REPUBLIC OF SOUTH AFRICA

HIGH COURT, SOUTH GAUTENG LOCAL DIVISION (JOHANNESBURG)

(1)	REPORTABLE: Yes.
(2)	OF INTEREST TO OTHER JUDGES: Yes.
(3)	REVISED.

.....	.....
DATE	SIGNATURE

Case No: A5058/16

In the matter between:

GEOFFREY COOK Appellant

and

MURRAY MORRISON First Respondent

SEABUSH INVESTMENTS (PTY) LTD Second Respondent

***Case Summary*: Prescription – Extinctive prescription – Debt - the remedy of restitution or of damages for breach of contract following rescission of a contract resulting from the defaulting party's repudiation has its correlative the obligation to restore performance received – that obligation constitutes a debt to which the extinctive prescription of the Prescription Act 68 of 1969 applies.**
Period of prescription – when it commences – innocent party's right of action for restitution or for restitutional damages resulting from the defaulting party's repudiation of a contract only accrues, and the correlative obligation or debt to make restitution or to pay damages becomes due in terms of s 12(1) of the Prescription Act, when the innocent party exercises his or her election to accept the repudiation, rescind the contract and the election is communicated to the party who has repudiated.

Section 11(d) of the Prescription Act applying – debts had prescribed after three years. Appeal dismissed.

JUDGMENT

MEYER J (KATHREE-SETILOANE and TWALA JJ concurring)

[1] This is an appeal against the whole judgment and order of the Gauteng Local Division of the High Court (Moshidi J) delivered on 4 August 2016, upholding the special plea of prescription raised by the first respondent, Mr Murray Morrison Morrison), and the second respondent, Seabush Investments (Pty) Ltd (Seabush), against the claims as formulated by the appellant, Mr Geoffrey Cook (Cook), in his particulars of claim. Since 2 August 2010, Morrison has been the sole director of and shareholder in Seabush. The appeal is with the leave of the trial court.

[2] Cook's summons was served on 22 April 2014. Apart from Morrison and Seabush, six other parties are also cited as defendants, but no relief is claimed against most of them. Morrison and Seabush filed a special plea and pleaded over on the merits. Cook did not raise any answers to the special plea in a replication. The matter came to trial before Moshidi J in the Gauteng Local Division of the High Court, Johannesburg. The trial court ordered, under rule 33(4) of the Uniform Rules of Court, that the only question to be tried initially was the question of prescription. The trial court upheld the special plea with costs.

[3] In considering the special plea of prescription, the postulation is that the factual basis, the set of material facts, that begets Cook's claim had in fact been established. (See *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA), para 20.) Background information is first set out in the particulars of

claim, followed by a statement of the material facts upon which Cook relies for his claims, essentially against Morrison.

[4] In the background part, Cook avers that during February 2003, the second defendant, Mr Nicholas Fox (Fox), Morrison and he concluded an oral joint venture agreement to establish the Sibuya Game Reserve near Kenton-on-Sea in the Eastern Cape. The game reserve was established in February 2003 and operated on land held by him, Fox and Morrison in various land-owning entities. Seabush is one of these land-owning entities. The shares in Seabush were owned 50/50 by Cook and Morrison. The seventh defendant, Hesber Impala (Pty) Ltd (Hesber), was another. Fox owns 50% shares in Hesber and Cook and Morrison 25% each. Then there are also other entities that are central to the operation of the game reserve; the sixth defendant, Sibuya Game Reserve & Lodge (Pty) Ltd (SGR&L), operates tented camps in the reserve and the eighth defendant, Salisbury Trading CC, owns game.

[5] In pleading his cause of action, Cook avers that by 2010 Morrison and he were the only two directors of, and shareholders in, both Seabush and SGR&L. Differences between them culminated in the two of them concluding an oral agreement on 2 August 2010, referred to as the 'swop agreement', which provided the terms and conditions upon which Cook would exit both Seabush and SGR&L. In terms of the swop agreement, Cook was obliged to transfer his shares in both Seabush and SGR&L to Morrison, to resign his directorship in both companies, to settle a debt of about R1.1 million owed by Seabush to Inverstec and to pay Morrison an additional sum of R900 000. (These terms were subject to Morrison being able to sell his shares in Sibuya to Fox on terms agreeable to Morrison.) In exchange for this Morrison was obliged to assist Cook with sub-dividing a portion of

Seabush's land situated in the game reserve, which had a house on it (the swop land). Once the swop land had been sub-divided out from the rest, it was to be transferred to Cook.

