REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

(NORTH GAUTENG, PRETORIA)

CASE NO: 6751/10

17/8/2012

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED.

2012 : 08 : 20
DATE

SIGNATURE

In the matter between:

HERMAN HEUKELMAN	First Plaintiff
JAN HEUKELMAN	Second Plaintiff
ANNA ELIZABETH PRINSLOO (born HEUKELMAN)	Third Plaintiff
and	
FRITS HEUKELMAN N.O.	First Defendant
FRITS HEUKELMAN	Second Defendant

JUDGMENT

MAKGOKA, J

[1] On 17 August 2012 I made the following order:

> 'The defendants' special plea is upheld with costs, which costs shall include the reasonable and taxable costs in respect of the following experts:
>
> 1. Dr Michael Hendrik Veldman
> 2. Mr. Gerhadus Wilhemus van der Linde (Actuary)'

[2] I undertook to furnish the reasons for the order later. Here are the reasons. The defendants have raised a special plea of prescription to the plaintiffs' summons, in which the plaintiffs claim from the defendants, delivery of an account and certain information regarding the assets which devolved upon the plaintiffs and the second defendant in terms of the massed estate upon the death of Frederik Heukelman. The plaintiffs claim debatement of such account and delivery of such assets as accrued to the plaintiffs, alternatively payment of the value of such assets. In the alternative to main prayer the plaintiffs claim payment of certain sums of money to them respectively, together with interest.

[3] Effectively the plaintiffs are claiming that the first and second defendants deprived them of the *corpus* of which they became apportionate owners, on 6 May 1966, upon the death of their father, Hendrik Heukelman. With specific reference to the special plea, the question is the point at which the plaintiffs became aware, or are deemed to have become aware, of the fact that the defendants had caused them damage.

[4] At the commencement of the hearing, the parties' respective counsel informed me that it had been agreed that the defendants' special plea would be adjudicated upon first and will be separated from the merits and *quantum* of the matter. It was furthermore agreed that the argument in respect of the special plea of prescription will be dealt with on the common cause facts, and with reference to a bundle of documents, largely correspondence exchanged between the parties over the years regarding the dispute.

[5] The common cause factual background appears from a document titled 'Summary of Agreed Facts', handed up by agreement. The parties are siblings, born of the marriage between the late Frederik Hendrik Heukelman and the late Rachel Margaret Heukelman. They also have a sister, Rita Schaars, who lives in the Netherlands. She is not a party to these proceedings. For the sake of convenience, and without meaning any disrespect, I shall refer to the deceased father as 'Frederik' and to the mother as 'Rachel 'or 'the deceased', as the context dictates.

[6] Frederik and Rachel executed a joint will dated 25 December 1952, in terms of which their joint estates would mass upon the death of the first deceased and the massed estate would, upon the death of the first deceased, be inherited by the children born out of the marriage. In terms of the joint will the surviving spouse would live on the fruits of the estate so inherited by the children. Frederik died on 6 May 1966. All the siblings were minors at the death of the late Frederik. The massed estate, being the subject of this action, came into existence in terms of the joint will in 1966, on Frederik's death.

[7] Rachel, as the surviving spouse, adiated to the joint will in terms of a certificate of adiation. Barclays Bank administered Fredrik's estate and thereafter Rachel and the second defendant. A copy of the first liquidation and distribution account was prepared and Barclays Bank also prepared a second and final liquidation and distribution account. In terms of the latter account and in accordance with the joint will, the shares and cash were allocated to siblings, who, accordingly, inherited, and became owners of the massed estate of Frederik and Rachel, subject to Rachel's lifelong usufruct.

[8] The parties agree that as siblings, they received at least two distributions of assets from the massed estate with the consent of all five of them as well as with the consent of Rachel, the one being during 1987 and the other during 1996. A further distribution took place during 2005 but the issue of whether this was with the consensus of all five the children, is in dispute.

