REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **40081/2013**

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED ✓

12/5/17
Date:

WHG VAN DER LINDE

In the matter between:

Stand 242 Hendrik Potgieter Road Ruimsig (Pty) Ltd	**Applicant**
and	
Bubesi Investments 196 (Pty) Ltd	**First Respondent**
Karl-Heinz Gobel	**Second Respondent**
Vernon Wilken	**Third Respondent**
Certified Master Auditors Inc	**Fourth Respondent**
Floris Du Toit	**Fifth Respondent**
Karl-Heinz Gobel N.O.	**Sixth Respondent**
Christina Petronella Gobel	**Seventh Respondent**
Paul Hendrik Barnard N.O.	**Eighth Respondent**
Vernon Wilken N.O.	**Ninth Respondent**
Anna Susanna Wilken N.O.	**Tenth Respondent**

Gert Ignatius Marias N.O. **Eleventh Respondent**

Jan Adriaan Jacobs

(t/a Jacobs Robertse Attorneys) **Twelfth Respondent**

JUDGMENT

Van der Linde, J:

Introduction and background

(1) The applicant applies, by notice of motion dated 3 March 2016, to join the respondent as a 12th defendant in a pending action. The action had been instituted on 9 September 2009, and it was initially for the transfer to the applicant as plaintiff of two erven ("the property") on which an income producing enterprise was being conducted, by the first defendant seller. In the alternative, should it be held that the sale was not binding, damages were claimed from the first to fifth defendants.

(2) The main claim was preferred because the seller was alleged to have repudiated the sale by failing to recognise the validity of the sale. The alternative claim, on the stated predicate, was against the seller and the second and third defendants as the seller's representatives, and against the fourth and fifth defendants respectively as the company that rendered accounting services to the seller and its representative.

(3) It was said that these two sets of defendants had made various misrepresentations to the plaintiff buyer, including that the seller had authorised the sale, and that all the statutory preconditions for the sale, including a resolution in terms of s.228 of the previous Companies Act 61 of 1973, had been complied with.

(4) When the sale was concluded the applicant had not yet been incorporated. The particulars of claim asserted that one Mr Van Zyl made the written offer as trustee and agent on behalf of a company to be incorporated. The written offer to purchase was attached to the summons. It described Mr Van Zyl as acting *"on behalf of a new company to be formed."*

(5) It is said that in due course the plaintiff was incorporated and upon its incorporation, the plaintiff *"duly ratified and confirmed the contract of sale, thus becoming the purchaser of the property."*

(6) Finally, by way of identifying the existing parties to the pending litigation, the sixth to eleventh defendants were joined for their interest, and no relief is claimed against them, nor against the trusts of which they are trustees.

(7) In time the summons was amended. This was the result of a judgment in the Supreme Court of Appeal[1] which held that indeed the sale was invalid for lack of compliance with s.228. That judgment was an unsuccessful appeal from a judgment by Lamont, J in this division who set aside an earlier interim interdict granted in favour of the applicant by Jajhbay, J (since deceased), pending the action.

(8) The amended particulars still assert that the seller failed and refused to recognise the sale as being valid, for want of compliance with s.228. But the particulars now accept that that position was valid, because it goes on to assert that that section had not been complied with and that the sale was accordingly not valid or enforceable.

(9) The cause of action in the amended particulars of claim is misrepresentation to both Mr Van Zyl and the plaintiff, inter alia that s.228 had been complied with; and it is asserted that the first to fifth defendants owed the plaintiff a duty of care. It is said that had the misrepresentations not been made, steps would timeously have been taken to ensure inter alia that s.228 would have been complied with.

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[1] Stand 242 Hendrik Potgieter Road Ruimsig (Pty) Ltd and Another v Gobel NO and Others, 2011 (5) SA 1 (SCA).