[6] Cook avers that '[i]n partial fulfilment of the 'Swop Agreement' he transferred his shareholding in Seabush and in SGR&L to Morrison '*as agreed*', he 'resigned as a director' of Seabush and of SGR&L '*as agreed*', he 'settled the debt' owed by Seabush to Investec, which was an amount of R1, 161, 984 '*as agreed*', the share register of Hesber 'was corrected' to reflect Cook as the holder of 25% of the shareholding in that company '*as agreed*' and Morrison 'reached an agreement with Fox on the sale of' SGR&L '*as agreed*'. However, so Cook avers, the sub-division was never procured and the swop land was never transferred to him.

[7] On 8 September 2010, 'Morrison purported to impermissibly sever and cancel part of the Swop Agreement' by refusing to perform those obligations and by nevertheless retaining the performance that he had received from Cook under the swop agreement. He retained for himself all of the shareholding in both Seabush and SGR&L as transferred to him by Morrison, he retained for himself and/or Seabush the sum of R1 161 984 as paid by Cook to settle the debt owed to Investec and he retained for himself and/or Seabush the swop land which should have been created out of the sub-division and transferred to Cook. In acting as aforesaid, so Cook's particulars of claim continue, 'Morrison's conduct is unconscionable *and* contra bonos mores *and* amounts to a breach and/or repudiation of the Swop Agreement'. And then he avers:

'28. On 29 September 2010 the plaintiff accepted Murray Morrison's breach and/or repudiation of the Swop Agreement and cancelled the Swop Agreement, alternatively the plaintiff hereby cancels the Swop Agreement.'

[8] It is then averred that, in addition to the express terms, it was an implied and/or tacit term of the swop agreement that if the swop land could not be sub-divided and transferred to Cook then Morrison 'would be obliged to make restitution to the plaintiff of whatever performance he had received from the plaintiff including the performance retained by him'; and that in breach of the implied and/or tacit term Morrison has failed to make restitution. Cook then repeats the contents of paragraph 28, which I have quoted above.

[9] Cook concludes by averring that he suffered loss and/or damages as a result of not being restored to his former position because Morrison was retaining his performance. He, therefore, claims his shares back, his directorships reinstated and repayment of the money that he had spent on settling the Investec debt. He frames the relief which he seeks in the following terms:

'(a) As against Murray Morrison, that 50% of the shares in Seabush Investments (Pty) Ltd be delivered to him and that he be re-instated as a director of that company together with his loan account and claims against the company alternatively should restitution and/or vindication be impossible or impractical then Murray Morrison and/or Seabush Investments (Pty) Ltd pay the plaintiff an amount of R6.3 million (which is 50% of the market value of Seabush Investments (Pty Ltd) further alternatively that he be directed to produce a statement of account in respect of the assets and liabilities of Seabush Investments (Pty) Ltd and that he be directed to debate such with the plaintiff and thereafter pay the plaintiff whatever damages the plaintiff is found to have suffered in lieu of restitution and/or vindication;

(aa) Additionally, and if restitution and/or vindication in respect of 50% of the shares in Seabush Investments (Pty) Ltd is possible and practical as contemplated in (a) above:

(i) declaring that the plaintiff is the lawful owner of 50% of the shares in Seabush Investments (Pty) Ltd;

(ii) directing that Seabush Investments (Pty) Ltd rectify the company's share register to reflect the plaintiff as a 50% shareholder in the company.

(b) As against Murray Morrison and/or Seabush Investments (Pty) Ltd, that 50% of the shares in Sibuya Game Reserve & Lodge (Pty) Ltd be delivered to him and that he be re-instated as a director of that company together with his loan accounts and claims against the company alternatively should restitution and/or vindication be impossible or impractical then Murray Morrison and/or Seabush Investments (Pty) Ltd pay to the plaintiff R9 million (which is 50% of the market value of Sibuya Game Reserve & Lodge (Pty) Ltd) further alternatively that they be directed to produce a statement of account in respect of the assets and liabilities of Sibuya Game Reserve & Lodge (Pty) Ltd and that Murray Morrison be directed to debate such with the plaintiff and thereafter pay him whatever damages he is found to have suffered in lieu of restitution and/or vindication;

(bb) Additionally, and if restitution and/or vindication in respect of 50% of the shares in Sibuya Game Reserve & Lodge (Pty) Ltd is possible and practical as contemplated in (b) above;

(i) declaring that the plaintiff is the lawful owner of 50% of the shares in Sibuya Game Reserve & Lodge (Pty) Ltd;

(ii) directing that Sibuya Game Reserve & Lodge (Pty) Ltd rectify the company's share register to reflect the plaintiff as a 50% shareholder in the company.