[9] Rachel died on 13 February 2007. The second defendant was appointed as executor of her estate on 4 September 2007.The plaintiffs failed to ever claim from their deceased mother to frame an inventory of the massed estate or the fruits earned from the massed estate, as well as the compilation of the "share portfolio" from time to time. Summons was issued and served on the defendants on 8 February 2010.

[10] The parties are also in agreement that during her lifetime, Rachel administered the massed estate in good faith and to the best of her ability. She did not become incapable of managing her own affairs after she suffered an alleged stroke during or about 1995; she was not in incapable of making any decisions regarding her financial affairs by herself since 1995; she did not transfer any of her usufruct rights to the second defendant and no security for the due performance of her duties as usufructuary was demanded in terms of the last will and testament of the late Hendrik or the Master of the High Court or in terms of any court order.

[11] With reference to the bundle of documents referred to earlier, it contains 10 letters and a power of attorney. They are marked 'H1'-'H11'. What follows is a summary of each letter and its contents.

(a) Annexure 'H1'

It is dated 3 November 1994, and was written by the first plaintiff to the second defendant, in which the first plaintiff alleged, among others, wrongful and intentional misappropriation of the *corpus* by Rachel and the second defendant of the massed estate. The first plaintiff, among others, required information regarding the massed estate from the second defendant;

(b) Annexure 'H2'

It was written by the second defendant to the first plaintiff, in response to 'H1', received this letter. The second defendant in this letter, among others, indicated the following to the first plaintiff that :

Rachel, had acquired her own estate from the fruits of the *corpus*; he, the second defendant, had no particular knowledge of either the massed estate nor the deceased's estate at the time the letter was written; the beneficiaries of the massed estate had already received more that the inheritance as it was at their father's death; and the beneficiaries were properly maintained by the deceased. The second defendant referred to a meeting between himself, the first and second plaintiffs in Rachel's home some years prior to the writing of this letter during which various issues were discussed. The second defendant made the following remarks in the letter:

> 'Ons het toe oopgemaak of is daar dinge wat jy nog weggesteek het. Ek het nog nooit iets weggesteek nie en ek glo nie ma sal iets vir jou wegsteek inteendeel al haar boeke het jy mos gehad, al haar dokumente,onthou jy.'

(c) Annexure 'H3'

This letter is dated 10 December 1994, written by the first plaintiff to the second defendant in response to annexure 'H2'. It was also sent to Rachel and the late Anna Robertson (sister of the late Frederik); the second plaintiff; Rita Schaars and the third plaintiff.

(d) Annexure 'H4'

It is dated 29 May 2004, and was written and signed by the first and the second plaintiffs to the second defendant. The authors allege, among others, wrongful and intentional misappropriation of the *corpus* by the second defendant and Rachel. The first and second plaintiffs, once more, as in annexure 'H1' required information and documentation relating to the *corpus* as well as Rachel's estate. They demanded delivery of this information and documentation within 60 days from date of the letter failing summons shall be issued for delivery thereof;

(e) Annexure 'H5'

It is dated 31 January 2006 written by attorneys Solomon Nicolson Rein & Verster to the second defendant, on the instructions of the first plaintiff, in which it is required information regarding the

massed estate from the second defendant. This letter also confirmed that a meeting was during November 2005 where all the siblings, being the beneficiaries of the massed estate, were present, and that the meeting referred to was arranged between all the beneficiaries in an attempt to solve the disputes between the plaintiffs and the second defendant regarding the allegations surrounding the misappropriation. The attorneys also in this letter, based on certain allegations of impropriety, demand delivery of documents failing which summons for delivery shall be issued from the High Court.

(f) Annexure 'H6'

It is dated 14 February 2006, written by attorneys Breytenbacht-Keulder Inc to to the first plaintiff's attorneys of record at that stage, on the instructions of the second defendant, in response to the letter Annexure 'H5'.