(10)The respondent as proposed twelfth defendant is an attorney. The joinder sought to be attained in this application would be accompanied by an amendment which asserts that either Mr Van Zyl or the plaintiff instructed the respondent to act as attorney and conveyancer; that an agreement between them thus came into existence, and that in terms of that agreement the respondent would ensure that the sale agreement was valid and binding. This included, according to the proposed cause of action, that the respondent was duty bound to ensure that there had been due and proper compliance with s.228.

The main issue in the application

(11)The joinder and amendment application was opposed on a number of grounds, the most of important one of which was the question of prescription, it being asserted that the proposed cause of action will have been prescribed. In view of the conclusion to which I have come on this issue, it is not necessary to deal with the other submissions on behalf of the respondent.

(12)The applicant accepted, I believe correctly so, the principle that a court would not allow an amendment which involves the joinder of a party against who the proposed cause of action will have been extinguished by prescription.

(13)The cutting edge of the debate was this: the applicant submitted that although it was aware, long enough ago otherwise to result in prescription, of the allegations of negligence that were being levelled against the respondent as attorney, it did not then believe those allegations, as the respondent had been its attorney, or at least that of Mr Van Zyl, for many years, and he was implicitly trusted.

(14)Against this the respondent argued that whether or not the applicant believed the allegations when it came to know of them is actually irrelevant; the simple question was whether the relevant facts, for the purposes of s.12(3) of the Prescription Act 68 of 1969, were known to the applicant sufficiently long ago for prescription to have run its course.

Discussion

(15)In the founding affidavit the applicant alleges that the respondent had deliberately withheld facts from the applicant. If this is so, then of course the provisions of s12(2) of the Prescription Act would avail the application. The founding affidavit alleges that the respondent got his assistant Jooste to call the respondent in March 2009 before the first tranche of the purchase price was paid. He says that during that call the respondent told Jooste that he had drafted the s.228 documents and had personally obtained the required signatures to them.

(16)What has since become accepted by all by now, and what the Supreme Court of Appeal – according to the applicant himself – had found, was that what had been stated in the s.228 documents were false. This is borne out by what was said in this regard by Lewis, JA in that case (emphasis supplied):

"[4] On 2 February 2009 Göbel and Wilken signed a document certifying that they were the directors of Bubesi, and that the sale had been approved by the shareholders 'in a general meeting in terms of section 228 of the Companies Act' or that the property 'does not constitute the whole or greater part of the assets of the company'. Both statements (in the alternative) were false. As I have said, the property was the sole asset of the company, and the other trustees of the shareholding trusts asserted that they were not aware of the sale.

...

[8] There was indeed no special resolution, either authorising or ratifying the sale to Stand 242, passed by the shareholders of Bubesi. Nor was there any evidence that the trustees of the shareholding trusts of Bubesi were aware of or had consented to the sale. Stand 242 argued that the trustees were Wilken and Göbel and their respective wives, who must have known of the sale and thus consented to it.

[9] It should be noted, however, that Stand 242 has instituted an action for specific performance or damages against Wilken and Göbel for R10.2 million. The question of knowledge and consent will no doubt be tested in that action."

(17)The applicant will of course have been aware of this judgment in 2011 and of what was said in it. In his answering affidavit, however, the respondent refers back to July 2009 when the applicant brought the urgent application interdicting the seller to deal with the property pending the action to be instituted in relation to the property. In response to that application the seller deposed to two affidavits, respectively on 20 and 21 July 2001. In paragraphs 7 and 8 of the second of these two affidavits, Mr Gobel explained that he and

Wilken were asked by the respondent to sign many documents relative to the transfer, and likely also the impugned s.228 resolution.

(18)The deponent asserted that he and Wilken were not given the opportunity to read them, nor were the documents fully explained to them. In paragraph 8 the deponent said: *"Jacobs never informed or explained to Wilken and myself what the relevance of clause 5 of annexure A was or what section 228 of the Companies Act meant."*

(19)Subsequently, when the two representatives of the seller pleaded in the applicant's action, they expressly pleaded that the respondent requested them on more than one occasion to sign and initial many documents, without giving them the opportunity to read the documents or without fully explaining the contents thereof. It is further said that the respondent never explained to them what the relevance was of clause 5 of the certificate purported given by the two directors of the seller.

