for loss of profit and income. She alleges that the damages resulted from the defendant's wrongful occupation during 1995, of the piece of land belonging to the deceased described as the Zazulwana Trading Site, situated in Zazulwana Administrative Area No.1, and held in terms of the Deed of Grant No. G[...], in the Eastern Cape Province (the property). According to the plaintiff, the said occupation was contrary to the terms of an agreement to exchange land that the deceased and the defendant concluded.

[2] The defendant denies liability for the damages claimed, and it raised two special pleas, namely, that of *res judicata* and issue estoppel, alternatively, prescription. On the date of the trial of the matter, the parties applied that these special pleas be separated from the merits of the claim and dealt with first. That application was granted.

[3] In so far as the special plea of *res judicata* is concerned, the defendant contends that the same cause of action was determined by the court in proceedings that were instituted by the deceased in 2018 under case number 5242/2018, against the defendant and two of its officials, and also, that, the same issues of fact and law arose in that action. As regards prescription, the defendant alleged that the plaintiff's claim arose in 1993 being the time when she alleges that the deceased suffered damages as a result of the missed business opportunity of establishing a Shell Petrol Filling Station on the property, and, therefore, the plaintiff's claim has become prescribed.

[4] In replication, the plaintiff alleged, regarding the special plea of *res judicata*, that, in the previous action, the claim against the defendant was founded on unjustified enrichment, while in the present action, the cause of action is loss of profit and income that the deceased's estate would have derived from the property had the defendant not wrongfully occupied it.

[5] As regards the special plea of prescription, the plaintiff alleged that since 1993, the deceased had reasonably believed that the defendant would compensate him for his property, and, that, at all material times prior to 6 September 2021, she believed that the defendant would finally transfer to the deceased's estate, a piece of land equivalent to the deceased's property in keeping with the terms of the land exchange agreement. On these bases, the plaintiff alleges that prescription began to run after 6 September 2021 when it became clear that the defendant had no genuine intention to give effect to the exchange of land as envisaged in the agreement that was concluded.

[6] The plaintiff pleaded, in the alternative, that the defendant misrepresented its true intentions, resulting in the loss that the deceased's estate suffered, and that it is estopped from relying on her failure to timeously claim compensation which resulted from its wrongful occupation of the property. Furthermore, the plaintiff asserts that the defendant prevented her from knowing the facts giving rise to the debt, by preventing her from knowing that it had no intention of transferring the land it promised to the deceased. She goes on to allege that the defendant did this by preventing her from knowing that it had no control over the transfer of the land it promised to the deceased, and by concealing the fact that the said land is not available to be transferred to the estate of the deceased.

[7] As alternative responses to the defendant's special plea of prescription, the plaintiff alleges that the debt she seeks to enforce is a reciprocal debt which, by virtue of section 13(2) of the Prescription Act 68 of 1969 (the Act), has not become prescribed. Section 13(2) of the Prescription Act provides that a debt that arises from a contract and that would, but for the provisions of section 13(1), become prescribed before a reciprocal debt that arises from the same contract becomes prescribed, does not become prescribed before the reciprocal debt becomes prescribed. The plaintiff alleges that that reciprocal debt remains unenforceable as

long as the defendant has not fulfilled the obligation it had in terms of the land exchange agreement pertaining to the transfer of an equivalent piece of land to the deceased's estate.

[8] Further alternatively, the plaintiff alleges that the court must interpret section 12(3) of the Act in a manner that promotes the spirit and object of the bill of rights under the Constitution, in particular, the right to ownership of property in terms of section 25(1) of the Constitution; the right to of access to court and to have a dispute resolved through the application of the law. The plaintiff further invited this Court to pronounce that 'a cause of action that seeks to affirm a real right under common law, even if based on delict', ought not to prescribe; and to limit the right of the organs of state to raise technical defences in circumstances where they are not prejudiced.