(g) Annexure 'H7'

It is dated 29 March 2006, from Solomon Nicolson Rein & Verster on the instructions of the first plaintiff to the attorneys for the second defendant. This letter specifically stated and recorded the following:

> 'Ons kliënt is ook nie bereidom toe te laat dat die aangeleentheid onbepaald vertraag word nie. Ons kliënt dring daarop aan dat verrekenning moet plaasvind binne (veertien) dae vanaf datum hiervan.
>
> Indien u kliënt sou versuim om volledig te reageer op ons kliënt se vereistes sal ons kliënt geen ander keuse gelaat word dan om teen wil en dank regsaksie in te stel teen die moeder Mev. R M Heukelman waartoe u kliënt as verdure verweerder gevoeg sal word vir 'nvolledige verrekening en debattering. Ons kliënt wil dit verseker nie aan sy moeder doen nie, maar indien u kliënt sou aanhou versuim om rekenskap te gee van sy administrasie, sal u kliënt ons kliënt gee ander uitweg laat nie.'

(h) Annexure 'H8'

It is dated 3 April 2006, written by Breytenbach-Keulder Inc on behalf of the second defendant, and addressed to the first plaintiff's attorneys of record at that stage. It is stated that the second defendant had to obtain some records and did some enquiries, following which the second defendant reported as set out in the letter.

(i) Annexure 'H9'

The first plaintiff is the author of this letter, dated 30 November 2007 and addressed to Breytenbach Keulder Inc. The first plaintiff stated the following:

a. 'Die skuldoorsaak van my eis is my regmatige gedelte ge-erf van my vader warop R M Heukelman slegs vruggebruik gehad het tot met haar afsterwe.

b. Eis kon eers onstaan na RM Heukelman se afsterwe omdat sy vruggebruik gehad het op my bates.

c. F Heukeman word bygevoeg omdat hy volgens my inligting waar hy in beheer was van my bates onregmatig en sonder my toestemming voor RM Heukelman se afsterwe van my bates onregmatig gevat het.

d. eis het onmiddellik opeisbaar en betaalbaar geword na afsterwe van RM Heukelman.Vrugte op my bates verdien na RM Heukelman se afsterwe is ook nou verskuldig en betaalbaar'.

(j) Annexure'H11'

This letter, dated 30 July 2008 was written by Rudman Attorneys to Bretenbach Keulder Inc and raised queries emanating from Rachel's liquidation and distribution account and it was requested that the first defendant provide the second plaintiff and his auditor with a power of attorney to enable him to investigate the financial affairs of the deceased in respect of bank statements, income tax statements, broker and computer share.

(k) Annexure 'H10'

This is a special power attorney given by first defendant to the second plaintiff and an auditor, Mr WA Eskteen, on 5 September 2008, and sent to the plaintiffs' attorney by way of email on 8 September 2008.

The defendants' special plea

[12] The special plea by the defendants relies for its material facts on the allegations contained in paragraphs 11, 13 and 16 of the plaintiffs' amended particulars of claim. Since the allegations in those paragraphs are very central to the adjudication of the special plea, they are quoted in full:

> '11 In 1975 the massed estate that the plaintiffs and defendant inherited and from which fruits the deceased lived, consisted of immovable property in Pretoria and Nylstroom and shares.
>
> .....
>
> 13. After the deceased's death, the second defendant produced a will executed by the deceased on 14 February 2006. The will purported to dispose of an estate to which the deceased was not entitled to as these assets or the proceeds thereof had devolved on the plaintiffs, Rita Schaars and the second defendant in terms of joint will of Frederik and the deceased, alternatively the assets were assets purchased on behalf of the plaintiffs and the deceased with the proceeds of assets which had so devolved on the children;
>
> .....
>
> 16. Since on or about 1996 up to the deceased's death the second defendant wrongfully and intentionally transferred, sold or in other ways alienated assets belonging to the children having originated out of the massed estate of Frederik and the deceased and thereby deprived the plaintiffs from the inheritance they received, subject to the deceased's usufruct in terms of the joint will. The effect of the actions of the second defendant in his personal capacity and the first defendant in his capacity as executor is that the plaintiffs have been deprived of the assets belonging to them being the corpus of the massed estate and the defendants refused to account in regard thereto.'

