IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

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

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

(3) REVISED

2014.06.06 _____

DATE SIGNATURE

CASE NUMBER: 39233/08

DATE: 2014.06.06

KOSMOS X6 HOMEOWNERS ASSOCIATION PLAINTIFF

VS

LEOPONT 64 PROPERTIES (PTY) LTD DEFENDANT

and

JACOBUS JUACHUM GRABE 3RD PARTY

JUDGMENT

MABUSE J:

[1]. This is an application brought by way of a combined summons for rectification of certain agreements of purchase and sale of land in a development area and furthermore for an interdict in terms whereof the defendant is ordered to perform certain acts. In this matter the dispute between the parties concerns the attributes of a development at Kosmos Extension 6 or otherwise known as Falcon View Estate.

[2]. The plaintiff is an association incorporated in terms of the provisions of section 21 of the Companies Act 63 of 1971, as it then was, and conducted, at the time it commenced litigation in this matter in 2008, its business at its registered office situated at Falcon View Estate, Main Gate Office, Kosmos Drive, in the province of North West. The plaintiff was incorporated on 3 March 2005. According to its memorandum of association, in modern parlance now called Memorandum of Incorporation ("MOI"), the main business of the plaintiff is the promotion, advancement and protection of the communal interests of the owners and occupiers of Kosmos X6 Township.

[3]. The defendant is a company duly incorporated with limited liability in accordance with the company statutes of this country, with its principle place of business at 6 Dwars Street, Krugersdorp. The defendant is the owner and developer of the said township of Kosmos Extension 6. The third party is an adult businessman whose chosen *domicilium citandi* is plot 23 Vieira Street, Amaros Agricultural Holdings, Roodepoort, in the province of Gauteng. By agreement reached by the parties at the commencement of the trial and which was subsequently made an order of the court the issues involving the third party were separated in terms of Rule 13(A) of the Uniform Rules of Court from the current trial. Accordingly relief in this matter is sought only against the defendant.

THE ISSUES TO BE DECIDED AT THIS STAGE AS AGREED BETWEEN THE PARTIES

[4]. On the application of the parties the court granted, right at the inception of the trial, the agreed order for the separation of issues. This court was called upon, in this truncated trial, to decide only the following issues:

(1) the issues raised in paragraphs 1 to 8 and 11-12 of the plaintiff's particulars of claim;

(2) the defendant's plea of prescription in respect only of the claim contained in paragraph 9;

(3) the third party's lack of authority to conclude agreements of purchase and sale with the purchasers on behalf of the defendant;

(4) an estoppel defence raised by the plaintiff against the defendant's plea of lack of jurisdiction in respect of the third defendant;

(5) the plea of nullity of the agreements relied on by the defendant, and;

(6) the implication of the replication of the plaintiff in particular paragraph 5 of the summons.

[5]. The plaintiff has set out his cause of action against the defendant as follows. During the period 1998 to 15 August 2006, the defendant was the owner of portion 176, a portion of the farm De Rust 478, Registration Division, the province of North West on which it had established a township consisting of erven and streets as set out in General Plan NO. SG 8467/2001, known as Kosmos X6, otherwise, known as Falcon View Estate. Initially the said township consisted of four erven, namely 667, 668, 669 and 670. Erven 667 and 668 were later consolidated into one erf and renamed erf 678.

[6]. The defendant became the owner of the said erven under the following circumstances. During the course of time and with developments, the defendant subdivided erven 669, 670 and 678 into a number of portions that, following a number of different diagrams of the said township that were prepared from time to time and as occasions necessitated such changes, it also renumbered from time to time.

[7]. During the year 2004, and in terms of a written agreements of sale, the defendant, duly represented at the time by one J.J. Grabe ("Mr. Grabe"), the third party in this matter, sold such portions in the said townships of Kosmos Extension 6. It is apposite at this stage to point out that the defendant, while it acknowledges that the said Mr. Grabe sold some of the erven, disputes his authority to do so.

[8]. The sale of the portions of the subdivided erven 669, 670 and 678 took place under the following circumstances. On 18 November 2002 and despite the fact that the proposed township of Kosmos Extension 6 had not been declared or proclaimed as an approved township in terms of the provisions of the Town Planning Ordinance 15 of 1986 ("the Ordinance"), Madibeng Local Municipality granted the defendant, as a registered owner of the farm at the time and as the applicant in respect of the proposed township, permission to enter into the contracts of purchase and sale of the proposed portions in the proposed township of Kosmos Extension 6.

[9]. The said permission was granted subject to the defendant complying with the provisions of subsection 97(4) of the Ordinance, which required the sale agreement to contain a clause stating that the Township concerned was not an approved or a proclaimed township.