The background facts

[9] These are the background facts to the plaintiff's claim. In his lifetime, Mr Mzimkhulu Jonas entered into an agreement with the predecessor of the defendant, the Emmanuel Student Village on 07 August 1995. In terms of the agreement, he would exchange his property, measuring 5000 square metres of which he was the holder and possessor in perpetuity, for a certain other piece of land. A plan or diagram illustrating the respective pieces of land that formed the subject of the exchange agreement was annexed to the papers filed of record. For ease of comprehension, it is necessary to reproduce the relevant material terms of the agreement, which are as follows:

'The above-mentioned parties to this agreement agree to the registration of the piece of land marked as A on the attached plan in favour of Emmanuel Student Village subject to the following conditions –

1. The land currently registered in favour of Mr Jonas measuring 5000 square metres and marked B on the attached plan be not included in the initial application for registration.
2. When the land marked A has been registered in the name of Emanuel Student Village the parties to this agreement agree that Emmanuel Student Village will give Mr Jonas and equal piece of land at the Mazeppa Turn off Marked C on the plan in exchange for the piece of land currently in the name of Mr Jonas marked B on the attached plan.
3. Once the Emmanuel Student Village has successfully registered the land marked as A on the plan the parties will immediately apply for the re-registration of the pieces of land being exchanged to give effect to this agreement.
4. The parties to this (sic) will individually be responsible for the costs of surveying and registration of the pieces of land they apply to register except that Emmanuel Student Village will on successful transfer of the land re-imburse Mr Jonas for the surveying and registration of the costs he incurred (sic) in registering his current piece of land marked as B on the plan subject to submission of documentary proof when the land currently registered in his name has been registered in the name of Emmanuel Student Village.'

[10] During the year 1995, the defendant (then Eastern Cape Technicon) developed the property by erecting 42 blocks of student accommodation. At the time, the envisaged exchange of land had not been given effect to – Mr Jonas's property was now in occupation and use by the defendant although the land that he was promised in exchange of it had not been transferred to him.

[11] In 2018, the deceased instituted an action in this Court in which he claimed damages for loss of rental income. The gist of that claim was that the defendant's wrongful occupation of the property caused him loss of rental income in the sum of R18 784 800.00 (eighteen million, seven hundred and eighty-four thousand, eight hundred rand) which he would have generated from the property but for its wrongful occupation. He further alleged that the defendant derived from his property an unjustified benefit to his prejudice. In that claim, the defended raised a special plea of prescription, which the court upheld. In the special plea, it

contended that the cause of action arose in 1995, and the plaintiff ought to have instituted his claim no later than 1998.

The pleadings

[12] For proper context and comprehension of the special pleas, in particular, that of *res judicata*, it is expedient to highlight the facts that the plaintiff had alleged in support of the previous and the present claims, respectively, against the background set out above regarding the land exchange agreement.

[13] The facts on which the plaintiff relied in the previous action may conveniently be summarized as follows:

(a) Without an agreement with the plaintiff, the defendant, built student residences on the property during 1995, which it let to students over the years, and it generated profit therefrom to the plaintiff's prejudice. The property is suitable for student accommodation, and the plaintiff has not been able to gainfully and profitably use it by reason of its occupation by the defendant and its predecessors.

(b) At all material times, the plaintiff awaited the Emanuel Student Village to have successfully registered in its name the piece of land marked A in the diagram so that the parties may give effect to the exchange agreement; and the plaintiff was ready, willing, and he offered to transfer his land to the defendant and its predecessors.

(c) The defendant and its predecessors failed to successfully have the said piece of land registered in its name, as a result, since the coming into being of the defendant, it has not been possible for the parties to give effect to the agreement.

(d) The defendant has, meanwhile, gainfully and profitably used the plaintiff's property by means of developing it into 42 blocks of student housing with each block accommodating eight tenants at the annual rental of R18 620.00.

(e) The plaintiff intended to use the property for rental accommodation, however, by reason of its occupation by the defendant, he had not been able to gainfully and profitably utilize it. But for this occupation of the property by the defendant, the plaintiff would have utilized the land for student accommodation and rental.

(f) The damages[1] that the plaintiff claimed were from 2015, as he accepted that any period beyond three years from the date of service of summons had been hit by prescription.

(g) The plaintiff anticipated his loss to continue and escalate in value due to inflation and other factors until the land is restored to him or judgment is granted in his favour.

[14] In the present action, the plaintiff relies on the following facts, appropriately summarized:

(a) During 1995, and for and on behalf of the former Eastern Cape Technikon, the Emanuel Student Village built structures on the plaintiff's property for student accommodation. The defendant, a successor in title of the Eastern Cape Technikon took occupation of the property during 1995 and utilizes it as accommodation for students who are enrolled with it and/or its predecessor.

(b) The plaintiff did not consent to the defendant's occupation of the property, which amounted to expropriation without compensation.

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[1] Emphasis intended.