[13] The defendants further contend that on the face of their particulars of claim the plaintiffs acquired knowledge of all the facts pertaining to their alleged claims, more than three years prior to the service of the summons on the defendants, alternatively with the exercise of reasonable care would have acquired the knowledge, alternatively could have acquired the relevant knowledge. The defendants argue therefore that the plaintiffs' summons was served on them more than three years after the date the claim arose, hence special plea of prescription.

Prescription

[14] In terms of section 11(d) of the Prescription Act 68 of 1969 (the Act) a 'debt' shall prescribe after three years. The trite principle is that prescription does not begin to run until the creditor has knowledge of the facts giving rise to his cause of action (*See Harker v Fussel* 2002 (1) SA 170 (T)). A 'debt' in this context is to be construed as the correlative of a right of action or claim, as distinct from a cause of action *(See Standard Bank of South Africa v Oneanate Investments (Pty) Ltd* 1998 (1) SA 811 (SCA) 826J-827A. The word debt must be given a wide and general meaning denoting not only a debt sounding in money which is due, but also, for example, a debt for the vindication of property *(See Evins v shield Insurance Co Ltd* 1979 (3) SA 1136 (W) at 1141F). In *LTA Construction Limited v Minister of Public Works and Land Affairs* 1992 (1) SA 837 (C) at 849I it was stated that the word included 'whatever is due under any obligation, an obligation to do something or refrain from doing something, and includes an employer's obligation to hand over a building to a contractor.' For a full exposition of the meaning of the word 'debt', see *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at15B -16 in which the authorities on the point are usefully summarized.

[15] From the above exposition, there should not be any doubt that the plaintiffs' action falls squarely within the definition of 'debt' as envisaged in section s **11(d)** of the Act. I turn now to consider the merits of the plaintiffs' special plea. I have already set out the basis of the defendants' special plea. In what

follows I state the plaintiffs' replication to the defendants' special plea, followed by the submissions made on behalf of the plaintiffs.

The plaintiffs' replication and submissions

[16] In their replication, the plaintiffs plead that they acquired knowledge of the facts pertaining to their claims 'during or about' March 2008 when the first defendant signed the first and final liquidation and distribution account in the estate of Rachel. Accordingly, it is contended that it was only thereafter that the second plaintiff could verify the correctness of the account, after having obtained a power of attorney granting him full access to Rachel's affairs. Developing his argument from that premise, Mr *Dreyer* SC, counsel for the plaintiffs, submitted that Rachel's estate, represented by the first defendant as executor, was obliged to render a proper account of her dealings with the usufructuary property, and that the first defendant, as executor, had a fiduciary duty to account of her dealings with the usufructuary property

[17] With regard to the second defendant, it was submitted that he had a duty to account, albeit only for those assets which still existed on the date of Rachel's death, since he assisted Rachel from approximately 1972, and in 1995, when Rachel grew older and frail, and obtained a power of attorney to handle her financial interests. It was therefore submitted that prior to the death of the deceased, the second defendant performed certain acts of administration on Rachel's behalf by way of a power of attorney and otherwise. This, counsel submitted, was demonstrated by among others, at least two distributions of assets being shares, after the second defendant received a power of attorney to act on the deceased's behalf i.e.1996 and 2005.

[18] Counsel further submitted that since approximately 1996 up to Rachel's death the second defendant wrongfully and intentionally transferred, sold or in other ways alienated assets belonging to

the children having originated out of the massed estate of Frederik and Rachel, and thereby deprived the plaintiffs from the inheritance they received, subject to the deceased's usufruct in term of the joint will. Mr. *Dreyer* further submitted that since the plaintiffs and the second defendant were co-heirs of the assets of the massed estate, the second defendant also acted in a fiduciary relationship, either as authorized by the deceased or as co-heir or co-owner, *vis-a-vis* the plaintiffs.