(c) As against Murray Morrison and/or Seabush Investments (Pty) Ltd, payment of R1,161,984;

(d) Interest on any amounts found to be due to the plaintiff at 15.5% per annum from the date upon which they became due until the date of payment;

(e) Alternatively to claims (a), (b), (c) and (d) above the plaintiff claims as against Murray Morrison an amount of R6,3 million (which is 50% of the market value of Seabush

Investments (Pty) Ltd) plus R9 million which is 50% of the market value of Sibuya Game Reserve & Lodge (Pty) Ltd plus R1,161,984 (the Investec loan paid) plus interest at 15.5% found to be due to the plaintiff.

(f) Costs of suit;

(g) Further and/or alternative relief.'

[10] The special plea of prescription raised by Morrison and Seabush, reads thus:

'1 In paragraph 28 of the particulars of claim the Plaintiff alleges that he accepted the First Defendant's breach and/or repudiation of the "Swop Agreement" and cancelled the "Swop Agreement" on 29 September 2010.

2 Prayers (a), (b), (c), (d) and (e) on amended pages 16 and 17 of the particulars of claim arise from the so-called "Swop Agreement" and its purported cancellation by the Plaintiff on 29 September 2010.

3 The Plaintiff's summons was issued on 17 April 2014, being a date which is more than 3 years after the date of the purported cancellation of the "Swop Agreement" by the Plaintiff.

4 To the extent that the Plaintiff has any claims or causes of action against the Defendants (which is denied), same have prescribed.'

[11] In separating the question of prescription, the trial court held that the separation application has 'profound merit' and that the special plea of prescription is one of law 'which may decide the outcome of the trial, one way or the other, without the expensive necessity of leading of evidence'. The trial court thus directed that the question of prescription be tried first. In upholding the special plea of prescription, the trial court held that all the claims set out in prayers (a) to (e) of Cook's particulars of claim are debts as envisaged in s 11 of the Prescription Act 68 of 1969 (the Prescription Act). It held that Cook had a complete cause of action in respect of its

claims upon the acceptance of Morrison's repudiation and cancellation of the agreement in September 2010. Furthermore, that '[i]t is common cause that since the acceptance of the repudiation and the cancellation of the agreement in September 2010, no further action took place'.

[12] Cook argues that the trial court erred on two fundamental bases: First, in finding that the issue of prescription could be determined separately from the rest of the trial without evidence. A trial is needed, so he argues, to establish whether a partnership exists, whether Cook is the owner of the shares and whether and when the swop agreement was cancelled. The existence of a partnership, the ownership of the shares and whether and when the swop agreement was cancelled, according to Cook, are disputed facts. If there is a partnership, Cook argues, then the claims have not prescribed by virtue of s 13(1)(d) of the Prescription Act, which provides that '[i]f the creditor and debtor are partners and the debt is a debt which arose out of a partnership relationship, the period of prescription shall not be completed before a year has elapsed after . . . the day on which the relevant impediment [the partnership] has ceased to exist.' Cook argues that if he is the owner of the shares, he can vindicate them at any time within 30 years. If the evidence establishes that the swop agreement was only cancelled by means of the averment in his particulars of claim, then prescription only started to run at the time of service of his summons.

[13] The second fundamental basis, according to Cook, on which the trial court erred was the finding that all his claims are 'debts' falling within the ambit of s 10 read with s 11(d) of the Prescription Act. He argues that restitution pursuant to the cancellation of a contract or the vindication of shares or the rectification of a company's share register or a claim for a statement and debatement of account is

not a ‘debt’ as contemplated in the Prescription Act. It is to the latter question - whether the obligation that Cook seeks to enforce in this case is a debt within the meaning of that term in the Prescription Act - that I now turn.

[14] Section 10 of the Prescription Act provides for a ‘debt’ to be extinguished by prescription after the lapse of the relevant prescriptive period. In terms of s 12(1) prescription begins to run when the debt is due. Section 11 stipulates the different periods of prescription of debts. It is trite that not all rights of action give rise to a debt capable of being extinguished by extinctive prescription under s 10 of the Prescription Act. (See for example *Makate v Vodacom Ltd* 2016 (4) SA 121 CC, paras 189-192 and 196-197; *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Limited and Other* [2017] ZACC 15, paras 46-53 and 72-73; *Off-Beat Holiday Club v Sanbonani Holiday Spa Shareblock Ltd* 2016 (6) SA 181 (SCA), paras 32-36; and the various authorities referred to in these judgments.) I need not elaborate on the examples where a debt is not constituted within the meaning of the Prescription Act.