[10]. The relevant permission which had been founded on a resolution by the Mayoral Committee Meeting held on 18 November 2002 stated, among others, that:

"2. That consent be granted that Leopont 64 Properties (Pty) Ltd, as the registered owner of the property and applicant for the proposed Township Kosmos Extension 6, comprising of erven 667, 668, 669 and 678, may enter into contracts and options as provided for in section 97(1) of the Town Planning and Townships Ordinance, 1986, (Ordinance 15 of 1986) and that a clause stipulating that the township is <u>not</u> an approved proclaimed township, be included in such contract or option."

[11]. On 31 May 2005 Madibeng Local Municipality, acting in terms of the provisions of section 103 of the said Ordinance, declared, in the Provincial Gazette of the same date, the township of Kosmos Extension 6 to be an approved township. During October 2005 the Municipality authorised the subdivision of Erven 669, 670 and 678 into portions in accordance with the approved General Plan of Kosmos Extension 6 Township. On 11 November 2005 and by way of an extraordinary Provincial Gazette, the said municipality published the amended version of its declaration of 31 May 2005. Following the said subdivision the defendant became the owner of all the erven in the said township and at the same time the developer of the said township.

[12]. The details of both the purchasers and the portions in the proposed township of Kosmos Extension 6 which are relevant to the plaintiff's claim against the defendant are contained in annexures 'FW4' to 'FW8' inclusive to the plaintiff's combined summons. These annexures are in fact the agreements of sale purportedly concluded between the defendant and certain of the purchasers. Now annexure 'FW4' refers collectively to the agreements of purchase and sale in which a company called Umhlaba Projects (Pty) Ltd ("Umhlaba") the nominee of one I. Ichikowitz ("Ichikowitz") had entered into such agreements with the defendant either at Sandton or Roodepoort, some on 31 March 2004 or 1 April 2004 and others on 1 May 2004. The relevant portions to which the agreements of sale grouped as 'FW4' are the following:

10.1 Portions 152, 151, 150, 149 and 146 of Erf 670 Kosmos Extension 6 Registration Division JQ in the province of North West. After the conclusion of the said agreements, the

aforementioned portions were respectively renumbered as portions 1, 2, 3, 4 and 5 of Erf 670.

10.2 Erf 38 of portion 667 and portion 671 also of erf 670 were after the conclusion of the said agreements of purchase and sale, respectively renumbered as portions 91 and 93 of erf 678.

[13]. Annexures 'FW5' to the plaintiff's summons consists of agreements of sale entered into between PE Schröder, as a representative of Sarpo (Pty) Ltd and the defendant on 5 April 2004 either at Rustenburg or Roodepoort. Part of the agreements of sale in 'FW5' is a diagram. In terms of the said agreements of sale, Sarpo had purchased, from the defendant, the property depicted by the figure ABCDEFG on the diagram which included erven 14 to 22 of erf 667 and which subsequently were renamed portions 104 to 105 of erf 678 respectively.

[14]. On 24 March 2004 the defendant entered into an agreement of purchase and sale at Rustenburg with Statsec 120 (Pty) Ltd which at the time was duly represented by its authorised representative with regards to portion 145 of erf 670 and portion 144 of erf 670 which were later renamed after the conclusion of the said agreement as portion 6 of erf 670 and portion 7 of erf 670 respectively. The said agreement between Statsec 120 (Pty) Ltd and the defendant herein is attached to the combined summons as annexure 'FW6'. Also attached to the combined summons and marked annexure 'FW7' is a collective reference to the agreements of sale wherein Ulaka Lodge Holdings (Pty) Ltd which name was later changed to Harts Falcon View (Pty) Ltd is the nominee of I. Ichikowitz who

entered into the agreements of sale with the defendant at Sandton or at Roodepoort on 31 March 2004. The relevant portions involved in annexure 'FW7' are described as erf 115 of portion 668, erf 66 of portion 670 and erf 23 of portion 667 and with the conclusion of the aforementioned agreements they were renamed portion 22 of erf 678, portion 88 of erf 670 and portion 126 of erf 670 respectively. Finally annexure 'FW8' is the agreement of sale entered into between JCLR Trust duly represented at the time by its representative and the defendant concluded on 5 April 2004 at Roodepoort with regard to erf 42 of portion 670, erf 48 of portion 667 and erf 70 of portion 667 which later and after the conclusion of the aforementioned agreement on the 5 April 2004 were renamed as portion 63 of erf 678, portion 70 of erf 678, and portion 92 of erf 678 respectively. The agreements of sale referred to in annexures 'FW4' to annexure 'FW8' inclusive only took place after the condition which was stipulated in paragraph 3 of the mayoral resolution of 18 November 2002 had been complied with. Paragraph 3 of the said resolution stated as follows:

"*That this consent will only be applicable to erven 667, 668, 669 and 670 and shall take effect on the date when a services agreement has been completed and signed by both Leopont 64 Properties (Pty) Ltd and the Council in receipt of the appropriate guarantees as stipulated in the signed agreement to be provided by Leopont 64 Properties (Pty) Ltd as provided for in section 97(2) of the Town Planning and Townships Ordinance, 1986 (Ord 15 of 1986).*"

[15]. Each agreement of sale referred to in annexures 'FW4' to 'FW8' contained the following further annexures:

1) Offer to purchase;

2) The diagram;

3) Falcon View Estate Development Control Purpose and Aim which was marked as annexure 'B' to the agreement of sale; and

(4) Annexures 'C', 'D' and 'E'.

