IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Reportable

Case No.: 17670/2024

In the matter between:

A[...] F[...] D[...]	**Applicant**
and	
C[...] C[...] D[...]	**First Respondent**
FIRST NATIONAL BANK	**Second Respondent**

Coram: Francis J

Heard: 25 March 2026

Delivered: 16 April 2026

ORDER

1. The non-compliance with the time limits for the filing of the first respondent's answering affidavit is condoned.

2. The first respondent's counter-claim for specific performance under the deed of sale dated 14 January 2011 is dismissed on the ground of prescription.

3. The remaining issues in the main application are postponed for determination in the further proceedings to be arranged with the Registrar.

4. Each party shall bear their own costs in respect of the preliminary issues argued and determined in this judgment.

JUDGMENT

FRANCIS, J:

Introduction

[1] This matter concerns the fate of a former matrimonial home. The walls of 1[…] M[...] Street, Athlone, have borne witness to decades of family life, and now, long after the traces of that life have faded, they contain only the stark contest of legal principle between the applicant, Mr A[...] D[...] (‘A[...]’), and the first respondent, Ms C[...] D[...] (‘C[...]’).

[2] A[...] approaches this court by way of the *actio communi dividundo*, seeking the sale of the property and an equal division of the proceeds. C[...] resists this, and in her answering affidavit, she mounts a counter-claim for specific performance. She relies on a Deed of Sale dated 14 January 2011, which she alleges entitles her to acquire A[...]'s half-share of the property for no cash consideration.

[3] A[...] raises three preliminary objections against this counter-claim. He contends the answering affidavit was filed out of time without condonation; that the counter-claim is procedurally irregular for want of a separate notice of motion; and, most pivotally, that the claim has prescribed under the Prescription Act 68 of 1969. He also makes the serious allegation that his signature on the 2011 Deed is a forgery.

[4] The matter has a complex procedural history, having been referred for the hearing of oral evidence on the main *actio* application. However, at the court's direction, the parties have argued the preliminary issues relating to the sustainability of the counter-claim as discrete and potentially dispositive.

[5] Having carefully considered the papers and the helpful supplementary heads of argument filed by both counsel, I have come to the firm conclusion that the counter-claim cannot survive the plea of prescription. I therefore do not deem it

necessary to resolve the factual dispute regarding the authenticity of the signature on the Deed of Sale. For the purpose of testing the legal viability of C[...]'s claim, I will assume, without deciding, that the Deed of Sale is valid and binding. As will become apparent, even under the benevolent light of that assumption, the claim is extinguished by the unceasing march of time.

The procedural objections

[6] Before turning to the substance of prescription, I must address the two procedural hurdles raised by A[...]. While I find they do not bar the consideration of the counter-claim, they warrant a more in-depth examination than a mere cursory nod.

(a) ***The late filing of the answering affidavit***

[7] It is common cause that the answering affidavit, containing the counter-claim, was filed significantly out of time. A draft order of 4 September 2024 required filing by 14 September 2024. The affidavit was not filed in its complete form until 19 February 2025, some five months later. Compounding this lapse, C[...] did not file a formal application for condonation for this non-compliance.

[8] Mr Filton, for A[...], urges me to disregard the affidavit entirely. He points to the principle that a party that flouts a court order without explanation acts *mala fide* and should not be heard.

[9] The power of this court to condone non-compliance with its rules or orders is a judicial discretion to be exercised upon a consideration of all the relevant facts.

The guiding light remains the classic formulation in ***Melane v Santam Insurance Co Ltd*** 1962 (4) SA 531 (A), where it was held that the court must be satisfied that "good cause" has been shown. This involves considering the degree of lateness, the explanation provided, the prospects of success on the merits, and the importance of the case.

[10] I have two primary reasons for exercising my discretion in favour of C[...] on this point, despite the record's unsatisfactory state.

{i) First, there is a clear absence of prejudice to A[...]. He was able to file a comprehensive and robust replying affidavit that addresses the counter-claim on its substantive merits, including a detailed plea of prescription and an allegation of forgery. The purpose of procedural rules is to ensure a fair trial, not to create traps for unwary litigants. The delay did not hamper A[...]'s ability to meet the case against him.