(c) the defendant's occupation deprived the deceased of the use and enjoyment of the property as its owner.

(d) The defendant and/or its predecessor wrongfully benefitted from their occupation of the property they never owned. Their occupation is unlawful and wrongful, and it violates the legal convictions of the community.

(e) The defendant and/or its predecessor enjoyed the use of the property to the financial detriment of the deceased's estate. The defendant and/or its predecessor misled the plaintiff into allowing them to occupy the property under the pretext that they transfer to the deceased's estate equivalent property from which she could conduct business, while in truth and in fact they had no such intention.

(f) The defendant and/or its predecessors foresaw and/or could have foreseen that their wrongful occupation of the property would cause the deceased's estate pure economic loss in the form of business and other developmental rights available to it as the owner of the property.

(g) The defendant's occupation of the property caused the plaintiff loss of business as the deceased's estate could not use the property for any purpose beneficial to it. At all material times, the deceased wanted and intended to establish a business on the property. But for the wrongful occupation, he would have established a business on the property and made an income and profit on it. He would have, and had, by 1993, taken steps to secure a business opportunity in the form of a Shell Filling Station.

(h) The amount of damages claimed, is computed based on the expert calculation of the profit the deceased's estate would have made had the deceased managed to establish the Shell Filling Station on the property or any other filling station.

[15] At the hearing of the special pleas, the defendant who bore the onus proof, and the duty to begin, adduced no evidence. Mr *De la Harpe* who represented the defendant invited the court to consider the defendant's pleadings and the argument rendered on its behalf in support of the special pleas. The plaintiff closed its case without calling witnesses.

The parties' submissions

[16] On behalf of the defendant, Mr *De La Harpe* made these principal submissions. The 2018 action involved the same parties and the same subject matter. The same issues of fact and the issue of law in the form of the special plea of prescription, arose in that action. The action was finally adjudicated when the court upheld the defendant's special plea of prescription. For this reason, the institution of the present claim is precluded by *res judicata* and issue estoppel.

[17] Regarding the special plea of prescription, Mr *De La Harpe* submitted that none of the grounds relied upon by the plaintiff in rebuttal ought to succeed. This being a claim for damages, he said, it is a debt as envisaged in section 10 of the Act, which ought to have been claimed no later than three years after it became due. That was in 1993 or 1995 when, according to the plaintiff, the defendant missed a business opportunity when the alleged wrongful occupation occurred. This, so the submission went, was when the facts which the plaintiff would need to prove in order to succeed in her claim, became known to her.

[18] Mr *De La Harpe* further submitted that no allegation was made by the plaintiff in replication, that the defendant deliberately and intentionally prevented her from coming to know of the existence of the debt, in order to successfully rely on section 12(2) of the Act. And, in the light of the fact that the plaintiff instituted the previous claim on 08 October 2018, it follows that she had knowledge of the

minimum facts required to sustain that claim. As regards the 'continuing wrong contention, Mr *De La Harpe* submitted that this is not a vindicatory action or a claim to terminate ongoing harm. He distinguished between the single wrong and continuous wrong and submitted that the alleged wrong was a single act which occurred in 1993 or 1995, and the damages currently claimed are said to emanate from that single act.

[19] Dealing with the reciprocal obligation assertion that the plaintiff made, Mr *De La Harpe* submitted that the current claim is not for enforcement of a reciprocal debt, namely, the transfer of the land as envisaged in the exchange agreement, but for damages resulting from the alleged wrong. He further submitted that the prescription periods provided for in the Act are recognised in our law as a matter of public interest to ensure timeous adjudication of legal disputes. Furthermore, that, there is no legal basis for the pronouncement that the claim has not become prescribed as the plaintiff is not asserting any real right to the property.

[20] Mr *Mapoma* who represented the plaintiff submitted, chiefly, that the special plea of *res judicata* cannot be sustained, in that, the 2018 and current actions were founded on different causes of action. It was his submission further that in the current claim, the plaintiff asserts her ownership rights to the property, a matter that never arose in the previous action. According to Mr *Mapoma*, the damages that the plaintiff claims in the present action result from the wrong committed by the defendant when it wrongfully occupied the property, which wrongful occupation still continues. On these bases, he submitted that plaintiff's claim has not become prescribed.

