




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

CASE NO: 33399/2016

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
<u>20/12/2019</u> DATE	 SIGNATURE

In the matter between:

THE SALVATION ARMY PROPERTY COMPANY NPC Applicant/Defendant

and

JOOSUB, ABDUL GANI Respondent/ Plaintiff

JUDGMENT

YACOOB J:

1. This matter came before me as a stated case after the defendant's special plea of prescription was separated from the remainder of the issues in dispute in this case by an order granted by consent on 14 February 2019.

2. For purposes of the determination of the special plea, the defendant is the applicant and the plaintiff is the respondent. I shall refer to them as the plaintiff and defendant to avoid confusion.
3. The plaintiff and defendant entered into a written agreement on 4 November 1998, in terms of which the defendant sold an immovable property to the plaintiff for R150 000.
4. The plaintiff contends that he had paid the full purchase price by September 2000, which the defendant denies. The defendant did not transfer the property on the basis that the plaintiff was in breach of the agreement, and cancelled the agreement on 19 September 2012.
5. On 13 September 2013 the plaintiff then launched an urgent application to stay the sale of the property by auction (scheduled for 17 September 2013) on the basis that he was the rightful owner of the property. The stay was sought pending determination of action proceedings to be instituted by the plaintiff by 30 October 2013 for an order that he is the owner of the property. The application to stay was dismissed with costs on 18 September 2013 and an application for leave to appeal was lodged on 04 October 2013. As at 07 May 2019 the reasons for the decision had not yet been furnished and the application for leave was still pending. I was told at the hearing that the reason for the delay was related to obtaining the transcription.
6. The defendant sold the property on 18 September 2013 and transferred the property to a third party in December 2013. The plaintiff served summons on the defendant on 14 October 2016, seeking damages on the basis that the

cancellation was unlawful. The plaintiff also claims the return of the purchase price.

7. The defendant then filed a special plea of prescription together with its plea. It is common cause that prescription started to run on 19 September 2012, which is when, on the plaintiff's own version, the defendant cancelled the agreement.
8. The plaintiff contends that prescription was interrupted by the urgent application it instituted on 13 September 2013. According to the plaintiff, then, summons was issued after prescription had already been interrupted, and was simply an additional step in the enforcement of the claim for the payment of a debt.
9. The only issue, then, is whether the urgent application did interrupt prescription.
10. Section 15 of the Prescription Act, 68 of 1969, deals with "Judicial Interruption of Prescription":

15. Judicial interruption of prescription.—

- (1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.
- (2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.
- (3) If the running of prescription is interrupted as contemplated in subsection (1) and the debtor acknowledges liability, and the creditor does not prosecute his claim to final judgment, prescription shall commence to run afresh from the day on which the debtor acknowledges liability or, if at the time when the debtor acknowledges liability or at any time thereafter the parties postpone the due date of the debt, from the day upon which the debt again becomes due.
- (4) If the running of prescription is interrupted as contemplated in subsection (1) and the creditor successfully prosecutes his claim under the process in question to final judgment and the interruption does not lapse in terms of subsection (2), prescription shall commence to run afresh on the day on which the judgment of the court becomes executable.

- (5) If any person is joined as a defendant on his own application, the process whereby the creditor claims payment of the debt shall be deemed to have been served on such person on the date of such joinder.
- (6) For the purposes of this section, “process” includes a petition, a notice of motion, a rule nisi, a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced

11. Mr Campbell for the defendant submitted that, had the plaintiff in fact instituted summons on or before 30 October 2013 (or at any time thereafter before 19 September 2015), this would have interrupted prescription. However, the interim interdict is a different kind of relief which did not or would not have determined the rights of the plaintiff.

12. In this regard Mr Campbell referred me to the case of *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd* 2015 (3) SA 532 (SCA).

13. The Supreme Court of Appeal in that case expressed the view that an application to interdict the transfer of property to a third party where the applicant had a right of pre-emption would not have been means “whereby the creditor claims payment of a debt”. It would have prevented the transfer to the third party, but would not have taken the right of the person applying for the interdict any further.¹ It would therefore not have interrupted prescription.