[19] On these bases it was submitted on behalf of the plaintiffs that since Rachel's estate was accountable for the usufructuary assets on her death, the right to claim an account in order to vindicate (or to claim by *condictio*) the usufructuary assets or their value, from the second defendant could have arisen no earlier than Rachel's death on 13 February 2007. Accordingly, so was the contention, the debt could not have been due earlier than that date. As a correlative, the right to claim (the right of action) only then vested in the plaintiffs. The fact that the plaintiffs could have taken steps earlier to call for an inventory or have applied for some other relief in no way affects the vesting of the right of action referred to above. In other words, the debt is only due when it is claimable by the creditor (the plaintiffs), and as a corollary thereof, is payable by the debtor (the first and second defendants).

[20] Mr. *Dreyer* also submitted that the wrongful conduct in the present case was a continuous one, as opposed to single, completed wrongful act, in respect of which prescription could not arise in terms of s 15(1) (d). In the present case the wrongful conduct was alleged to have endured until the death of Rachel on 13 February 2007, and accordingly no debt could have been due to that date. Having served summons on 8 February 2010, the three year period of prescription has not taken effect and the plaintiffs' claim could therefore not have prescribed. Lastly, Mr. *Dreyer* submitted that with regard to the third plaintiff, she was not involved in any situation from which it can be inferred that she had knowledge of what was going on.

Discussion

[21] The last point, raised in respect of the third plaintiff, can be disposed of summarily. It is common cause that during November 2005 there was a settlement agreement involving all the siblings in terms of which certain shares to the value of R724 000 were to be transferred to each of the siblings before December 2005. I turn now to consider the plaintiffs' contentions. In order to properly locate the plaintiffs' argument, regard should be heard to the common cause facts and to the pleadings. In this regard it should be borne in mind that the plaintiffs and the second defendant became apportionate owners of the massed estate of Hendrik and Rachel in 1966.

[22] It appears from the correspondence referred to earlier, that as early as the 1990's the plaintiffs made allegations of improper conduct on the part of Rachel and the second defendant in connection with the *corpus*. The thrust and tenor of the letters make it patently clear that the plaintiffs had knowledge of their right to claim an inventory from Rachel in her capacity as usufructuary and to claim an inventory of the *corpus*. Though legal action was threatened, nothing was done until 2008. It is not the plaintiffs' case that their claim only arose at the death of Rachel. In the bigger scheme of things, the death of Rachel had no bearing on the plaintiffs' claims.

[23] The simple fact is this. If the plaintiffs realised, at the very latest by 1996 that Rachel and the second defendant were allegedly dissipating *corpus* assets, their right to claim accrued then. It should be recalled that Mr. *Dreyer*'s argument on this point was that the right to claim only vested upon termination of the usufruct, at the death of Rachel. In principle there cannot be any issue with that submission, as a general proposition. Where I part ways with Mr. *Dreyer* is his suggestion that, even in the face of clear dissipation of *corpus* assets by a usufructuary, the owners of the usufruct property are entitled to adopt a supine attitude and not take action to protect their assets. Of course they may, in

their election, decide to conduct themselves in that manner. However, that is not without consequences, one of which is the risk of prescription.

[24] In any event, the plaintiffs must make their election as to which period is important for their claim, as the two periods contended for as relevant to their knowledge of dissipation of the *corpus* assets are mutually exclusive. The plaintiffs claim that they only realised during March of 2008 after having sight of the liquidation and distribution account in the estate of Rachel that her estate comprised of, among others, *corpus* assets. On the other hand they claim to have known, at least by 1996, that Rachel, together with the second defendant, was dissipating the *corpus* assets. This is contradictory in terms.

