IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: **2011/36274**

In the matter between:

KUHN, CHRISTIAAN FREDERICK	Applicant
and	
UP TO DATE SALES (PTY) LIMITED	First Respondent
LBCS TRADING 73 (PTY) LIMITED	Second Respondent
BOTHA, LOUIS	Third Respondent
RAJZMAN, STEVEN PAUL	Fourth Respondent
BOTHA, LOUIS **RAJZMAN, STEVEN PAUL and** **BOTHA, DE WET NNO**	Fifth Respondent
JOHAN GREYLING **RONEL YVONNE GREYLING NNO**	Sixth Respondent
BOTHA, LOUIS **BOTHA, UYS NNO**	Seventh Respondent
KOTZE, JOHANNES MARTIN ABRAHAM	Eighth Respondent
LANDGREBE W.H.K	Ninth Respondent
SCHLEBUSCH, DIRK N.O.	Tenth Respondent
GREYLING, JOHAN	Eleventh Respondent

JUDGMENT

BASSLIAN AJ:

[1] This application has a long and protracted history which to a large extent, if not completely, has been brought about by the actions and inactions on the part of Applicant.

[2] Owing to the fact that the court file was mislaid and had to be reconstituted (possibly on more than one occasion), notations on the file as to what occurred on each occasion that the matter was postponed as well as notes that I had made are not available to me and I am no longer able from memory to recall precisely what the reasons were for each postponement. Insofar as I am able to recall, the reasons for the various postponements included the fact that the court file was not in order and/or complete, Applicant's representative wished to deal with certain aspect which had not been dealt with and Applicant wished to join a party to the proceedings. None of the postponements were brought about as a result of a request or fault on the part of the Respondents.

[3] The events relating to the hearing of the matter are as follows:

[3.1] The application was launched by the Registrar of this Court on 22nd September 2011.

[3.2] On 25 October 2011, the First to Seventh, Ninth and Eleventh Respondents (collectively referred to as "the Respondents") served an answering affidavit together with a counter-application.

[3.3] Applicant's replying affidavit and answering affidavit to the counter-application was served on 2nd November 2011.

[3.4] The Respondents' replying affidavit in their counter-application was served on 16 November 2011.

[3.5] Insofar as I am aware, the matter was first set down for hearing on the opposed motion roll for hearing in the period of 29 November 2011 to 2nd December 2011.

[3.6] The matter came before me and I entertained argument on the 1st and 2nd December 2011.

[3.7] At the hearing on 1 December 2011, I indicated to Applicant's representative that some of the relief sought in the notice of motion did not seem to make sense. Following on this, the parties agreed that Applicant would amend his notice of motion but that pending same, the merits of the application would be argued before me, judgment in respect thereof to be reserved pending the amendment.

[3.8] Having concluded argument on 2nd December 2011, the matter was postponed in order to afford Applicant an opportunity to amend his notice of motion.

[3.9] Some months after the matter was postponed, confusion arose between the parties in regard to whether Applicant had in fact amended his notice of motion, Applicant adopting the view that he had and Respondents contending that he had not. This resulted in Applicant having to comply with the provisions of Rule 28 if he wished to proceed with the amendment.

[3.10] It was only on 2nd July 2012 that Applicant served his notice of intention to amend his notice of motion in terms of Rule 28.

[3.11] Respondents delivered a notice of objection to the proposed amendment in terms of Rule 28(3) on 16 July 2012.

[3.12] On 23 July 2012, Applicant delivered an application in terms of Rule 28(4) for leave to amend the notice of motion.

[3.13] Once affidavits had passed in the Rule 28(4) application, the matter came before Ms Acting Judge Kolbe who determined that since I was still seized with the matter, it was I who should entertain the 28(4) application.