(ii) Second, I cannot ignore the realities of this litigation. C[...] is an unemployed woman who was initially unrepresented. The record reflects that Legal Aid South Africa subsequently came on record for her. While this does not excuse non-compliance with a court order, it offers context for the procedural disarray. The issues at stake—the potential loss of a home and a claim to property—are of great significance. To shut the door on C[...]'s defence and counter-claim on this ground alone, especially where the opposing party has suffered no demonstrable trial prejudice, would be a disproportionate response and would not serve the interests of justice.

[11] Accordingly, the non-compliance with the time limits is condoned.

(b) ***The failure to launch a formal counter-application***

[12] A[...]'s second objection is that C[...]'s prayer for specific performance is not properly before the court because it was not accompanied by a separate notice of motion. He argues that all applications must comply with Rule 6(1) of the Uniform Rules of Court.

[13] With respect, this argument misapprehends the nature of motion proceedings. The mechanism for a counter-application in motion proceedings is governed specifically by Rule 6(7). It provides that a party may bring a counter-application "*to the same extent as would be competent if the party wishing to bring such counter-application... were a defendant in an action.*" The Rule does not require a separate notice of motion. The vehicle for the counter-application is the answering affidavit itself.

[14] The commentary in Erasmus Superior Court Practice (RS 21, 2023, D1-82) stats that a notice of motion is not necessary for a counter-application. In my view, the relief is set out in the answering affidavit and the notice of motion in the main application will serve as the vehicle for the counter-application. This practice has been affirmed in numerous cases, including ***Costa v Korte and Another*** [2022] ZAGPJHC 1037.

[15] The purpose of pleading is to define the issues. In her answering affidavit, C[...] clearly set out the relief she seeks: rectification of the Deed of Sale and an

order for specific performance directing A[...] to take all steps necessary to transfer his half-share. A[...] knew precisely what case he had to meet, and he met it directly in his replying affidavit. There is no irregularity. This point is dismissed.

Prescription: the extinction of the claim

[16] I now turn to the real substance of the matter: has C[...]'s claim for transfer of the property prescribed?

[17] It is an established and venerable principle of our law that a claim for the transfer of immovable property constitutes a "debt" as contemplated in the Prescription Act. This was authoritatively settled by the Appellate Division in ***Desai NO v Desai*** 1996 (1) SA 141 (A) and reaffirmed by the Constitutional Court in ***eThekwini Municipality v Mounthaven (Pty) Ltd*** [2018] ZACC 43 at paragraph [8], where the court stated: "*A claim to transfer immovable property in the name of another is thus a claim to perform an obligation to deliver goods in the form of immovable property. It is a "debt"...*"

[18] Section 11(d) of the Prescription Act provides that a debt is extinguished by prescription after a period of three years. The critical question is always: when did this three-year period commence? Section 12(1) provides the answer: prescription commences to run "*as soon as the debt is due*."

[19] The principles for determining the due date of a contractual debt were succinctly summarised by the Constitutional Court in ***Trinity Asset Management (Pty) Ltd v Grindstone Inv 132 (Pty) Ltd*** 2018 (1) SA 94 (CC) at paragraph [47]: "*A contractual debt becomes due as per the terms of the contract. When no due*

date is specified, the debt is generally due immediately on conclusion of the contract".

[20] The Supreme Court of Appeal applied this very reasoning in a property transfer context in ***Frieslaar NO v Ackerman*** [2017] ZASCA 03 (2 February 2018). In that case, the SCA held that, on proper construction of the agreement, there was an unconditional obligation to transfer, and, because no date was specified, the debt became due immediately upon signing the contract.

[21] Applying these principles to the Deed of Sale before me, Clause 6 states:
"*Transfer of the property in the name of the Purchaser shall be attended to by the Seller's transferring attorneys, Vorster & Brant. The Purchaser shall pay all transfer costs of this agreement to the said transferring attorneys upon demand.*"

[22] There is no specified date for transfer. There is no suspensive condition that suspends the obligation to transfer until the bond is paid off. The phrase "*upon demand*" qualifies only the Purchaser's (C[...]'s) obligation to pay the transfer costs. It does not, on a plain and grammatical reading, qualify the Seller's (A[...]'s) antecedent and primary obligation to attend to the transfer of the property.