(20)That clause reads as follows:

"5. The disposal of the property, being the whole or the greater part of the assets of the company, has been approved by the Shareholders in a General Meeting in terms of Section 228 of the Companies Act
OR
The abovementioned property does not constitute the whole or greater part of the assets of the Company."

(21)S.228 of the then Companies Act originally required a members' resolution passed at a general meeting, and thus a directors' resolution would not have been sufficient; but by 2 February 2009 that section required a special resolution of shareholders. In paragraph 17 of that plea, the two directors further asserted:

"Jacobs owed his client, the Plaintiff, a duty of care to have seen to it that there had been full compliance with section 228 of the Companies Act."

(22)That plea was dated 5 September 2011, which came some months after the judgment in the Supreme Court of Appeal on 1 June 2011.

(23)In its replying affidavit the applicant's deponent, Mr Van Zyl, admits that he became aware of the allegations concerning the respondent's negligence as long ago as July 2009, but *"however without a moment's hesitation dismissed it as a blatant falsehood and just another attempt by the Respondents to avoid their obligations."* The affidavit goes on to say that when confronted with these allegations, the respondent himself scoffed at them as untrue, using foul language in the process.

(24)Section 12 of the Prescription Act provides as follows:

> ***"12. When prescription begins to run***
> *(1) Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due.*
> *(Section 12(1) substituted by section 68 of Act 32 of 2007)*
> *(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.*
> *(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."*

(25)Mr Both, SC for the applicant argued that here the applicant was confronted by two versions; that of the seller and its two directors, and that of the respondent, his attorney of many years standing, whom he believed implicitly. That being so, it cannot be said, according to the argument, that the applicant actually had knowledge of the facts from which the debt arises back then. It was only later when the respondent admitted that the two directors may be correct, that it dawned on the applicant that the respondent's denial might not have been honest.

(26)In response, Mr Seleka, SC for the respondent, relied on Fluxmans Incorporated v Levenson[2] for the proposition that the legal implication of the facts known to the creditor mattered not; what is needed for a debit to become due is merely the minimum facts need to institute action. In that matter a client had concluded an unlawful contingency fee agreement with an attorney, who subsequently overcharged the client. Upon becoming aware that the

[2] (523/2015) [2016] ZASCA 183; [2017] 1 All SA 313 (SCA); 2017 (2) SA 520 (SCA) (29 November 2016)

agreement offended the law, the client sued for what was alleged to be the extent of the overreach.

(27)The court *a quo* held that the claim had not been extinguished by prescription, as the fact that the agreement was unlawful, was a fact which the client needed to know before prescription began to run. The Supreme Court of Appeal by a majority held that knowledge that the agreement was unlawful was not such a fact. Relevant portions of the judgment are these (emphasis supplied):

"[34] This court in Truter & another v Deysel [2006] ZASCA 16; 2006 (4) SA 168 (SCA) para 16 said that:

'For the purposes of the [Prescription] Act, the term "debt due" means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.' (See, for example, Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A) at 838D-H; and Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd [1990] ZASCA 136; 1991 (1) SA 525 (A) at 532H-I. See further M M Loubser Extinctive Prescription (1996) para 4.6.2 at pp 80-81 and the other authorities there cited.)"

and

"[42] Knowledge that the relevant agreement did not comply with the provisions of the Act is not a fact which the respondent needed to acquire to complete a cause of action and was therefore not relevant to the running of prescription. This Court stated in Gore NO para 17[24] that the period of prescription begins to run against the creditor when it has minimum facts that are necessary to institute action. The running of prescription is not postponed until it becomes aware of the full extent of its rights nor until it has evidence that would prove a case 'comfortably'. The 'fact' on which the respondent relies for the contention that the period of prescription began to run in February 2014, is knowledge about the legal status of the agreement, which is irrelevant to the commencement of prescription. It may be that before February 2014 the respondent did not appreciate the legal consequences which flowed from the facts, but his failure to do so did not delay the date on which the prescription began to run. Knowledge of invalidity of the contingency fee agreement or knowledge of its non-compliance with the provision of the Act is one and the same thing otherwise stated or expressed differently. That the contingency fees agreements such as the present one, which do not comply with the Act, are invalid is a legal position that obtained since the decision of this court in Price Waterhouse Coopers Inc and is therefore not a fact which the respondent had to establish in order to complete his cause of action. Section 12(3) of the Prescription Act requires knowledge only of the material facts from which the prescriptive period begins to