[3.14] Thereafter the parties appeared before me for purposes of arguing the Rule 28(4) application as follows:

[3.14.1] On 15 November 2012 when the matter was postponed, costs reserved;

[3.14.2] On 11 February 2014, when the application was struck from the roll, Applicant being ordered to pay the wasted costs including the costs of Senior Counsel. The matter had also been set down for 3 December 2012 and although there was no appearance on that day, the wasted costs were reserved.

[3.14.3] On 13 May 2013, the application was again postponed, Applicant was ordered to pay the costs including the costs of Senior Counsel.

[3.15] On 24 January 2014, the matter once again came before me and certain issues referred to hereunder were raised and debated. By agreement, both parties submitted additional heads of argument to me in about February 2014, relating to the aspects raised by me.

[3.16] Applicant's attorney only delivered the court file to me some months after I had received the additional heads of argument.

[4] I have not delivered judgment in respect of either the Rule 28(4) application or in respect of the merits of the main application. For reasons as will appear from what is recorded hereunder, there is no need for me to do so.

[5] Applicant's notice of motion consists of 13 pages. In both its original form as well as the intended amended form, it is difficult to comprehend the exact nature of what actions Applicant suggests should be instituted by First and Second Respondents. This is so as Applicant has not in his founding affidavit, read with the annexures thereto, furnished sufficient details with regard to what he claims are the various causes of action that First and/or Second Respondents have against the other Respondents named in the notice of motion.

[6] In prayers 1 and 2.1 of the notice of motion, Applicant seeks leave in terms of Section 165(5)(a)(ii) of the Companies Act 71 of 2008 ("the Act") to institute various actions in the name of the First and Second Respondents respectively against the named other Respondents. For purposes of this judgment, I shall assume that Applicant intended to refer simply to sub-section 165(5) of the Act.

[7] The relief sought by Applicant centres around actions that he states should be instituted by First and Second Respondents respectively against

various of the other Respondents for payment of varying amounts as well as certain other relief. No purpose will be served in my burdening this judgment by repeating what is claimed. I shall, however, deal with the various claims hereunder.

[8] In the course of hearing argument in relation to the Rule 28(4) application on 24 January 2014 I raised the following issues and requested the parties' representatives to address same, namely:

[8.1] Whether by virtue of the judgments of Willis J and the judgment delivered by me involving the same or substantially the same parties relating to the appointment of certain directors and the holding of certain directors meetings, which were declared to be invalid and set aside, Applicant had complied with the provisions of Section 165(2) of the Act by serving his demand letters, "FA1", "FA2" and "FA3" to the founding affidavit on the two Respondents. At that stage the directors whose appointments were declared to be invalid and set aside, purported to act as directors of First and Second Respondents. What concerned me was whether Applicant had, in the circumstances, delivered his demand letters to the two Respondents as neither of their boards was properly constituted.

[8.2] Whether, since the causes of action/debts relied on by Applicant to be brought in the names of First and Second Respondents respectively

and which appear on the face of it to have accrued in excess of 3 years prior to the institution of the proposed actions such claims had not in any event already prescribed in terms of the Prescription Act 68 of 1969 ("the Prescription Act").

PRESCRIPTION

[9] In terms of Section 165(5) of the Act:

"A person who has made a demand in terms of sub-section (2) may apply to court for leave to bring or continue proceedings in the name and on behalf of the company, and the court may grant leave only if –

(a) the company –

(i) has failed to take any particular step required by sub-section (4);

(ii) appointed an investigator or committee who was not independent or impartial;

(iii) …

(iv) …

(v) …

and

(b) the court is satisfied that –

(i) the Applicant is acting in good faith;

(ii) the proposed or continuing proceedings involve the trial of a serious question of material consequence to the company; and

(iii) it is in the best interests of the company that the Applicant be granted leave to commence the proposed proceedings or continue the proceedings, as the case may be."