[16]. The plaintiff contends that it was an express, alternatively an implied and further alternatively a tacit term of the agreements referred to as annexures 'FW4' to 'FW8' that they would be so concluded subject to certain terms and conditions. The plaintiff has fully set out in its particulars of claim the further such terms. It is furthermore the plaintiff's case that in respect of the agreements marked annexures 'FW5' and 'FW6' in addition to the express, alternatively implied and further alternatively tacit terms set forth in the preceding paragraphs uch agreements would include the following express, alternatively tacit terms:

16.1 That a sewerage station and sewerage purification works will be erected to the satisfaction of Madibeng Local Municipality and any other responsible authority; and,

16.2 That water would be pumped from the purification works to the said drinking troughs along a pipeline to the four animal drinking troughs in the mountain area.

[17]. According to the plaintiff's combined summons the agreements of sale referred to as annexures 'FW4', 'FW5', 'FW6', 'FW7' and 'FW8' do not correctly record the agreement, alternatively the common intention between the defendant, as then represented by Mr. Grabe and each of the purchasers, at the time when the said agreements were concluded. The said agreements of sale do not correctly record the entire terms of the agreement

between the parties or by reason of the common mistake on the part of both parties, that is the defendant and the purchasers, the agreements do not include the following terms:

17.1 That the seller would build a parking area as indicated on the diagrams attached to each of the agreements of sale;

17.2 the seller would take all necessary steps to obtain a list on behalf of the plaintiff for the recreation area indicated on the diagram attached to the agreements of sale (the recreation area), from the relevant Governmental Department;

17.3 the recreation area would be cleaned, rocks and alien trees would be removed and the land would be filled, topsoil would be carted in and grass would be planted and electricity and lightning would be installed;

17.4 the seller would build a circle road around the sewerage pump station in the recreation area;

17.5 the seller would erect a security wall between the waterfront area and the waterfront erven to the west of the boat tow slope;

17.6 the seller would build an earth embarkment as per annexures 'FW9' to the particulars of claim as well as a long sinking pad for boats to the dam;

17.7 the seller would build an ablution facility for ladies and gentlemen at the recreation area; and,

17.8 the seller would erect an electrical fence on top of the palisade fencing around the sewerage purification works.

[18].According to the plaintiff the defendant and the respective parties had intended that the aforegoing terms should be pleaded in paragraph 7.2 of the agreements of purchase and

sale and should be reduced to writing. Accordingly the plaintiff contends that the agreements of sale between the defendant as represented by Mr. Grabe and each of the purchasers, do not correctly record the agreements between the defendant and each of the purchasers as a result of a common error by the said Mr. Grabe and each of such purchasers as represented. It is for this reason that the plaintiff seeks rectification of the various agreements of sale in order to include the terms that are referred to in paragraphs 16 and 17 supra.

THE DEFENDANT'S SPECIAL PLEA OF PRESCRIPTION

[19] In paragraph 4 supra I set out the issues that the parties have agreed should be determined. These issues were advanced by the parties in no particular order. In dealing with them I will commence with the defendant's special plea of prescription for the simple reason that if this Court should uphold such a plea the need to deal with the other issues will automatically fall away. Although the Court was requested to deal with the six specific points referred to in paragraph 4 supra it is clear from the defendant's plea that the defendant relies firstly, in its defence, on a special defence, namely prescription. It is equally clear, as it is practice, that the defendant seeks a dismissal of the plaintiff's claims, without any reference to the merits of such claims, if the court upholds its special defence. The fact that the parties advanced the points the court was required to determine in no particular order did not imply that the court should deal with all points singly despite its finding on the defendant's special defence. It was, in my view, in the contemplation of the parties that before the court could deal with the merits of the plaintiff's claims, it must first clear any hurdle in the form of special defences.

[20]. The defendant raised a special plea of prescription against the plaintiff's claims. It contended that, on the facts in the pleadings, the claims which constituted the foundation of the plaintiff's action became due more than three years before 12 May 2009. According to the defendant, the plaintiff's claims was extinguished by prescription in terms of the Prescription Act No. 68 of 1969 ("the Act"), in particular s. 10(1) and (2) thereof. On this basis the defendant prays that the plaintiff's claims should be dismissed with costs.