[21] For the balance of his submissions, Mr *Mapoma* referred this Court to the heads of argument that were filed on behalf of the plaintiff. In them, it was submitted as another reason why the special plea of *res judicata* should not succeed, that, in the 2018 action, the court did not determine the merits of the

claim but only dealt with prescription. I will revert to this aspect later on in this judgment.

[22] Mr *Mapoma* sought and was granted leave to file supplementary heads of argument on behalf of the plaintiff on the special plea of prescription. Those heads of argument were filed on 04 June 2025. Issue was taken in the plaintiff's supplementary heads of argument, with the defendant's failure to adduce evidence to prove the special pleas of prescription whereas it had the onus to prove the special pleas. For this reason, it was submitted that the defendant failed to prove the date on which the plaintiff acquired the knowledge of the facts giving rise to the debt. Apart from this, it was further submitted that it is incorrect to suggest, as the defendant did, that the plaintiff is precluded from claiming damages resulting from the wrongful occupation that occurred in 1995 for as long as the wrong continues.

[23] In response to these supplementary submissions, the defendant persisted with the arguments it previously posited, emphasizing that contrary to what the plaintiff states that the defendant's occupation of the property constitutes a continuous wrong, the occupation was a single act of the alleged appropriation of the property which occurred more than 3 years before she instituted the current claim. Furthermore, since the plaintiff did not advance a vindicatory claim, it is incorrect that her claim has not become prescribed.

The legal principles

[24] The need for an end to litigation and the protection of persons against harassment with second litigation on the same subject is at the heart of the defence of *res judicata*.[2] In its strict sense, the defence means that a matter has already been decided by a competent court on the same cause of action and for the same relief

[2] Erasmus Superior Court Practice [service 15, 2020], D1- 283 – 284.

between the same parties.[3] For this defence to succeed, the defendant who relies on it must allege and prove that (i) there is a previous judgment by a competent court (ii) between the same parties (iii) based on the same cause of action, and (iv) with respect to the same subject-matter, or thing.[4]

[25] The courts have relaxed the application of the defence of *res judicata* in order to ensure equity and fairness, and to prevent an abuse of the process of court.[5] This has been done by the endorsement of issue estoppel as part of the defence. The essence of issue estoppel, as laid down in *Boshoff v Union Government*,[6] is that even if the cause of action and the subject matter were not the same in the two actions, where the same issue of fact or law formed the subject of the previous judicial determination, the party will be estopped from re-ligating on the same issues.[7] A re-statement of the reasoning behind issue estoppel as explained in *Democratic Alliance v Brummer*,[8] is instructive, with respect, where the following was said:

> '[I]ssue estoppel developed precisely because requiring the sameness between the two causes of action allows parties to relitigate the same issue by garbing these up in different causes of action. . .'

[26] The facts of each case must be carefully considered in order to determine whether the same issue of fact or law arose in the previous judicial adjudication.

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[3] *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and Others* (CCT 212/18) [2019] ZACC 41; 2020 (1) SA 327 (CC); 2020 (1) BCLR 1 (CC); 2019 BIP 34 (CC) (24 October 2019) para 70.
[4] Id, para 71.
[5] *Smith v Porrit and Others* 2008 (6) SA 303 (SCA) at 307J – 308A-D.
[6] 1932 TPD 345.
[7] *Smith v Porrit and Others,* supra*; 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 657E-G.
[8] 2021 (6) SA 144 (WCC) para 28.

[27] As regards the prescription of debts, this is a matter governed by the Prescription Act. In terms of section 10 of the Act, a "debt" is susceptible to prescription if not claimed within the relevant period as laid down in section 11. In *Makate v Vodacom (Pty) Ltd*[9] Wallis AJ, writing for the minority, re-affirmed the meaning of "debt" that was enunciated in *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd*[10], where the Appellate Division said that the word "debt" in the Prescription Act should be given the meaning ascribed to it in the Shorter Oxford English Dictionary, namely:

"1. Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another. 2. A liability or obligation to pay or render something; the condition of being so obligated."[11]

[28] Section 11(d) of the Act provides for a general period of 3 years within which any other debt not specified in that section must be claimed, save where an Act of Parliament provides otherwise. And, in terms of section 12(1), prescription begins to run when the debt becomes due, and that will be when the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises. What is required to trigger the commencement of prescription, is the creditor's knowledge of the minimum facts that are necessary to institute the action.[12] This does not include legal conclusions to be drawn from the facts (such as the requirements of unlawfulness and fault).[13]