[15] Prescription, as was said by Nugent JA in *Duet and Magnum Financial Services CC (in liquidation) v Koster* 2010 (4) SA 499 (SCA), paras 9 and 23-24, ‘. . . is about rights that have come into existence but have ceased to exist by the passage of time’. Indeed, said Nugent JA, -

‘. . . it is not unusual when dealing with prescription for courts to ask only when the ‘right of action’ arose, leaving it to implication that its complement is a ‘debt’. Thus in *Mazibuko v Singer* [1979 (3) SA 258 (W) at 265D-F], which has often been cited in this court, Colman J referred to the ‘right of action’ prescribing, implying that its compliment was a ‘debt’. Trollip JA said that expressly in *Evins V Shield Insurance Co Ltd* [1980 (2) SA 814 (A) at 825F-H], when he said:

“”Cause of action” is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff’s legal right of action and, complementarily, the defendant’s “debt”, the word used in the Prescription Act.”

. . . A “debt” for purposes of the Act is sometimes described as entailing a right on the one side and a corresponding ‘obligation’ on the other.’

(Footnotes omitted.)

[16] The meaning that the Constitutional Court unanimously attributed to the word ‘debt’ as contemplated in ss 10, 11 and 12 of the Prescription Act in *Makate*, paras 85-86, 93 and 187, is 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.’,

which meaning was first adopted by the Supreme Court of Appeal in *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) at 344E-G. The Constitutional Court held (para 93) that to the extent that the Supreme Court of Appeal in *Desai NO v Desai* 1996 (1) SA 141 (SCA), at 146I, (there it was held that the term ‘debt’ in the context of the Prescription Act ‘has a wide and general meaning, and includes an obligation to do something or to refrain from doing something’) -

‘. . . went beyond what was said in *Escom*, it was decided in error. There is nothing in *Escom* that remotely suggests that ‘debt’ includes every obligation to do something or refrain from doing something, apart from payment or delivery.’

[17] Wallis AJ, in the second of the two judgments in *Makate*, said the following:

‘[188] The correlative of a debt in this sense is a right of action vested in the creditor in which the payment of money, or the delivery of goods, or the rendering of services is claimed. And, when payment, delivery or the rendering of services extinguishes the debt, the right of action is likewise extinguished. That is why s 12(1) of the Prescription Act provides that prescription will commence to run once the debt is due. If the debt is not due then prescription cannot run. Debts become due when they are immediately claimable and recoverable.

. . .

[195] . . . As Corbett JA said in *Evins* [*Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 842E-F] and Van Heerden JA said in *Oertel* [*Oertel en Andere NNO v Direkteur van Plaaslike Bestuur en Andere* 1983 (1) SA 354 (A) at 370B-C] a debt is the correlative of a right of action, and when one is extinguished so is the other. That is why debt has been defined by reference to the means by which the debtor can discharge it, namely payment, or the delivery of goods, or the provision of services. The obligation that underlies the existence of the debt must be one that is capable of being discharged by one or other of these means. . . . ‘

(Footnotes omitted.)

[18] In *Sanbonani*, the Constitutional Court re-affirmed its decision in *Makate* that the meaning of the word ‘debt’, as adopted in *Desai*, was too wide to the extent that it went beyond the narrow meaning of ‘that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another’, ascribed to it in *Escom*. (See the main judgment prepared by Mhlantla J, particularly paras 47-49 thereof, para 70 of the second judgment prepared by Froneman J and para 102 of the third judgment prepared by Madlanga J.)

[19] The three judgments are aligned on the acceptance of the correlative right of action/debt requirement for a claim to constitute a debt in terms of the Prescription

Act. Also, that substance must prevail over form in determining whether a claim gives rise to a debt capable of being extinguished by extinctive prescription under ch III, ss 10-12, of the Prescription Act. In this regard Mhlantla J said the following (paras 32-34):

'In this case, we are not dealing with relief of the nature discussed in *Koster* [*Duet and Magnum Financial Services CC (in liquidation) v Koster* [2010] ZASCA 34; 201 (4) SA 499 (SCA)] where declaratory relief immediately precedes a claim that practically is a "debt" under the narrow construction of the term in *Escom*. In this sense the declaratory would be a mere litigatory framing technique that fetters even the narrow application of the Act. . . .

However, before an analysis can be undertaken as to whether the applicant's claim constitutes a debt for purposes of the Prescription Act, it must be established first what the correct characterisation of the claim is. Because a given claim can be characterised in different ways, it can constitute a debt on one characterisation but not another. The applicants argue that their claim is not a debt because it is a claim for declaratory relief, which is not a debt in the ordinary sense of the term according to *Escom*. However, the respondents argue that the claim is a debt, because alteration of the articles would lead in effect to a new contract. Thus, there is a need for there to be an objective characterisation of the claim independent of the averments of the parties that can be easily identified by a court and that advances rather than diminishes the purposes of the Prescription Act. . . .