[23] Mr Nduli argued thoughtfully that this cannot be what the parties really intended. He pointed out that in 2011, there was still a substantial mortgage bond over the property. It would have been impossible, in practise, to register the transfer while that bond was in place. He says the parties must have intended for the obligation to become due only once the bond was paid up and the transferring attorneys issued a demand for costs.

[24] I have some sympathy for this view. It seems unlikely that the parties, as laypeople, contemplated that prescription would start running while a bond prevented any actual transfer. But the law does not always correspond with the unexpressed, subjective intentions of contracting parties. A practical obstacle to the fulfilment of an obligation does not, as a matter of legal principle, delay the due date of that obligation. The right to claim performance (the *debitum*) existed from the day the agreement was signed. In 2011, C[...] could have demanded that A[...] instruct his attorneys to begin preparing for transfer, even if the final registration had to wait.

[25] But I do not need to rest my decision on that strict interpretation alone. Even if I give C[...] the full benefit of the doubt, the result is the same. Even if I accept that the debt could not become due until the practical bar of the mortgage bond was lifted, the facts are against her. The bank statements in the record show, beyond any doubt, that the bond was paid in full and closed on 28 February 2019.

[26] From that moment onwards, there was nothing—not a legal bar, not a practical hurdle—standing in the way of C[...] demanding that A[...] take steps to transfer his half-share. If the debt was not due before, it was certainly due on 28 February 2019. The three-year clock began to tick on that day. It ran out, quietly and finally, on 28 February 2022.

[27] C[...] only asserted her claim for specific performance in her answering affidavit filed in February 2025. That is nearly three full years too late. Whether one calculates the prescription from the date of signature in 2011 (expiring in 2014) or from the settlement of the bond in 2019 (expiring in 2022), the claim is extinguished.

[28] There is one final argument I must address. It was suggested that, because the transferring attorneys never issued a demand for the transfer costs, the debt never became due. I cannot accept this. To do so would mean that A[...], by simply instructing his nominated attorneys to remain silent, could indefinitely postpone the running of prescription and keep C[...]’s claim in a state of perpetual legal suspension. That is not how the law works. The purpose of extinctive prescription is to bring certainty and finality. A construction of the contract that allows one party to control the accrual of the other's cause of action in that way is not one that commends itself.

[29] For these reasons, I uphold the plea of prescription. The counter-claim for specific performance, founded upon the Deed of Sale of 14 January 2011, is dismissed.

The remaining issues and costs

[30] My finding on prescription renders it unnecessary to determine the remaining disputes regarding the validity of the Deed of Sale, the allegation of forgery, or the enforceability of the agreement in light of the 2004 Divorce Order. Those issues remain to be ventilated, should it become necessary, in the context of the main application for the *actio communi dividundo*.

[31] In the exercise of my discretion on costs for this preliminary phase, I note that A[...] succeeded on the decisive, substantive issue of prescription, but failed in his procedural objections regarding the filing of the affidavit and the form of the counter-claim. Conversely, C[...] successfully resisted the procedural attacks but failed on the point that determines the fate of her counter-claim. In these

circumstances, I consider it just and equitable that each party bear their own costs for this portion of the proceedings.

Order

[34] I make the following order:

1. The non-compliance with the time limits for the filing of the First Respondent's answering affidavit is condoned.

2. The First Respondent's counter-claim for specific performance under the Deed of Sale dated 14 January 2011 is dismissed on the ground of prescription.

3. The remaining issues in the main application are postponed for determination in the further proceedings to be arranged with the Registrar.

4. Each party shall bear their own costs in respect of the preliminary issues argued and determined in this judgment.

M FRANCIS

Judge of the High Court

Appearances:

For Applicant: Adv Mark Filton

Instructed by: L Boer Attorneys

For Respondent: Mr Bonginkosi Nduli

Instructed by Legal Aid SA