[29] In terms of section 12(3) of the Act, a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from

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[9] *Makate v Vodacom (Pty) Ltd* (CCT52/15) [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) (26 April 2016), *(Makate 2016)*.
[10] 1981 (3) SA 340 (A) at 344E-G.
[11] Id, para 187.
[12] *Truter and Another v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA); *Minister of Finance and Others v Gore NO* [2006] ZASCA 98; [2007] 1 All SA 309 (SCA); 2007 (1) SA 111 (SCA); *Links v MEC, Department of Health, Northern Cape* [2016] ZACC 10; 2016 (5) BCLR 656 (CC); 2016 (4) SA 414 (CC).
[13] *Mtokonya v Minister of Police* [2017] ZACC 33; 2017 (11) BCLR 1443 (CC); 2018 (2) SA 22 (CC), para 63.

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 running of prescription will not commence if the debtor wilfully prevents the creditor from coming to know of the existence of the debt, until the creditor becomes aware of the existence of the debt. This is in terms of section 12(2). With these legal principles in mind, I turn to deal with the special pleas raised in the present case.

Discussion

[30] There is no controversy regarding the fact that the parties in the 2018 and the current claim are the same in the sense that in 2018, the deceased in his lifetime instituted proceedings in his personal capacity, while in present action, his estate is represented by the plaintiff. The defendant is the same in this action as in the previous action. Both causes of action arose from a failed land exchange agreement that was concluded in 1995 whose factual background I have set out above.

[31] It bears mentioning at this earliest stage that the facts relied upon by the plaintiff in the 2018 claim are markedly an oscillation between ineptly pleaded claims for damages and unjustified enrichment. With that said, I am willing to accept, for the present purposes, the plaintiff's own classification of the 2018 claim in her replication, as a claim for unjustified enrichment in its general form. Moving from this premise, the starting point is that although the 2018 claim for unjustified enrichment and the current claim for damages both entail a form of financial loss, they are not the same causes of action.

[32] In the enrichment claim, the plaintiff sought restitution of unjustly obtained gains, whereas in the damages claim, she claims compensation for loss of profit and income. This makes the two causes of action distinct from one another. A damages claim is founded on a delict, whose essential elements are an act,

wrongfulness, fault, causation, and harm.[14] A claim for unjustified enrichment, in its general from, on the other hand, consists in *(a)* the enrichment of the defendant; *(b)* the corresponding impoverishment of the plaintiff; and *(c)* a causal link between the defendant's enrichment and the plaintiff's impoverishment; and *(d)* the enrichment which must be unjustified or without legal cause (*sine causa)*.[15]

[33] In the context of the present case, if the defence of *res judicata* is applied in its traditional form, it must follow that the two causes of action are not the same. That being so, the defendant contends that the factual basis of both claims is the same and that the same questions of fact and law at play in the present matter arose in the 2018 claim for unjustified enrichment. Hence, the reliance on issue estoppel.

[34] Issue estoppel, as mentioned, bars the plaintiff from re-litigating on the same issues of fact and law that arose in the previous litigation. I have no difficulty in finding that the factual matrix in the present dispute remains the same as that in the 2018 action. Not only that, but based on that same factual basis, the defendant, in the 2018 claim, like in the present claim, raised the defence of prescription which the court upheld. This means that the same issues of fact and law arose in both claims. This is a typical case where this Court must consider the relaxation of the *res judicata* defence.

[35] I must interpose to deal with the contention that the plaintiff made, that, since in the 2018 action the court did not consider the merits of the claim but only dealt with the special plea of prescription, then, the current claim is not precluded. It is indeed so, that in dealing with the special plea of prescription, the court does not determine the merits of the claim. That being so, the plaintiff's assertion

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[14] *H L & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd* (281/98) [2000] ZASCA 187; [2000] 4 All SA 545 (A); 2001 (4) SA 814 (SCA) (29 September 2000), para 13.

[15] *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* (100/02) [2003] ZASCA 64; [2003] 3 All SA 1 (SCA); 2003 (5) SA 193 (SCA) (30 May 2003); para 17; *PRASA Corporate Real Estate Solutions v Community Property Company Ltd and Another* (384/2023) [2024] ZASCA 35 (28 March 2024), para 27.

overlooks the applicability of issue estoppel as outlined above. It is precisely because of the final determination of the same special plea of prescription in the 2018 action that issue estoppel is raised by the defendant in the present action. Therefore, considered against the principle of issue estoppel, the defendant's special plea of res judicata in its extended form, must succeed.