In order to identify what the relevant claim is, the court should use the applicants' cause of action as guidance. However, the court is not beholden to the applicants' characterisation of the claim, which might be at variance with the relevant legal provision. The latter governs.'

(Footnotes omitted.)

[20] And Madlanga J said this:

'[100] Not all claims prescribe under the Prescription Act; only claims that are "debts" within the meaning of that Act do. If we were to look to the remedy sought to establish whether a claim at issue is a "debt", an ingenious applicant or plaintiff could use the simple stratagem

of concealing the true nature of the underlying claim. For example, the litigant could do this by seeking relief that is not specific beyond a generalised prayer for whatever a court might find to be just and equitable relief. An example is the section 252(3) relief. [A reference to s 252 of the Companies Act 61 of 1973, which 'provides a remedy to minority members of companies in cases where the majority are guilty of oppressive conduct that has unfairly prejudiced them'(fn 7).] An unsuspecting respondent or defendant would easily find her- or himself defending the merits of the claim and not raising an otherwise available defence of prescription. Because in our law the defence of prescription may not be raised by a court of its own accord, the respondent or defendant may end up being prejudiced. Surely, the shield of prescription cannot be pierced so easily.'

And:

'[103] The very essence of prescription is that ordinarily the merits of debts that have prescribed should not be adjudicated. That much is plain from the words of this Court in *Mdeyide*. [*Road Accident Fund v Mdeyide* [2010] ZACC 18; 2011 (2) SA 26 (CC), para 8.] If, because of how the relief has been couched, a claim that is, in fact, founded on a debt would end up being adjudicated even if it would otherwise have prescribed, that would defeat the objectives of the Prescription Act.'

(Footnotes omitted.)

[21] In this case Cook primarily sues Morrison for restitution of his own performance consequent upon the cancellation of the swop agreement. His cause of action is founded in contract, the swop agreement. He pleaded the swop agreement; the performance which he rendered in terms thereof; Morrison's material breach and repudiation of the swop agreement on 8 September 2010; the subsequent cancellation thereof on 29 September 2010; the obligation on Morrison created by the cancellation to restore to him such performance that he had made in terms of the swop agreement.

[22] The main relief which he consequently claims, is restitution, and, in the alternative, damages for breach of contract, or, as it is sometimes referred to, restitutional or restitutionary damages (see *Probert v Baker* 1983 (3) SA 229 (D) at 233H-236E). Prayers (a) and (b) relate to the alleged obligation upon Morrison to re-transfer to Cook 50% of the shares in Seabush (prayer (a)) and 50% of the shares in SGR&L (prayer (b)). The main claims are for re-delivery of shares and restitution of 'board' seats. Ancillary relief in the form of a declarator to the effect that Cook is 'the lawful owner' of 50% of the shares in Seabush and of 50% of the shares in SGR&L and for rectification of each company's share register to reflect him as a 50% shareholder is claimed in prayers (aa) and (bb). Damages in quantified amounts equivalent to 50% of the market value of each company are claimed in the alternative to each main claim for restitution. In the alternative to awards of damages in the quantified claimed amounts (in other words, if it is found that the quantified amounts do not constitute 50% of the true market value of each company) then in each instance an account is claimed from Morrison, a debate thereof and payment of the amount of damages found to be due. Prayer (c) is a claim for restitution of Cook's performance in paying the debt owed to Investec. Prayer (d) is a claim for 'interest on any amounts found to be due'. Prayer (e) is merely a repeat of Cook's damages claims for specified amounts.

[23] The obligation to restore arises on cancellation of a contract as a matter of law and the claim for restitution is a contractual remedy (see *Baker v Probert* 1985 (3) SA 429 (A) at 438J-439C and 446E). In an article published in the Journal of Contemporary Roman-Dutch Law (MM Loubser *Is a right of rescission subject to extinctive prescription?* (1990) 53 THRHR 43 at 53), Prof Loubser undertook a comprehensive analysis of the legal nature of 'the right of rescission'. He states:

'There are various grounds upon which a right to rescind a contract can arise. The contract itself may provide for such a right as an express or implied term of the contract; or such a right may arise on the ground of material breach of contract; or as a result of repudiation of the contract by one party, which repudiation is then accepted by the other party; or on the ground of misrepresentation by one party which induced the other party to enter into the contract. In the last-mentioned case the representee exercises his right of rescission either by way of a defence or by way of an action. A party exercising a right of rescission must make his election to rescind the contract within a reasonable time, or run the risk that his conduct may justify the inference that he has waived his right of rescission; and once he has made his election he must abide by it.