[10] In terms of the sub-section, the Court is only entitled to grant leave to bring or continue proceedings as envisaged therein if it is satisfied that the requirements set out therein have been met. In this regard:

[10.1] The requirements of sub-section 165(5)(2)(i) to (v) are clearly not conjunctive and accordingly it is sufficient if an applicant shows the presence of one or more of the named factors. In this regard, Applicant relies on sub-section 165(5)(2)(a)(ii), namely that the Ninth Respondent

who was appointed by First and Second Respondents to investigate the matters raised by him in his demand letters was not independent and impartial. For purposes of this judgment and without finally deciding thereon, I will assume that Applicant succeeded in discharging the onus that he bore of showing that Ninth Respondent was not independent and/or impartial.

[10.2] On the other hand, sub-section 165(5)(b) requires that all three named factors must be present in order for the Court to be satisfied that the sought after order should be granted.

[11] If a Court is not satisfied that all three elements specified in sub-section 165(5)(2)(b) have been shown, it cannot issue the order envisaged in Section 165 of the Act. It was for this reason that I raised the issue of prescription as if the proposed claims that First and Second Respondents are to institute have prescribed as against the proposed Defendants/debtors, it cannot be said that the granting of the order *"is in the best interests of the (First and Second Respondents)"*. For the granting of the order to be in the best interests of First and/or Second Respondents it must, on at a *prima facie* basis, be shown that the claims are enforceable against the proposed Defendants/debtors and that there is some prospect of succeeding in the action/s.

[12] In the additional heads of argument presented on behalf of Applicant, one of the issues raised relates to the provisions of Section 17 of the Prescription Act which provides that:

"17(1) A court shall not of its own motion take notice of prescription."

[13] This is so in relation to an action or application between a creditor and a debtor. The application before me is not between a creditor and a debtor and accordingly the said provision is not of application. As is required of me, in terms of Section 165(5)(2)(b) of the Act, before granting an order I am required to be *"satisfied"* that it is in the best interests of the First and Second Respondents. A Court and accordingly I cannot be satisfied in circumstances where it is apparent from the papers that the proposed claims have prescribed as in such circumstances it cannot possibly be in the best interests of the two Respondents, as, for example, not only would they face the prospect of not succeeding in the proposed actions but would also be faced with enormous attorney and client costs as well as the costs of the intended Defendants.

[14] In the demand letters, "FA1", "FA2" and "FA3" to the founding affidavit, relied on by Applicant, it is stated a number of times that *"Lest it be contended that this claim may be prescribed, you are referred to Section 12(3) of the Prescription Act."* From this it is apparent that Applicant and his

legal representative were alive to the issue at least by the time that the letters were addressed. There is nothing in Applicant's papers to indicate that the provisions of Section 12(3) of the Prescription Act are or even might be of application. From the Respondents' affidavits and documents it appears that there is no prospect of either First and/or Second Respondent being able to rely on the provisions of Section 12(3) of the Prescription Act.

[15] Applicant has not, whether in the papers before me or after the issue was raised by me, placed any facts before me that indicate even on a *prima facie* basis that the running of prescription against the proposed debtors was delayed as provided for in terms of the Prescription Act. Not even in Applicant's additional heads of argument is this addressed. In the absence thereof, I must accordingly assume that no basis for such a claim exists and that the prescribed three year period is of application. It goes without saying that the bringing of the application by Applicant does not interrupt prescription against the proposed debtors.

[16] In prayers 1.1.1 and 1.1.2 of the notice of motion, it is envisaged that First Respondent institute action against Fifth Respondent for payment of R45 000,00 per month for 12 months and R49 500,00 per month for the following 12 months. No dates are given either in the notice of motion or the founding papers to indicate when these payments should have been made. However, it is apparent from paragraphs 1.2.1 to 1.2.2.2 of "FA1" that same

would have arisen during the period 2006 to 2008. Prescription in terms of the Prescription Act would have commenced running on the date that each payment became payable. Even if an order had been granted on 2nd December 2011 and having regard to the procedure that had to be followed before summons could be issued, a period of 3 years would have elapsed and the claims would have prescribed.