[36] Even if I am wrong in making these findings, there is another reason why the plaintiff's claim should not be permitted. This I say, despite the argument that Mr *Mapoma* made to the effect that, in the current claim, the plaintiff asserts her ownership rights to the property. He suggested that the present action is an assertion of a real right (action *in rem*), therefore, for as long as the defendant's unlawful occupation continues, the plaintiff's cause of action does not prescribe.

[37] I was referred to *Barnett v Minister of Land Affairs*[16] in which the government made a claim to evict the respondents who were the occupiers of sites and cottages on the Transkei Wild Coast in an area 13 kilometres north of Port St Johns and situated in the magisterial district of Lusikisiki, on the basis that the sites they occupied formed part of State land. In that case, Brand JA explained the legal position as follows:

'Broadly stated, it must therefore be accepted for the prescription issue that the defendants' occupation of their sites constitutes a contravention of both the Decree and the common law. Departing from this premise, the answer to the prescription defence is, in my view, to be found in the concept which has become well-recognised in the context of prescription, namely that of a continuous wrong. In accordance with this concept, a distinction is drawn between a single, completed wrongful act – with or without continuing injurious effects, such as a blow against the head – on the one hand, and a continuous wrong in the course of being committed, on the other. While the former gives rise to a single debt, the approach with regard to a continuous wrong is

[16] *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA) (Barnett).

essentially that it results in a series of debts arising from moment to moment, as long as the wrongful conduct endures.[17] (footnotes omitted).

[38] However, Mr *Mapoma*'s argument overlooks the fact that in the current claim the plaintiff claims not the return of the property, or relief that would put an end to the unlawful occupation, but compensation for the damages she suffered as a result of the wrongful occupation of the property by the defendant.

[39] The essence of the plaintiff's response to this special plea is two-fold. In the first instance, she contends that at all material times before September 2021 she reasonably believed that the defendant would compensate her for the deceased's property by effecting the transfer that was envisaged in the land exchange agreement. She further states that prescription *commenced to run on 06 September 2021 when it became clear*[18] that there was no genuine intention on the part of the defendant to effect the envisaged transfer, to her loss through the wrongful occupation. An assertion that 'it only became clear to the plaintiff on 06 September 2021' that the defendant had no genuine intention to cause the envisaged transfer, cannot be correct. I elaborate below.

[40] As already mentioned, the factual milieu forming the basis of the previous claim is the same as the one relied upon in the current claim. The importance of this is that, in order for the plaintiff to institute the 2018 claim for unjustified enrichment, she would have acquired the knowledge of the facts giving rise to the debt. Those facts were, the identity of the defendant; the fact that the defendant developed the property without his consent, and that it failed to give effect to the envisaged transfer, as well as the fact that for all these years the defendant was deriving financial benefit from his property in the form of student rental housing to

[17] Id, para 20.
[18] Emphasis intended.

his financial loss or prejudice. These are the minimum facts that the plaintiff would have known when the 2018 claim was instituted. These facts could not have changed, and dare I say they have not, for the purposes of the current damages claim. This finding disposes of the alternative pleaded by the plaintiff in replication that the defendant withheld the facts which gave rise to the debt claimed in the current action.

[41] Concerning the continuous wrong alternative argument, the plaintiff invited this Court to pronounce that a claim that seeks to affirm a real right under common law, even if based on delict, ought not to prescribe; and to limit the right of the organs of state to raise technical defences in circumstances where they are not prejudiced. I can do no better than quote Wallis AJ in his separate concurring judgment in *Makate 2016*, where he said:

> '[I]n the case of a continuing wrong there can be no question of prescription even though the wrong arises from a single act long in the past. The reason, which may appear somewhat artificial, but which is well established, is said to be that while the original wrongful act may have occurred at a past time the wrong itself continues for so long as it is not abated. <u>But the running of prescription in respect of any financial claim arising from the same wrong will not be postponed.</u> <u>Accordingly, if financial loss was occasioned by the original wrongful act, the debt in relation to that loss would become due and prescription would commence to run when the original wrongful act occurred and loss was suffered.</u> The result is that the impact of prescription on claims having their source in the same right may differ depending on the nature of the claim.'[19] (my own emphasis)

[42] The current claim is for delictual damages for loss of profit and income. I have already observed that the plaintiff is not here claiming the return of the land (an action *in rem*), but compensation (an action *in personam*). On the plaintiff's own showing, the harm causing occupation took place in 1995. The damages that she now claims flow from that wrongful act. Viewed against the exposition of the

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[19] Id, para 192.

legal principle in the above quoted passage from *Makate 2016*, the plaintiff's 'continuous wrong' contention cannot be sustained.