[21]. It is only apposite for this court to set out the history of this matter in order to put the defendant's special plea of prescription in a better perspective. It is crucial to point out firstly that the plaintiff and the defendant did not conclude any agreement between them with regard to the property or any attributes of thereof. The plaintiff derives its *locus standi* from a cession which it took from certain purchasers. These purchasers were four companies and a trust. Before the establishment of the plaintiff these purchasers were themselves members of the defendant. All the purchasers who ceded their rights of action to the plaintiff were themselves developers with no intention to purchase the properties for their individual residential use. These purchasers were:

23.1 Sarpro Investments (Pty) Ltd which had purchased 22 sites;

23.2 Umhlaba Projects (Pty) Ltd which had purchased 7 pieces of land;

23.3 Ulaka Lodge (Pty) Ltd which had purchased 3 stands. Ulaka Lodge (Pty) Ltd later became known as Harts Falcon View (Pty) Ltd;

23.4 Statsec (Pty) Ltd 120 which had acquired 3 stands, and;

23.5 JCLR Trust which had bought 3 stands.

[22] As I pointed out in paragraph 12 supra, the contracts which constitute the bases of the plaintiff's claims were concluded between 25 March 2004 and 5 April 2004. A copy of the summons commencing this current action was served on 20 August 2008 after period of four years four months and twenty two days reckoned from 5 April 2004 had passed. On 12 October 2008 the defendant delivered, on the plaintiff, an exception to the summons on the basis that it lacked the averments necessary to sustain a cause of action, in the alternative, that it was vague and embarrassing in some respects. It is sufficient only to mention that the defendant proceeded to list all the respects in which it contended that the summons was vague and embarrassing. Following the said notice of exception, on 21 May 2009 the plaintiff delivered its amended particulars of claim.

[23] The plaintiff requested the defendant to furnish precise dates on which the defendant contended that the plaintiff's claim had arisen. To this request, the defendant responded by stating that the plaintiff's claim arose:

"*on or about the dates on which the contracts were signed, alternatively within a reasonable time and thereafter which reasonable time had expired before May 2006.*"

[24] On a further question as to how the date 15 May 2009 (sic) was relevant, which was the date on which the plaintiff amended its summons, the defendant alleged that the said date was the first date on which a justiciable claim existed.

[25].It is clear from the defendant's plea that the precise date on which the plaintiff's claims arose was not stated at least with any precision. The Court is now called upon to decide the date on which the plaintiff's claims arose. The purpose of this exercise and its eventual

result is to establish the date on which prescription commenced to run and ultimately the date on which the plaintiff's claims, if so, were extinguished by prescription, if the defendant's special defence is anything to go by. According to **Gericke v. Sack 1978 (1) S A 821 (A)** the duty to establish the date on which prescription began to run is cast upon the defendant.

[26]. In terms of s. 12(1) of the Act, prescription commences to run as soon as the debt is due. According to the defendant's counsel, that date, with specific reference to this matter, is the date on which the agreements were concluded or 21 May 2005 perfected its cause of action. The last of such agreements were concluded, it will be recalled, on 5 April 2004. Counsel for the defendant contended that because the agreements concluded were not subject to the fulfilment of any suspensive condition, (I will later deal with a condition to which the agreements were subjected to), the date on which the contracts were concluded, that is 5 April 2004, or the date on which the plaintiff delivered its amended claims, was the date on which the debt became due. This was the date on which the purchasers' rights of action accrued. Accordingly, depending on the date of the conclusion of the various contracts and on the defendant's contention, the prescription began to run in respect of the contracts from 24 March 2004 to 5 April 2004. Counsel for the defendant relied on the following authorities. In **The Master v I L Back and Company Ltd 1983(1) SA 986 [A] ("the Back case")**, the court had to decide, inter alia, the date on which prescription began to run. Counsel for the Master, the appellant in the said authority, had submitted on behalf of the Master that the debts, being fees charged in terms of s.15(1) of the Companies Act 61 of 1973 and published in Government Gazette 4128 of December 1973, had not become due until the Master had assessed them. Simply put counsel for the Master had submitted that

until the Master had first assessed the fees payable to him by the respondent such fees would not be due and therefore prescription could not begin to run against them.

" *The submission on behalf of the Master that the debts had not become due until the Master had assessed the fee was framed as follows:*

> *'(aa) A debt being due in this context involves two things, namely that the creditor is in a position to claim payment forthwith and that the debtor does not have a defence to the claim for immediate payment. In other words, that the creditor's cause of action is complete- as to which see Evins v. Shield Insurance Co Ltd 1980 (2) SA 814 (A) at 778";*
>
> *and*
>
> (bb) *It is an essential part of the cause of action in the present case that shall have made an assessment and this involves a decision on the gross value of the assets.*

The Court was then in agreement with the submission counsel for the Master had made in "(aa) supra. It had the following to say:

"*The submission in (aa) is clearly correct. The date on which the debt arose and the date on which it is due are not necessarily the same, see List v. Jungers 1979 (3) SA 106 (A) at 121. The import of the submission in (aa) and (bb) is that the debt may well have arisen but that it had not become due as required by s 12(1) of the Prescription Act. The words "debt is due" must be given their ordinary meaning. It seems clear that this means that there must be a liquidated money obligation presently claimable by the creditor for which an action could presently be brought against the debtor. Stated another way, the debt must be one in respect of which the debtor is under an obligation to pay immediately".*