14. Similarly, a declaratory order would not have interrupted prescription in the circumstances of that case - because it also did not take the right any further. It was not a necessary step towards the desired outcome but merely confirmed

¹ At para [29]

existing rights.² That would not necessarily have been the case in this matter. But since no declaratory order was sought, nothing turns on it.

15. The SCA found in *van Deventer* that prescription had not even started running on the right in issue. Its reasoning regarding interruption of prescription is therefore *obiter*. It is nevertheless useful, particularly as it quotes other case law to support the reasoning.

16. Mr Campbell submitted that the interdict proceedings were not a necessary step in enforcing the debt, and that they do not in fact enforce the debt. He also pointed out that the interdict was not necessary in order for the plaintiff to issue summons.

17. It was his submission that the plaintiff had a choice between claiming ownership and claiming damages, and launched proceedings to claim neither within three years from the cancellation of the agreement. The application for an urgent interdict did not take either remedy any further and therefore did not interrupt prescription.

18. Mr Ismail submitted that, because the urgent relief sought was interim pending the issue of the summons, and because the application for leave to appeal was still pending, the issue of the summons was not relevant. The issue of the urgent application was a step in claiming the payment of the debt. Mr Ismail did not explain how it was so, or how the urgent relief sought brought the plaintiff any closer to the ultimate relief sought in this action.

² Paras [30]-[35]

19. Mr Ismail submitted also that the summons could not be issued while the plaintiff was awaiting reasons for the urgent court's decision, as the reasons were relevant to the nature of the summons. However, as a matter of fact, the summons was issued before those reasons were available. I could not see how the reasons were relevant to the formulation of the summons, as the relief sought was entirely different. At most, the court may have expressed an opinion on whether the plaintiff had established a *prima facie* right, but that would not have been determinative of the action proceedings.

20. Mr Ismail relied on the case of *Peter Taylor & Associates v Bell Estates (Pty) Ltd & Another*³ as supporting his contention. In that case a notice of joinder was the process at issue, and the question was whether the notice interrupted prescription. The SCA found that, although the result of the joinder application would have resulted in a claim being brought against the party being joined (there was an existing claim against another party), that result did not dispose of any elements of the claim and therefore did not interrupt prescription.

21. Not only does the *Peter Taylor* case bind this court, it also does not support the plaintiff's case. In fact, it does the opposite. In my view the application for an urgent interdict brought by the plaintiff was even further away from the relief finally sought in the action proceedings than was the joinder application in *Peter Taylor* from the proceedings to which the party would have been joined.

22. The application for an interdict was not necessary before the plaintiff could either claim damages or a declaration of ownership and its dismissal did not prevent the

³ 2014 (2) SA 312 (SCA)

plaintiff from bringing action proceedings for the claim of damages or ownership (had the claim been brought before the transfer).


23. In addition, had the application for an interdict been granted, and the plaintiff had not brought the action proceedings before the date specified in the notice of motion (30 October 2013) he would not have been prevented from doing so at any time after that, until 19 September 2015. The only difference would have been that the interdict would have fallen away.

24. It is obvious, therefore, that the urgent application for an interdict was not a step in the enforcement of the purported obligation owed by the defendant to the plaintiff, and therefore, did not amount to process claiming payment of a debt as envisaged by section 15(1) of the Prescription Act.

25. The issue of the urgent application therefore did not interrupt prescription.

26. I therefore make the following order:

“The defendant’s special plea is upheld with costs.”


S. YACOOB
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for Applicant/Defendant	: A.G Campbell
Instructing Attorneys	: Fairbridges Wertheim Becker

Counsel for the Respondent/Plaintiff	: M.I.E Ismail
Instructing Attorneys	: Riaz Gani Attorneys

Date of hearing	: 09 May 2019
Date of judgment	: 20 December 2019