[43] As regards the plaintiff's further alternative contention that she seeks to enforce reciprocal obligations arising from the agreement between the deceased and the defendant, it bears mentioning that reciprocal obligations are obligations that are linked together in that the performance of one obligation is in exchange for the performance of the other.[20] The obligations must be reciprocal and the contractants must be obliged to perform simultaneously, or that the party who claims performance must be bound to perform before the defendant. The terms of the agreement considered as a whole, will determine whether the intention of the parties was that there would be reciprocity between the obligations undertaken by the parties.[21]

[44] Marais JA, in *Minister of Public Works and Land Affairs and Another v Group Five Building Ltd*,[22] said the following regarding the provisions of section 13(2) of the Prescription Act:

'The provision does not delay the commencement of the running of prescription: it serves merely to prevent prescription from taking its toll when the appropriate period has elapsed if there then happens to be in existence a reciprocal debt which is not yet prescribed. . . Reciprocity of debt in law does not exist merely because the obligations which are claimed to be reciprocal arise from the same contract and each party is indebted in some way to the other. A far closer, and more immediate correlation than that is required. . . The contractor's right to claim damages for breach of contract is not matched by any particular obligation towards appellants on its part. It is not

[20] Van Huyssteen et al Contract General Principles, 6th edition (Juta) 2020, p436.
[21] *Wynns Car Care Products (Pty) Ltd v First National Industrial Bank Ltd* 1991 (2) SA 754 (A) at 758C-D; *Miloc Financial Solutions (Pty) Ltd v Logistic Technologies (Pty) Ltd* (233/07) [2008] ZASCA 40; [2008] 3 All SA 395 (SCA); 2008 (4) SA 325 (SCA) (28 March 2008); para 51.
[22] 1996 (4) SA 280 (A) at 288C-D.

required to have performed or to tender performance of any reciprocal obligation in asserting such a claim. . .' (footnotes omitted)

[45] Ordinarily, an alleged failure to perform an obligation under a contract gives rise to two options to be exercised by the plaintiff – the first being to enforce the agreement by claiming specific performance; or to cancel the agreement and claim damages. The difficulty facing the plaintiff in regard to the assertion of reciprocal obligations, is that the current cause of action is founded on delict, it has nothing to do with breach of contract. The debt referred to in section 13(2) is a debt that arises from a contract.

[46] In the present action, the plaintiff claims damages arising not from a breach of contract but from the alleged unlawful and wrongful occupation of the property belonging to the deceased's estate. There is a distinction between an infringement of a contractual obligation (breach of contract) and delict, which is an infringement of a right owed to the contractant independently of the contract.[23] An inescapable finding is that the damages thus claimed cannot be classified as the enforcement of a reciprocal obligation in the context of section 13(2) of the Act. The plaintiff's alternative defence of reciprocal obligations can, therefore, not be sustained.

[47] Lastly, it is so, that the objects of the Bill of Rights are promoted by adopting a meaning that does not limit a right in the Bill of Rights, where the provision is capable of more than one meaning.[24] In asking this Court to adopt such a meaning in relation to the provisions of sections 12 of the Prescription Act, the plaintiff enumerates the right of access to court and to have the dispute resolved

[23] Van Huyssteen *et al*, supra, footnote 17 at p385.
[24] *Makate 2016*, supra, para 89.

through the application of the law, the right of ownership of property in section 25(1) of the Constitution, among other things.