In rejecting the submission made by counsel for the Master in paragraph (*bb) supra* the court had the following to say at p.1005C–F:

" This balance sheet is part of the report which a judicial manager is obliged to furnish in terms of ss 430 and 429(b) (ii) of the Companies Act. *We thus have the position that, the gross value of the assets having been determined as at 25 June, all the Master had to do was to make his assessment, ie make an arithmetical calculation. In any summons which he issued he would merely have to allege the determined value of the assets and state the amount of the fee which is payable, and which has been calculated in terms of the rate provided in annexure CM 103. The amount so calculated is not a fact proof of which was necessary to complete the cause of action. The calculation was merely to prove the quantum of the fee. The Court a quo correctly found (at 780 of the reported judgment) that this was a procedural matter relating not to the creation of a cause of action but only to its proof."*

[27] According to the above paragraph it is not so much the act of registration of the properties in the names of the individual purchasers as it is the conclusion of the purchase and sale agreements that creates a cause of action for the purchasers or the plaintiff in this case. The registration of the individual properties in the names of the purchasers was not a fact proof of which was necessary to complete the purchasers' cause of action. The plaintiff's cause of action arose on the date on which they concluded the agreements of purchase and sale with the defendant. They had the right to claim immediate transfer of the properties in their own names. This, in my view, is the date on which prescription commenced to run.

[28] The application of the principle set out in the Back case is not restricted to monetary claim only. The Court in the Back case set out the law, as it did, because in that matter it dealt with an issue that related to the payment of money. The same principle will still be applicable where the prescriptive period relates to obligations that have their provenance in contracts. In this regard see **Benson And Another v. Walters And Others 1984 (1) SA 73 AD** at 82 where Van Heerden JA, after citing with approval the principle set out in Back's case, underscored it as follows:

" In parenthesis it may be pointed out that, if it was intended to formulate the principle of general application, the words "liquidated" and "money" were clearly used per incurium, since there is no doubt that prescription runs in regard to unliquidated claims for damages and also claims not sounding in money". See also **HMBMP Properties (Pty) Ltd v King 1981(1) SA 986 (N) and Electricity Supply Commission v Stewarts and Lloyd of SAP Ltd 1981(3) SA 314.**

[29] It is clear that the date on which it is contended by the defendant that the prescriptions were to run was not chosen arbitrarily. It is of paramount importance to point out that the period of prescription of the plaintiff's claim is three years, as set out in the provisions of s. 11(d) of the Prescription Act. This is common cause between the parties for no other period of prescription was bandied around. The defendant did not rely on the other periods of prescription as set out in sections 11 (b) or 11(c) of the Act.

[30]The plaintiff, however, holds a different view. While counsel for the plaintiff acknowledges the provisions of s. 12(1) of Act, he also relied on the authority of **Benson and Others v Walter and Others 1984(1) SA 72 at 82** *supra.* He submitted that what s. 12(1) means is that

the debt must be immediately claimable by the creditor in legal proceedings and; (b) in respect of which the debtor is under an obligation to perform immediately. See in this regard **Western Bank Ltd v SJJ Van Vuuren Transport (Pty) Ltd** 1980 (2) S A 348 (T)

[31].It was submitted by counsel for the plaintiff that in *casu* prescription could not commence to run because a condition precedent to the running of the prescription had not been fulfilled. That condition was the registration of the properties into the names of the purchasers. It is important, in my view, to point out that this condition was not specifically mentioned in any of the agreements under scrutiny. Counsel for the plaintiff argued that it was common cause that transfer of the erven from the defendant to the purchasers only took place on 16 August 2006. He developed his argument and stated that because section 12(1) of the Act prescribed that prescription shall commence to run as soon as the debt is due that meant that the debt must be immediately claimable by the creditor in legal proceedings and be one in respect of which the debtor is under an obligation to perform immediately. He continued with his argument and stated that in this particular case, before 16 August 2006, which is the date on which the purchasers received ownership of their properties, the purchasers had no claim that was immediately claimable. In this manner counsel for the plaintiffs says to the defendant that "the plaintiff says *you cannot raise a special plea of prescription against our claims. Prescription against our claims could not commence to run before we received ownership of the properties in our names or before the properties were transferred into our names*". It is suggested that the defendant's liability to transfer ownership of the individual pieces of land to the respective purchasers was not a debt.

[32]This approach seems to be inconsistent with the approaches adopted in some authorities. In the first place, the defendant's identity has remained the same at all material times. The purchasers in their individual capacities and later as currently constituted were aware of the identity of the defendant. The defendant never changed its identity. At the time they purchased these lots, the purchasers were at the same time members of the defendant. They continued to be members of the defendant until on 3 March 2005 when they constituted themselves as the current plaintiff. It is not known whether they ceased to be members of the defendant on 3 March 2005. As members of the defendant the duty lay on them not only to convey ownership of the individual properties into the individual purchasers' names but also to ensure that all the obligations that arose from the purchase and sale were complied with within a period of 3 years in order to avoid prescription. Prescription started to run the earliest on 24 March 2004 and the latest 5 April 2004.