[17] In prayer 1.1.3 the sum of R583 853,34 is alleged to be payable by Fifth Respondent to First Respondent being the *"nett present value of the balance of the purchase price"* of a certain building (paragraph 1.3.3.8 of "FA1"). Paragraph 1.2.1 of "FA1" states that the building in question giving rise to the balance of the purchase price was sold in 2006 and transferred 2 years later, i.e. 2008. For the reasons recorded in paragraph 16 above, this claim has also prescribed.

[18] In prayers 1.1.4 to 1.1.8 the action/s sought to be instituted in the name of First Respondent against Fifth Respondent is/are for the setting aside of the acquisition by Fifth Respondent of shares in First Respondent in terms of Section 38(1) of the Companies Act 61 of 1973 together with repayment of the sums of R504 941,00, R380 000,00 and all dividends paid by First Respondent to Fifth Respondent as a result of the acquisitions of the said shares, it being alleged that the acquisition of the shares took place during 2006. These claims had clearly prescribed by the time the application

was launched and for that reason as well as the reasons set out in paragraph 16 above, these claims have prescribed. With regard to the dividend repayment claim, insofar as dividends were paid to Fifth Respondent within the past 3 years, as such a claim/s would have been ancillary to the claim to a declaration of illegality regarding the acquisitions, same would have been extinguished by prescription.

[19] In prayer 1.2, it is alleged that Third Respondent is indebted to First Respondent in the sum of R500 000,00, Third Defendant having paid such amount to himself and Closeprops 12 CC out of First Respondent's funds during 2006. This claim arose some 5 years before the application was launched and for that reason as well as having regard to what I state in paragraph 16 above this claim has similarly prescribed.

[20] In prayer 1.3 it is alleged that Fourth, Seventh and Eighth Respondents are indebted to First Respondent in the sum of R1 800 000,00 *"being the total of the profit they earned by the sale of their shares in Grove 250 (Pty) Limited which profit belonged to and should have been received by the first respondent."* In paragraph 3.8 of "FA1" it is alleged that the shares were sold in 2008. For the reasons as recorded in paragraph 16 above, this claim has similarly prescribed.

[21] In prayer 1.4 it is alleged that Third and Fourth Respondents and one

De Wet Botha are indebted to First Respondent in the sum of R805 295,84 in respect of certain debts *"illegally written off as losses incurred by the first respondent"*. In paragraph 4.2 of "FA1", it is alleged that this occurred in 2006. Once again a period well in excess of 3 years had passed by the time the application was launched and for this reason as well as for the reasons set out in paragraph 16 above, this claim has prescribed.

[22] In paragraph 1.5 it is alleged that Fourth Respondent is indebted to First Respondent in the sum of R381 150,00 *"which was unlawfully paid to him by the first respondent ostensibly in terms of severance package in October 2010"*. This claim would have prescribed in October 2013 and certainly had prescribed by the time Applicant was ready to argue the Rule 28(4) application on 24 January 2014.

[23] The alleged indebtedness by Third and Fourth Respondents to First Respondent as set out in prayer 1.6 is stated to have arisen from a collision that occurred on 27 April 2010. This claim would have prescribed by April 2013. There is no indication either in the founding affidavit or the demand letters that Santam Insurance Company Limited made a payment to First Respondent in response to a claim lodged against it by First Respondent in respect of damage to First Respondent's vehicle. In any event, the claim had prescribed by 24 January 2014 when Applicant was ready to argue the Rule 28(4) application.

[24] In prayer 1.7 it is sought that the First Respondent institute action against Third Respondent for payment of four amounts in respect of Pay As You Earn income tax as same was not deducted from payments made to Third Respondent thus exposing First Respondent to penalties and interest arising therefrom. The income tax years stated to be involved are the years 2007 to 2010. Any claim for the 2007 and 2008 tax years had prescribed by the time the application was launched. For the reasons recorded in paragraph 16 above as well as 26 below, any claim in respect of the 2009 and 2010 tax years, have also prescribed.