The party who has a right to rescind the contract can elect to do so by his own act and does not have to ask the court to rescind the contract. He must communicate his election to the other party by means of a clear and unambiguous notification of the election to rescind the contract. However, if either the ground for the rescission or the manner in which it is utilized is in dispute, the party electing to rescind the contract may have to ask the court to declare that he had a right of rescission and that it was properly exercised. In addition, he would have to ask the court to enforce the remedies following upon his rescission.

The principal effect of the exercise of a right of rescission is that the party exercising the right is no longer bound to performance in terms of the contract; and he can claim restitution of any performance which he has already rendered, because after rescission such performance is retained by the other party without proper cause.'

(Footnotes omitted.)

[24] Cook's right to rescind the swop agreement arose on the ground of material breach or as a result of repudiation of the agreement by Morrison. Cook elected to rescind the swop agreement by his own act. In the present action, he seeks to enforce the common-law remedies following upon his rescission and he thus claims restitution of the performance which he had already rendered or the payment of

damages if restitution is impossible or impractical. Cook's claims for an account, a debate thereof and payment of the amount of damages found to be due in the alternative to his claims for damages in the specified quantified amounts is merely a mechanism for calculating his damages. A court will have to determine his entitlement to damages in order to grant this relief. The complement to Cook's common-law right to restitution or to damages, which arose on cancellation of the swop agreement as a matter of law, is a 'debt' (the obligation to restore to Cook the performance which he had made or to pay him damages for breach of contract) against which prescription begins to run once Cook's right had accrued. It is the remedy of restitution or of damages following rescission that has its correlative the obligation to restore performance received and it is this obligation that is the debt to which the extinctive prescription of the Prescription Act applies.

[25] Each claim for restitution (delivery of shares and restitution of 'board' seats) and each alternative claim for damages has the creditor (Cook) and the debtors (Morrison or Morrison and Seabush or Morrison and SGRL) clearly identified and the factual matrix underlying the correlative rights and obligations set out in the particulars of claim. The means by which the debtor, Morrison, could discharge each debt is by delivery or payment. Delivery or payment would extinguish the debt, and likewise the right of action. All that is required is conduct on the part of the debtor, Morrison, alone.

[26] The inclusion of the further claims in prayers (aa) and (bb) for declaratory orders that Cook is the 'lawful owner of 50% of the shares' in Seabush and in SGR&L and the claims for Seabush and SGR&L to rectify their share registers to reflect Cook as a 50% shareholder in each company is, to borrow the words of Mhlantla J in *Sanbonani*, 'a mere litigatory framing technique that fetters even the

narrow application of the Act', which the majority judgment and the third judgment in *Sanbonani* were at pains to condemn. First, no factual basis is set out in the particulars of claim to beget each such claim. Second, the claims for declaratory and vindicatory relief are entirely at odds with the particulars of claim.

[27] The case put up by Cook in terms of his particulars of claim is not that he retained ownership of the shares in Seabush or in SGR&L irrespective of their sale and transfer by him to Morrison nor is it his pleaded case that the share register of each company was inaccurate or that there were any errors therein. What is alleged is that by agreement he transferred the shares to Morrison in partial fulfilment of his obligations under the swop agreement and that he became entitled to their re-transfer from Morrison upon the cancellation of the swop agreement. Each declarator and each claim for the rectification of the company's share register is merely a thinly disguised repetition of Cook's claim that the shares that he transferred to Morrison be re-transferred to him pursuant to the cancellation of the swop agreement.

[28] The true relief sought by Cook in this matter, therefore, is restitution (delivery of shares and restitution of 'board' seats) or, should restitution be impossible or impractical, damages for breach of contract. Stripped of the 'litigatory framing technique', Cook's claims are all debts as envisaged in section 11 of the Prescription Act within the narrow meaning of the term in *Escom*. For the reasons that follow I furthermore agree with the contention of Morrison and Seabush that the debt became 'due' in terms of s 12(1) of the Prescription Act, by the latest on 29 September 2010 when Cook accepted the repudiation and cancelled the swop agreement. The prescription period of three years in terms of s 11(d) of the

Prescription Act applies, and Cook's claims, therefore, prescribed on 28 September 2013, some seven months before the issue of summons.

[29] It is now trite that debts in terms of the 1969 Prescription Act become due when they are immediately claimable and recoverable. In *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 532G-H, the Supreme Court of Appeal held that for prescription to commence running,

'there has to be a debt immediately claimable by the creditor or, stated in another way, there has to be a debt in respect of which the debtor is under an obligation to perform immediately.'