[33] The mere fact that the defendant failed to transfer the properties into the names of the individual purchasers did not mean that the debt was not due until the defendant did so. In this regard I would adopt the approach set out in **The Master v I L Back and Company Limited 1983(1) SA 986 [AD] at p.1005F-G:**

"*The mere fact that the Master must assess the fees in terms of annexure C103 does not mean that no liability exists until he does so. If all that is required to be done to render the debt payable is a unilateral act by the creditor, the creditor cannot avoid the incidence of prescription by studiously refraining from performing that act.*"

It went further and stated at p. 1005G-H that:

"It was urged that the Master had failed to act timeously and his delay in doing so did not prevent prescription from running against him. A creditor's right of action is not "postponed" until such time as he may, either his wisdom or when he thinks he ought to, bestir himself."

The Court in Back's case adopted the view set out in the preceding two paragraphs.

[34] According to **Munnikus v. Melamed 1998 (3) S A 873 (W)**, a debt to perform contractual obligations becomes due in accordance with the terms of the parties' agreement. The pre-proclamation agreements that the parties concluded, all having the same wording, provided that:

" 1. The purchase price was the sum of R……..

Payable as follows;–

A deposit of R…… shall be paid upon signature by the purchaser of this agreement….

(b) The balance of R…… shall be secured by furnishing of the banker's guarantees in a form acceptable to the seller's conveyancer's and which guarantees shall be delivered to the seller's conveyancers within 30 (thirty) days of date of proclamation of the township."

This was, in my view, a term of the purported agreements. My understanding of the said term was that despite the fact that the agreements were concluded beween 25 March 2004 and 25 April 2004, the parties had agreed that the purchasers could not pay the balance of the purchase price before the township had been declared officially as a township by Madibeng Municipality and until such had happened there was no debt. The purchasers could not lawfully claim delivery of the pieces of land from the seller because they would

not have paid the balance of the purchase prices. On the other hand the seller could not lawfully claim payment of the balance of the purchase price because the township had not been officially proclaimed.

[35] No dispute exists, in my view, that on 31 May 2005, acting in terms of s 103 of the Ordinance, Madibeng Municipality declared the township of Kosmos X6 to be an approved Township. In the circumstances the purchasers had until 1 June 2005 to pay the balance of the purchase price by way of furnishing the seller's conveyancers with bank guarantees. The obligation to pay the balance of the purchase price arose and the concomitant right to claim transfer of the properties into their names arose simultaneously on 1 June 2005. OAn 1 June 2005 the right to claim specific performance under the terms of the agreement arose.

" A right to claim performance under a contract ordinarily becomes due according to its terms or, if nothing is said, within a reasonable time, which, in appropriate circumstances, can be immediately……The right to claim performance, and thus the event, such as the expiry of a maintenance period in a construction contract (Electricity Supply Commissioner v. Stewarts & Lloyds of South Africa (Pty) Ltd 1981 (3) SA 340 (A), or the receipt by a broker of the price of shares sold on behalf of the plaintiff (Olthaver & List trust Co Ltd v. Staunch NO 1972 (4) SA 48 (SWA), or the determination of the amount of an insured claims an indemnity from an insurer (Pereira v. Marine and Trade Co Ltd 1975 (4) SA 745 (A) at 757F-785F, or, in the case of property insurance, the date when the extent of the physical loss is known~not the date of the final ascertainment of the pecuniary extent (Cape Town Municipality And Another V. Allianz Insurance Co Ltd 1990 (1) SA 311 (C) at 421F and

324A, or when the creditor has performed, in whole or in part, as in the case of leases and contracts of work." See Munnikus v Melamed supra at 887D~887H.

[36]The right to claim performance under the contract concluded by the parties between 25 March 2004 and 4 April 2004 arose between 1 June 2005 the earliest and 1 July 2005 the latest. After payment of the balance of the purchase price there would have been a debt claimable by the purchasers for the transfer of the pieces of land into the various purchasers' names and for the seller to perform its contractual obligations. The purchasers would have been immediately entitled to sue for specific performance. Under these circumstances a claim in which a copy of the summons was served on 20 August 2008 would have become prescribed.

[37] Whichever way one looks at it, n my view, the plaintiff's claims that are based on the agreements of purchase and sale concluded between the plaintiff's members and the defendant from 24 March 2004 to 5 April 2004 and the resultant obligations have been extinguished by prescription.