[48] The time bars in litigation, which include those provided for in the Prescription Act have been held to be a part of our legal system whose purpose is to ensure social certainty and the quality of adjudication. In *Road Accident Fund and Another v Mdeyide*,[25] a matter which concerned a different context of the provisions of section 23(1) of the Road Accident Fund Act 56 of 1996, it was said:

> '[I]n 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.[26]

[49] Writing for the minority in the same matter, Froneman J said of time bars and prescription periods and their nature of limiting the right to seek judicial redress:

> 'The right of access to court to resolve justiciable disputes is fundamental to a society governed by the rule of law. Knowledge of the facts that give rise to a justiciable claim is a necessary precondition for the exercise of the right of access. Without that knowledge the right of access means nothing; it remains abstract and illusory. . . Even though these limitations serve an important purpose in preventing inordinate delays which may be detrimental to the interests of justice, they must still be scrutinised to determine whether they pass constitutional muster under section 36 of the Constitution. . . There is no hard and fast rule for determining the degree of limitation that is consistent with the Constitution. It depends upon whether the limitation affords

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[25] *Road Accident Fund and Another v Mdeyide* (CCT 10/10) [2010] ZACC 18; 2011 (1) BCLR 1 (CC); 2011 (2) SA 26 (CC) (30 September 2010).
[26] Id, para 2.

litigants an adequate and fair opportunity to exercise the right to judicial redress. The limitation must allow sufficient time between the date when the facts giving rise to the claim come to the knowledge of the claimant and the time within which litigation may be launched. The Prescription Act, as the benchmark legislation for the operation of prescription, requires knowledge, actual or reasonably deemed, as a necessary precondition to enable someone to exercise their right of access to court. This is also evident in various other laws and past decisions of this Court. The object of this requirement is aimed at preventing prescription running against a person who, by reason of the lack of knowledge and the inability to acquire it by the exercise of reasonable care, is unable to institute action.[27]

[50] I make the finding that the plaintiff was afforded adequate and fair opportunity to exercise the right to judicial redress. As the plaintiff in the 2018 action, the deceased acknowledged the fact that the portion of his claim arising from a period before 2015 had become prescribed. I re-iterate that the same facts in this action were relied on in advancing 2018 action. No sound legal basis exists for the interpretation that the plaintiff in the present case has called for. This alternative, too, must fail.

[51] To conclude, it is not correct, as suggested on behalf of the plaintiff in her supplementary heads of argument, that because the defendant relied on the pleadings and legal arguments made and adduced no evidence to prove prescription, it failed to discharge the onus that rested on it of proving the date on which prescription began to run. A defendant who raises prescription bears the full evidentiary burden to prove the plea of prescription, including the date on which a plaintiff obtained actual or constructive knowledge of the debt. The burden shifts to the plaintiff only if the defendant has established a prima facie case. This is trite law.[28]

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[27] Op cit, para 100 -103.

[28] *Macleod v Kweyiya* 2013 (6) SA 1 (SCA) para 10; *Jugwanth v MTN* (529/2020) [2021] ZASCA 114; [2021] 4 All SA 346 (9 September 2021), para 6.

[52] While it is indeed so that the determination of the special plea of prescription is fact based, the facts pleaded by the parties in the present case render the defendant's argument untenable. On the plaintiff's own version as pleaded, the wrongful occupation which resulted in her loss occurred in 1995. By 1993, the deceased had taken steps to establish the Shell Filling Station from which he would have conducted a business. From each of these two dates, a period of more than 3 years has elapsed before the date on which the present action was instituted.

[53] However, also relevant for the purposes of prescription in this case, is the plaintiff's assertion that the defendant prevented her from acquiring the knowledge of the facts giving rise to the debt. I have already made a finding that the facts pleaded in support of the 2018 action and the current one remain the same. They emanate from the failed 1995 land exchange agreement. From this alone, it ought to follow that when the deceased instituted the 2018 action, he had the knowledge of minimum facts necessary to sustain that action. Those facts have not changed in the current action. The result is that whether the debt became due in 1993 or 1995, it had become prescribed on 18 March 2022. The pleadings alone establish this.

[54] For all the following reasons, the defendant has discharged the onus of proving both exceptions, they must accordingly be upheld.

[55] In the result, I make the following order:

1. The special pleas of *res judicata* and prescription are upheld.
2. The plaintiff's claim is dismissed.
3. The plaintiff shall pay the defendant's costs including costs of counsel on scale C referred to in Uniform Rule 67A.

L. RUSI

JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff	:	*Adv. S X Mapoma* SC
		Adv. B Maswazi
Instructed by	:	Jolwana Mgidlana Inc., Mthatha
For the defendant	:	*Adv. D H De La Harpe* SC
Instructed by	:	Drake Flemmer & Orsmond Attorneys, Mthatha
Date heard	:	25 May 2025

(Supplementary heads of argument filed on 05 June 20025).

Date delivered	:	25 November 2025