[25] As Ms *Ferreira,* counsel for the defendants correctly submitted, on a proper construction of the plaintiffs' main claim, the plaintiffs are effectively claiming an inventory pertaining to the *corpus*. When the first defendant signed the first and final liquidation and distribution account in the estate of Rachel during March 2008, this account served as an inventory of the estate of Rachel, simultaneously serving also as an inventory of the *corpus*. So what the plaintiffs are seeking in their main claim (inventory of the corpus), they already had in March 2008 when they had sight of the liquidation and distribution account in the estate of Rachel. This would render the relief claimed nugatory.

[26] With regard to the second defendant, it should be accepted, from common cause factual background that the case against the second defendant did not depend on the termination of the usufruct by Rachel's death. There is therefore no reason whatsoever why an action could not have been instituted against him when it became clear that he, together with Rachel, were dissipating the *corpus* assets. In their replication, the plaintiffs have not made any reference to the second defendant in claiming when they acquired the knowledge of the facts pertaining to their claims. There is therefore

no explanation at all as to why a claim against the second defendant in his personal capacity would only arise on having sight of Rachel's final liquidation and distribution account during March 2008.

[27] It is clear that the plaintiffs on their own version became aware of the actions of Rachel, depriving them of their inheritance seated in the *corpus*, at the latest, during 1996. The plaintiffs failed to take any action against Rachel, to interdict her, to claim security, or to protect their interest in the *corpus* despite being aware of all these facts. Their inaction is the type sought to be penalised by the Act. The learned author APJ Bouwer in his work *Die Beredderingsproses van Bestorwe Boedels* 2ed p 450 makes the point that during the existence of the usufruct period, the bare dominium owners does not have any authority to interfere with the use of its property, unless the usufructuary abuses the property or discloses *male fides* which will necessitate the dominium to act.

[28] Mr. *Dreyer* submitted in this regard (the plaintiffs' prior knowledge) that a lot was based on no more than a suspicion. I do not agree. A cursory reading of the correspondence shows that the plaintiffs were specific in their assertions regarding Rachel and the second defendant's alleged dissipation of the corpus assets. However, even if this conclusion is wrong, suspicion was sufficient for the plaintiffs to approach the court to protect their interests. There is simply no reason why the relief claimed by the plaintiffs in these proceedings (for debatement of account) could not have been brought once the plaintiffs suspected any wrongdoing by Rachel and the second defendant.

[29] The defendants did not have to be aware of the full extent of their legal rights before approaching the court for relief. (see *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA) para 17). The knowledge which is required in this regard is 'the minimum necessary to enable a creditor to institute an

action' (see *Van Zijl v Hoogenhout* 2005 (2) SA (SCA) para 18, citing with approval *Nedcor Bank v Regering van die Republiek van Suid Afrika* 2001 (1) SA 987 (SCA) para13.

[30] I am in the result satisfied that the defendants' special plea of prescription was well taken, and should be upheld. Costs should follow the cause. Ms. *Ferreira* urged me to order costs of 15 days for which the trial of the matter was anticipated to last. I am not inclined to this request, for the simple reason that the matter did not come to me as a special trial. I am, however, disposed to grant the reasonable costs of the two experts reserved by the defendants, namely Dr. Veldman and Mr. Van der Linde.

[31] For all of the above reasons I made an order referred to in paragraph [1] above.

TM MAKGOKA
JUDGE OF THE HIGH COURT

DATE OF HEARING	**: 24 FEBRUARY 2012**
JUDGMENT DELIVERED	**: 20 AUGUST 2012**
FOR THE PLAINTIFFS	**: ADV J DREYER SC**
INSTRUCTED BY	**: RUDMAN ATTORNEYS, PRETORIA**
FOR THE DEFENDANTS	**: ADV R FERREIRA**
INSTRUCTED BY	**: BREYTENBACH-KEULDER INC. ,MODIMOLLE and VAN ZYL LE ROUX, PRETORIA**