[38].THE PLAINTIFF'S SECOND CAUSE OF ACTION

I now turn to the plaintiff's second claim. The plaintiff's second cause of action, according to paragraph 12 of the plaintiff's amended particulars of claim, arises from the following circumstances. During the period 3 May 2007 to 4 June 2007 the plaintiff, at all material times represented by its attorneys and the defendant, also represented therein by its attorneys, concluded a written agreement of sale. The terms of the said agreement were

contained in annexures 'FW11' and 'FW12'. Annexure 'FW11' was a letter dated 3 May 2007 from the plaintiff's attorneys to the defendant's attorneys while annexure 'FW12' was a letter dated 4 June 2007 from the defendant's attorneys to the plaintiff's attorneys. The plaintiff contends that the contents of FW11 and FW12, read together, constitute an agreement or an undertaking.

[39] It is the plaintiff's case that it was the expressed terms of the agreement alternatively of the binding undertaking by the defendant that the defendant would perform the work listed under the heading (*"Uitstaande Dienste en Werke soos op 29 Mei 2007"*) in annexure 'FW12'. The work to be performed is fully listed in the aforementioned amendment.

[40] The plaintiff contends that despite the effluxion of a reasonable time, the defendant had failed to perform its obligations as set out in annexure 'FW12'. On the basis of the amendment's failure to perform in accordance with the said obligations, the plaintiff contends that it is entitled to an order of specific performance against the defendant failing which to damages in the sum of R3,608,704.72.

[41] The defendant does not dispute the contents of the letters. It is the plaintiff's interpretation of the contents of the said letters that the defendant has a very serious problem with. The defendant disputes the plaintiff's contention that the contents of FW11 and FW12 constitute any agreement. In his heads of argument the defendant's counsel argued that it is common cause that no contract came into being regarding the *"Uitstande Dienste en Fasiliteite"*. It is crucial, in my view, to analyse the contents of the said letters. In the letter dated 3 May 2007, the plaintiff's attorneys wrote, among others, the following to the defendant's attorneys.

"1 Ons tree op namens die nuut verkose Direksie van die Kosmos X6 Huiseienaars Vereniging wat tydens 'n vergadering op Saterdag 24 Maart 2007 verkies is. Volgens ons inligting tree u op namens die ontwikkelaar, Leopont 64 Properties (Edms) Bpk en het u Mnr Gert Grobler, as hoof aandeelhouer, by bogemelde vergadering verteenwoordig.

3. Tydens die vergadering is deur die lede besluit om aan die nuut verkose Direksie opdrag te gee om met die ontwikkelaar oor te dra:

(1) dat die Kosmos 6 Huiseienaars Vereniging nie op hirdie stadium bereid is om verantwoordelikheid te aanvaar vir die beheer en administrasie van die dorp Kosmos X6 en dit van die onwikkelaar oor te neem nie: en

(2) dat van die ontwikkelaar vereis word word om die nodige stappe te doe nom die Dienste en fasiliteite aan Kosmos X6 te verskaf soos hierna uiteengesit.

Volgens die inligting tot ons beskikking was daar reeds kontrakteurs benoem om die werk te verrig teen aanvaarbare norme en standard, maar was die kontrakteurs nie volmag gegee om met die werk voort te gaan nie".

[42] In response, the defendant's attorneys wrote, among others, the following to the plaintiff's attorneys:

"Soos per die inhoud van ons skrywe gedateer 16 laaslede, is dit nie ons intensie om te reageer op al die beweringe vervat in u vorige korrespondensie en met spesifieke verwysing na u skrywe gedateer 3 Mei 2007 nie, en gevolglik behou ons klient se regte voor om hierdie aangeleentheid behoorlik aan te spreek by die gekose tyd en forum, sou dit enigsins benodig word.

Derhalwe moet ons versuim in die verband, nie gekonstrueer word as 'n erkenning van Sodanige bewering en/of onderneming om sodanige verpligtinge(wat ontken word) uit te voer

nie.

Gevolglik is dit wel ons instruksies om die volgende aan u te openbaar:

(1) Ons klient onderneem om sy juridiese verpligting stiptelik n ate kom, soos vervat in die Diensooreenkoms gesluit met die Munisipaliteit van Madibeng. Enige beweerde Verpligtinge wat buite die kader van voormelde ooreenkoms val, word verwerp en sal nie deur ons klient uitgevoer word nie,

(4) Soos aan mnr. Dekker meegedeel op 28 laaslede, was 'n bedrag van R1 754 386,00 Opsy gesit het en word huidiglik gehou in trust deur prokureurrs Swart, Redelingshuis en Nel, n Bedrag van R250000,00 was sedertien aangewend om die tuine in orde te kry.

(5) Ons heg hierby aan 'n uiteensetting van uitstande dienste en werke soos op 29 Mei 2007 en gedeeltelik ter antwoord van die inhoud van u voormelde skrywe. Ten Aansien van die items gemerk is Geen goedkeuring/Opdrag, is di tons instruksies dat ons klient nie voormelde sal uitvoer nie, aangesien dit nie deel deel van ons klient se juridiese verpligtinge is nie. In die verband verwys ons u weereeens na voormelde kommentaar wat hierop betrekking het."