run – it does not require knowledge of the legal conclusion (that the known facts constitute invalidity) (Claasen v Bester [2011] ZASCA 197; 2012 (2) SA 404 (SCA)."

(28)We are of course in this case not concerned with precisely the same issue. In this case the client was aware of what was being said about its attorney, the respondent: that he was negligent, and had acted in breach of a duty of care. But the client did not believe those allegations. So, the applicant had knowledge of the facts, but chose, for his own reasons, especially his past relationship with the respondent, not to act on those.

(29)It was only at a meeting on 7 September 2014 at the respondent's office, when the latter said that he had *"not been 100% honest with us and that there might be some truth in what"* was being alleged by the seller's two directors, that the applicant decided the truth had been kept from it.

(30)Was the applicant in a position to have sued the respondent earlier? In my view it clearly was. This conclusion is borne out by the assertions now proposed to be inserted in the amended particulars of claim, particularly in paragraph 13. The professional agreement is asserted in subparagraphs 13.3 to 13.5. That was obviously known to the applicant. In subparagraph 13.7 to 13.9 the standard with which the respondent was to have rendered the professional services is asserted. That too was known to the applicant. Causation is asserted in paragraph 14; that too was known, or could have been known. Paragraphs 15 to 17 are consequential assertions that would also have been known to the applicant.

(31)The contentious proposed factual assertions facts are the breach assertions made in subparagraph 13.6. These assertions are of the *"failing to ensure"* genre, meaning that they are assertions of fact of the conclusion kind, conclusions of fact which derive from an acceptance of the truth of what the seller's two directors had been saying all along.

(32)In my view the subjective disbelief of a creditor in facts that are known to it, which facts if established would found a cause of action against its debtor, cannot serve to prevent the

debt from becoming due. I do not agree, with respect, that this case is in this respect on all fours with Minister of Finance and Others v Gore NO,[3] on which Mr Both relied.

(33)In that case the creditor did not actually have the facts, only a suspicion. In this case the creditor had the facts, because they were spelt out by the two directors of the seller. It is just that he did not believe them, and only changed his mind when the respondent actually confessed. So, in my view, there is no scope for the argument that although the facts were known to a creditor, s/he did not actually believe them, and so the debt did not become due until s/he actually believed those facts.

(34)But if I am wrong, then the issue of the reasonableness of the creditor's belief arises: was the applicant justified in not accepting the seller's directors' version, and in preferring the respondent's exculpatory retort? Even if initially the applicant was justified in believing the respondent and even if initially the debt did not become due, in my view things changed when the SCA gave its judgement.

(35)That court said that the contents of clause 5 of the contentious certificate were *"false"*, and it referred to the question of knowledge being subject to being tested down the line in the anticipated trial action. Those comments ought to have set the alarm bells ringing: what if the seller's directors are believed? The applicant was not, after that judgment, immune to a challenge to the reasonableness of its belief in the respondent's innocence, and it could therefore have acquired the requisite knowledge for the purposes of s.12(3) of the Prescription Act more than three years before this application was brought.

(36)In these circumstances the claim has, in my view, been extinguished by prescription, and there would be no point in allowing the proposed joinder and the amendment. In the result I make the following order:

The application is dismissed with costs, including the costs consequent upon the employment of two counsel, where this was done.

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[3] 2007 (1) SA 111 (SCA) at [18].

WHG van der Linde
Judge, High Court
Johannesburg

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