[25] In paragraphs 1.7.5 to 1.7.9, it is alleged that Third Respondent is indebted to First Respondent in various amounts paid by First Respondent on behalf of Third Respondent to the named parties. No dates are furnished in the notice of motion or in the demand letters and the founding affidavit is silent with regard thereto. Applicant had the duty and onus of showing that instituting these actions (and indeed all of the actions) was in the best interests of the First Respondent and by not furnishing the information has failed to discharge the onus. I can only assume having regard to the dates of the other indebtednesses, that these have also prescribed.

[26] In prayer 1.8, Applicant claims that Fourth Respondent is indebted to First Respondent for Pay as You Earn income tax not paid during the tax years 2008 to 2011 in respect of which First Respondent would face penalties

and interest. The claim in respect of the 2008 tax year prescribed before the application was launched. By the time the application in terms of Rule 28(4) came before me on the 24th of January 2014 and I received the parties' additional heads, the claims in respect of the 2009, 2010 and 2011 tax years had prescribed. Even if I had given judgment in the matter in favour of Applicant on 24 January 2014, having regard to the procedure that had to be followed before institution of an action against Fourth Respondent by First Respondent, the claim for the tax year ending February 2011 being the last of the four claims, would have prescribed. The other three claims prescribed somewhat earlier.

[27] I will deal with the relief sought in prayer 1.9 hereunder.

[28] In prayer 2.1, Applicant claims that Second Respondent has a claim against Third Respondent the sum of R1 116 757,00. No details are given, however, in Annexure "FA2" it is stated that the said amount is owing to the Second Respondent by Third Respondent *"as reflect in your annual financial statement as at 31 December 2009, being money loaned and advanced by you to Mr Botha."* From what is before me, it is not possible to determine when the loan was made, however, assuming the most favourable date for Applicant, namely 31 December 2009, the claim would have prescribed on 31 December 2012. Even if I had given judgment in favour of Applicant on 2nd December 2012, having regard to the procedure to be adopted in order to

institute action against Third Respondent, this claim would have prescribed in any event and had certainly prescribed by the time the application in terms of Rule 28(4) finally came before me on 24 January 2014.

[29] I deal with prayers 3 to 6 hereunder.

[30] From the above it is apparent that a period in excess of 3 years has passed between the arising of the alleged causes of action/debts that Applicant seeks an order in terms of Section 165 of the Act to institute actions against the named Respondents in the names of First and Second Respondents. Accordingly, on the papers before me and on the face of it, all of the above claims relied on have prescribed in terms of the Prescription Act.

[31] I have considered the heads of argument presented by the parties' legal representatives and am not persuaded that my reasoning is flawed.

[32] In the result, Applicant has not shown on a *prima facie* basis that First and Second Respondents have potentially enforceable claims against the various Respondents which he states the two Respondents have claims against.

REMAINING PRAYERS

[33]

[33.1] In prayer 1.9, Applicant seeks an order that First Respondent's directors rectify First Respondent's share register as well as the CM42 in respect of a share transaction in terms of which the Sixth Respondent purchased shares in First Respondent allegedly for the sum of R3 700 000,00 but reflected in the share register and CM42 as R2 700 000,00. This is dealt with in paragraph 3 of "FA3".

[33.2] In response the Respondents attach as Annexures "LB36(1)" to "LB36(5)" copies of 5 share certificates issued in favour of the Sixth Respondent. Three of these certificates relate to shares in First Respondent and two of them in Second Respondent. Each certificate is in respect of 1,500 shares, the nominal amount reflected on each certificate being R413,333 per share.