[43] I have deliberately left out certain paragraphs of the defendant's attorneys for the simple reason that they do not, in my view, contribute towards assisting the court to establish whether any agreement came into being. For record purpose in paragraph 2 of the said letter the defendant complained that Mr Grabe, who had been appointed as the project manager had, during September 2006, concluded an agreement with the defendant in terms of which he undertook to complete the "*uitstande werke*" within a reasonable after which he would hand the development to the plaintiff. The same paragraph contains, furthermore, an attack on the ability of Mr Grabe to effectively execute his mandate. Of crucial importance in this paragraph is the acknowledgement by the defendant that there works on the development were incomplete or that there were still *"uitstande*

werke" on the development. Paragraph 3 thereof refers to the alleged breach of contract by the said Mr Grabe while in paragraph 5, the last paragraph of the said letter, the defendant's attorneys pointed out that Mr Grabe, had in December 2006 and without authority, allowed Kosmos Home Owners Association to utilise the sewerage system and finally that the sewerage system was installed over certain properties without the consent of the owners. It is for these reasons that I indicated that these paragraphs will not be of assistance in establishing the creation of an agreement pleaded by the plaintiff and disputed by the defendant.

[44] The question now is whether the contents of FW11 and FW12 contain an agreement. It is clear from the said FW12 that the defendant undertook to complete certain services set out in the Service Agreement with the Madibeng Municipality. It is also clear that it refused to execute any other service. It is not the plaintiff's case that the Madibeng Municipality Service Agreement included items or some items in the plaintiff's attorneys' list of "Uitstande Dienste en Fasiliteite." In FW12 the defendant's attorneys did not indicate the items in the list of "Uitstande Dienste en Fasiliteite" that were set out in FW11 which the defendant undertook to complete or execute. Instead the defendant's attorneys set out what in the defendant's view was its on list of "Uitstande Dienste En Werke" as at 27 May 2007. In this letter the defendant's attorneys sent out a mixed bag of admissions and denials. While it admitted that some works have not been completed it denied at the same time that it was obligated other works. There is therefore no clarity as to what the parties have agreed to as the plaintiff claims.

[45] Relying on the authority of **Seeff Commercial And Industrial (Pty) Ltd v. Silberman [2001]3 All S A 133; 2001 (3) S A SCA**, counsel for the defendant submitted that FW11 and FW12, read together, do not constitute an agreement because FW12 does not constitute an unequivocal acceptance of the plaintiff's offer contained in FW11. He regarded FW11 as an offer. An offer, as we understand it, consists of a proposal by one party, in this instance the plaintiff, of the terms on the bases of which such a party is prepared to conclude a binding agreement with the offeree, in this case, the defendant. The offer, in its fundamental nature, must be certain and definitive in its terms. If the

submission made by counsel for the defendant is anything to go by, I am satisfied that an offer made by the plaintiff and contained in FW11 is certain and definitive in its terms. The offer must be accepted by the offeree as an indication that the offeree is prepared to be bound by the terms proposed by the offeror. It is crucial that before such an offer can develop into a binding contract when it is accepted it is clear that it is intended to be the whole offer. When only part of the terms of the offer is accepted and the others not, pending agreement on the outstanding terms of the offer, no other party has rights against the other of them. See **Potchefstroom Municipal Council v. Bouwer NO 1958 (4) S A 382(T).** In this authority the parties had reached an agreement on the terms relating to the letting and hiring of services and remuneration but had reached no agreement about the date of commencement of duties. The court, finding that there was no contract, stated that until the date of assumption of duties was fixed by agreement between the parties, there was no contract of service but only a process of negotiation.

[46] Lastly it was argued by counsel for the defendant that the purported offer was made by the plaintiff more than a year before the claims were ceded to the plaintiff. At the material time of the offer was not acting for the individual purchasers. According to him the undertaking could not be regarded as an undertaking to comply with pre-existing contractual obligations. If no agreement resulted from the aforementioned correspondence very little chance existed for the creation of any obligations.

[47] Accordingly I find that the contents annexures FW11 and FW12 do not constitute an agreement.

[48] In the result I find that the plaintiff's claims contained in paragraph 9 of the summons have been extinguished by prescription.

Accordingly I make the following order:

The plaintiff's claim as contained in paragraph 9 of the Plaintiff's Particulars of Claim is hereby dismissed, with costs.

P.M. MABUSE

JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for Plaintiff:	*Adv. AJ Louw (SC)*
	Adv. M Ackermann
Instructed by:	*Len Dekker & Associate*
Counsel for the Defendant:	***Adv. P Ellis (SC)***
Instructed by:	***Lombard & Partners***
Counsel for the Third Party:	***Adv. LW de Koning (SC)***
Instructed by:	***O J Botha Attorneys***
Date Heard:	***22 October 2012 – 2 November 2012 &***
	20 May 2013 – 3 June 2013
Date of Judgment:	***2014. 06. 06***