[30] In *Culverwell and Another v Brown* 1990 (1) SA 7 (A), at 28A-F, Hefer JA said the following:

'Presumably because it found itself unable to decide the present case on authority the Court a quo decided it on principle. For convenience I quote the relevant passage from Friedman J's judgment at 477A - D. It reads as follows:

"The purchaser's wrongful repudiation does not per se bring the contract to an end. The seller is not obliged to accept it immediately; he has an election and may take a reasonable period of time in order to decide whether to accept the purchaser's repudiation. During that time, i e until he has exercised his election, it is open to the purchaser to retract his repudiation and tender performance of his obligations. It is only when the seller has exercised his election to accept the repudiation that the contract is cancelled. Only when the date of cancellation has been crystallised can any question of damages arise. It would be entirely artificial in a case such as this to assess the plaintiff's damages by reference to an anterior date, viz the date of repudiation, on which date the contract was still alive and no claim for damages had yet arisen. It seems, moreover, that those cases in which it has been held that the decisive date is the date of repudiation have proceeded on the unwarranted

basis that the innocent party is obliged to accept the repudiation immediately, which is clearly not so.'

No fault can be found with Friedman J's exposition of the law relating to repudiation. A repudiation, as was once said, is 'a thing writ in water' (per Asquith LJ in *Howard v Pickford Co Ltd* [1951] 1 KB 417 at 421; see also *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 910B - D). It merely affords the injured party an election to terminate the agreement by accepting the repudiation (*Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) at 22D - F), and unless and until that happens the repudiator's obligation to perform and the other party's right to receive performance remain wholly unaffected. The latter is not obliged to decide whether to accept the repudiation immediately but is allowed a reasonable period of time to consider and exercise his election (*Segal v Mazzur* 1920 CPD 634 at 644, *Potgieter and Another v Van der Merwe* 1949 (1) SA 361 (A) at 372; *Mahabeer v Sharma NO and Another* 1985 (3) SA 729 (A) at 736E - H).

[31] Furthermore, n *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA), para 29, Nienaber JA said the following:

‘The innocent party to a breach of contract justifying cancellation exercises his right to cancel it (a) by words or conduct manifesting a clear intention to do so (b) which is communicated to the guilty party. Except where the contract itself otherwise provides, no formalities are prescribed for either requirement. Any conduct complying with those conditions would therefore qualify as a valid exercise of the election to rescind.’

Nienaber JA, then continues to say that ‘the election to cancel, provided that it is unambiguous, need not be explicit and may be implicit’ and the ‘actual communication of the decision to cancel, once made and manifested may be conveyed to the guilty party by a third party.’

[32] The election possessed by the creditor to the contract in *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd and Another* 2017 (1) SA

185 (SCA) arose from an acceleration clause contained in the loan facility, which entitled the creditor bank, upon the occurrence of a breach by the principal debtor, at its election and upon notice of its election, to claim the full amount outstanding. The question was whether the debt is '. . . due when the principal debtor breaches the obligation to pay the monthly instalment, or is it due when the creditor elects to enforce the acceleration clause, in order to render the whole amount payable?' (para 2). The reasoning and finding of the Supreme Court of Appeal that, because of the provisions of s 12(1) of the current Prescription Act - which provide that prescription begins to run when the debt becomes 'due' and not when it first accrued as was the position under s 5(1) of the Prescription Act 18 of 1943 - the debt in terms of an acceleration clause that affords the creditor the right of election to enforce the clause upon default by the debtor, only becomes due when the creditor has elected to enforce the clause, are equally applicable to the running of prescription in a case such as the present one of repudiation of a contract where the innocent party is vested with an election to accept the repudiation and to cancel the contract.

[33] Indeed, the reasoning of the Supreme Court of Appeal included a comparison of the effect of other forms of election possessed by a party to a contract on the commencement of the running of prescription (when the debt becomes 'due' in terms of s 12(1) of the Prescription Act). In this regard, Mbha JA said:

'[20] The effect of an election possessed by a party to a contract, on the running of prescription, was considered in the decisions of *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 910 – 911 — in respect of an anticipatory breach of a contract — and *Big Rock (Pty) Ltd v Hoffman* 1983 (1) SA 534 (T) — in the context of the giving of notice in terms of s 13 of the Sale of Land on Instalments Act 72 of 1971. In *HMBMP Properties*, it was held that the innocent party's cause of action for damages resulting from the defaulting party's repudiation of an obligation which is to be performed by him at some future date, only

accrues (ie the 'debt' of the defaulting party only becomes due) when the innocent party elects to cancel the contract and to treat it as at an end. Prescription, consequently, commenced to run from that date. In *Big Rock (Pty) Ltd v Hoffman* 1983 (1) SA 534 (T) it was held that the furnishing of a notice in terms of s 13 of the Land Instalment Act to remedy a default and a failure to comply, was a condition precedent to the seller's right to claim payment of the full balance owing under the contract. Prescription therefore only began to run after the expiry of the prescribed notice period.'