[33.3] In paragraph 28 of Applicant's replying affidavit, he claims that the 5 certificates *"show I am correct"* and in paragraph 28.3 states *"Each one is stated to be for 1,500 shares at R413,33 each. This amounts to some R620 000,00 each. If one multiplies this by the five companies, one comes to R3 100 000,00 and not R4 100 000,00 in "RA5" which is the offer from the Sixth Respondent to buy the shares"*.

[33.4] The three share certificates referred to above are issued in respect of Up-to-Date Sales (Cape Town) (Pty) Limited, Registration No. 2007/015151/07, Up-to-Date Sales (Pty) Limited, Registration No. 2001/008621/07 (First Respondent) and Up-to-Date Sales Durban (Pty) Limited, Registration No. 2002/002813/07. The remaining two certificates are issued by LBCS Trading 103 (Pty) Limited, Registration No. 2005/020944/07 and LBCS Trading 73 (Pty) Limited, Registration No. 2001/006286/07 (Second Respondent).

[33.5] Out of the five entities that issued the 5 share certificates, only two of them are cited by Applicant.

[33.6] On the papers before me, it would appear that only 1,500 shares in First Respondent were issued to Sixth Respondent. It further appears that Applicant is somewhat confused with regard to the shares in the various entities and has assumed that all five share certificates are in respect of shares in First Respondent.

[33.7] Although it may well be that First Respondent's share register as well as the CM42 reflect the incorrect amount in respect of the purchase of the 1,500 shares which would have amounted to R619 999,50, as well as the number of shares held by Sixth Respondent in First Respondent, there is insufficient information before me to make an order in regard thereto.

[33.8] As any error in First Respondent's share register and the relevant CM42 may have arisen as a result of confusion with regard to the various entities with similar names to that of First Respondent, I would suggest that the First Respondent's directors investigate same and if necessary rectify its and the associated entities' share registers and the CM42.

[34] Prayers 3 to 6 would only be of application if leave was granted to Applicant to bring the various proceedings in the name of First and/or Second Respondent.

RESPONDENT'S COUNTER-APPLICATION

[35] In a counter-application, the Respondents seek relief in relation to enabling Ninth Respondent to conduct an investigation and compile a report in terms of Section 165(4)(a) of the Act in relation to the Applicant's demand letters to both First and Second Respondents. Having regard to what I have stated above and having regard to my above findings, conducting an investigation at this stage would be of no value to either the Applicant or the First and/or Second Respondents.

[36] In any event I am of the view that Respondents did not make out a case for the relief they sought. In this regard I refer to what I have stated in paragraph 10.1 above.

CONCLUSION

[37] In view of my findings:

[37.1] there is no need for me to deal with the Rule 28(4) application, the aspect raised by me as set out in paragraph 8.1 above or the main application;

[37.2] the main application must accordingly fail;

[37.3] the counter-application must also fail.

[38] As a guide to the Taxing Master in relation to the costs order in respect of the Respondent's counter-application, I indicate that only a small portion of the papers dealt with the counter-application.

[39] I accordingly make the following order:

1. The main application is dismissed.

2. The Respondents' counter-application is dismissed.

3. The Applicant is to pay the Respondents' costs of the main application including the costs of the Rule 28(4) application and

those costs which were reserved in relation to 15 November 2012 and 3rd December 2012 all on a party and party scale including the fees of Senior Counsel where Senior Counsel appeared.

4. The First to Seventh, Ninth and Eleventh Respondents jointly and severally, the one paying the other to be absolved, are to pay the Applicant's costs in relation to their counter-application on a party and party scale.

BASSLIAN AJ _____

Date of hearing: 1 & 2 December 2011 and 24 January 2014

Date of judgment : 13 November 2014

Counsel for Applicant:	Advocate K R Lavine Instructed by Eiser Kantor And subsequently Mr Eiser
Counsel for First to Seventh, Ninth and Eleventh Respondents:	Advocate J Uys initially and then Advocate J F Roos SC Instructed by Eugene Marais Attorney