[34] Mbha JA concluded thus:

'[26] Compliance with the jurisdictional requirements for acceleration of the outstanding balance is not simply a procedural matter but is essential in establishing a cause of action. Hence, it is no answer for the respondents to suggest that the failure by Standard Bank to exercise the election to claim the outstanding balance, is an instance of the creditor delaying the running of prescription by its own act. As pointed out in *Bankorp*, there is no sense in looking for the moment in time when the debt is due, if the debt does not even exist. It is not a case of delaying an existing claim. The creditor cannot be said to be in default, or guilty of dilatoriness, until he has made his election. The election and communication thereof in the form of the requisite notices are essential preconditions to create a cause of action in the first place. The election is one which Standard Bank does not have to take at all. Prescription would therefore commence to run only from the date of a notice claiming the outstanding balance in terms of clause 12.2.'

[35] Therefore, the innocent party's right of action for restitution or for restitutional damages resulting from the defaulting party's repudiation of a contract only accrues, and the correlative obligation or debt to make restitution or to pay damages becomes due in terms of s 12(1) of the Prescription Act, when the innocent party exercises his or her election to accept the repudiation, rescind the contract and the election is communicated to the party who has repudiated.

[36] Finally, I do not agree with Cook's contention that a trial was required to resolve the disputes of fact relating to the existence of a partnership, the ownership of the shares and whether and when the swop agreement had been cancelled. Disputed issues of fact relating to the existence of a partnership, the ownership of the shares and whether and when the swop agreement had been cancelled simply did not arise in the proceedings before the trial court. Morrison and Seabush, for purposes of their special plea of prescription, maintained that the claims, debts and obligations alleged by Cook in his summons to be due and owing to him, had, on his own averments in his particulars of claim, prescribed. They, therefore, as did the trial court, postulated that the facts set out in the particulars of claim that underpin Cook's claims, are correct.

[37] Cook did not raise as an answer to the special plea of prescription that the completion of prescription had been delayed by reason thereof that the creditor and the debtor are partners and that the debt is one which arose out of the partnership relationship. Moreover, the particulars of claim fall neatly into two parts: Background information concerning a joint venture agreement (paragraphs 1 to 18), which, irrespective of its label, I accept may or may not be proved to be a partnership (see *Botha v Coetzee* (459/09) [2010] ZASCA 90); and paragraphs 19 to 34B deal exclusively (without any cross referencing to the joint venture alleged in the background part of the particulars of claim) with the sale by Cook to Morrison of his 50% shareholding in Seabush and in SGR&L in terms of the swop agreement. The true *fons et origens* of Cook's claims against Morrison is the swop agreement to which the two of them were privy. Cook also concedes that the litigation is 'primarily' between him and Morrison, a concession well made.

[38] There is also no dispute of fact relating to the ownership of the shares. There is, as I have mentioned, no allegation in the particulars of claim to the effect that Cook retained ownership of the shares in Seabush or in SGR&L after having sold and transferred them to Morrison. Cook made the positive factual averment that he accepted Morrison's breach or repudiation of the swop agreement and that he cancelled the agreement on 29 September 2010. This factual averment was pertinently accepted by Morrison and Seabush in paragraph 2 of their special plea of prescription for the prescription issue. It was on that postulation that the matter was argued before the trial court. Cook's counsel, also in their heads of argument before us, made the submission on his behalf that:

'Cook alleges that he accepted the repudiation and cancelled the Swop Agreement on 29 September 2010. He now wants his shares back, his directorships reinstated, and to be repaid the money that he spent on settling the Investec debt. Morrison does not agree that Cook is entitled to any of this. There is the dispute that defines the litigation.'

Once it was accepted that Cook's allegation that he accepted the repudiation and cancelled the swop agreement on 29 September 2010 had in fact been established for the prescription issue, his alternative averment - that 'the plaintiff hereby cancels the Swop Agreement' – became inconsequential.

[39] In the result the following order is made:

The appeal is dismissed with costs, including those of two counsel.

P.A. MEYER
JUDGE OF THE HIGH COURT

F. KATHREE-SETILOANE
JUDGE OF THE HIGH COURT

M. TWALA
JUDGE OF THE HIGH COURT

Date of Hearing:	20 June 2017
Date of judgment:	18 August 2017
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