

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case number: 58497/2011

Date: 5 September 2016

In the matter between:

KENNETH BEDWELL

PLAINTIFF

and

DAVE PRETORIUS

DEFENDANT

JUDGMENT

DU PLESSIS. AJ

1.

The Plaintiff claimed R 2,004,000.00 from the Defendant for damages which the Plaintiff allegedly suffered as a result of the Defendant's repudiation of a

deed of sale dated 3 June 2007. The summons was issued by the Plaintiff on 11 October 2011.

2.

The sole issue for determination, is whether the Defendant's special plea of prescription raised *in limine*, should be upheld or not.

3.

In its particulars of claim, the Plaintiff relies on a written contract of sale of a property ("*the contract*") known as Erf[3..], Tuna Street, Oyster Bay and dated 3 June 2007. A copy of the contract was attached to the particulars of claim and at the commencement of the trial, the parties agreed that the contract as referred to should be rectified to correctly reflect the intention of the parties by adding certain paragraphs as agreed to by the parties, and attached to the pre-trial minute held on 28 April 2016. Such an order was made.

4.

In paragraph 12 of the particulars of claim, the Plaintiff relies on a repudiation of the contract for its cause of action. Paragraph 12 reads:

"12. On or about 2009, Defendant repudiated the contract between the parties by selling the Oyster Bay property to a third party, the Johannes Botha Family Trust, alternatively, on or about May 2009, Defendant evicted Plaintiff from the Oyster Bay property, alternatively denied the Plaintiff further use of the Oyster Bay

property, which repudiation the Plaintiff has accepted, alternatively, which is accepted herewith."

5.

In its plea, the Defendant raises a special plea that reads as follows:

"4. *In paragraph 12 of the particulars of claim, Plaintiff alleges that on or about May 2009, Defendant repudiated the deed of sale (amongst others) evicting Plaintiff from the Oyster Bay property, alternatively, by denying Plaintiff the further use of the Oyster Bay property.*

5.. *Defendant in fact evicted Plaintiff from the Oyster Bay property on or about 8 April 2008, alternatively Defendant on or about 8 April 2008, denied Plaintiff further use of the Oyster Bay property."*

6.

Defendant then concludes in its plea that, as the repudiation of the deed of sale occurred on the 8th of April 2008 and the Plaintiff only issued summons against the Defendant on or about 11 October 2011, the claim against the Defendant has prescribed by virtue of the provisions of Section 11 of the Prescription Act, Act 68 of 1969.

7.

The Defendant called one witness, Mr Pretorius and the Plaintiff Mr Bedwell

and his son Mr Bedwell Jnr.

8.

To determine the repudiation, it is necessary to refer to the background to this claim.

9.

The Plaintiff and the Defendant were friends for many years. The Plaintiff was the owner of a holiday home at Oyster Bay in the Eastern Cape. During 2007, the Plaintiff needed money to complete a guesthouse project and in order to gain access to further funds, he sold his holiday home in Oyster Bay to the Defendant for an amount of R 1,850,000.00. The agreement was embodied in a contract attached to the particulars of claim and as rectified by Annexure "X" as already referred to above. The property was registered into the name of the Defendant on 18 October 2007.

10.

The contract determined that, as soon as the Plaintiff qualifies for a bond in his own name to release the bond of the Defendant, the Defendant would retransfer the property into the name of the Plaintiff. In the interim, the Plaintiff, his then wife and guests had free and vacant possession of the property.

11.

Subsequent to the transfer of the property into the name of the Defendant, the relationship between the Plaintiff and the Defendant deteriorated to the extent

that the Defendant no longer wanted to accommodate the Plaintiff at the Oyster Bay property. When the Defendant learned on 8 April 2008 that the Plaintiff and some of his friends are staying over at the Oyster Bay property, he telephonically instructed the Plaintiff to leave the property and informed him that he would henceforth no longer be entitled to occupy the property and/or use the property. This discussion of 8 April 2008 is not denied by the Plaintiff and in his evidence Bedwell confirmed that he regarded the instructions of the Defendant Mr Pretorius to him as a threat and that Pretorius is reneging on the contract between them. The Plaintiff left the premises the next morning, never to return to the property subsequent to the incident on 8 April 2008.

12.

The incident of 8 April 2008 lead to the Plaintiff writing a letter to the Defendant on the same day. This letter is confirmed by the Plaintiff and reads as follows:

"To: Dave Pretorius

Re: Sale of dwelling at [3...]Tuna Street, Oyster Bay.

- 1. I suggest that after your threats this afternoon, that we set up a polygraph test between the three of us and we have our statements through your lawyers and my lawyer analysed. [NB: verbal agreements are binding].*
- 2. All assets in the house belong to me plus the agreement of sale.*
- 3. Please reply on above fax number.*

Ken Bedwell"

13.

The Defendant in turn also sent letters via his attorneys to the security company responsible for the security at the premises and to Chas Everitt (the Property Company), informing them that the Plaintiff would no longer be entitled to occupy the premises. The Plaintiff confirmed in his evidence that, approximately two weeks subsequent to the 8th of April 2008, he was phoned by a certain Mr Sevenster and informed of the letter that the security company received, denying him access to the property. The Plaintiff never visited the property again.

14.

Subsequent to this incident and during 2009, the Defendant sold the property to a third party. The Plaintiff claims that he only learned of this sale from his son during 2010. The Plaintiff's son gave evidence to this effect.

15.

The conduct constituting the repudiation is described by the Plaintiff in paragraph 12 of the particulars of claim as follows:

- 15.1. on or about 2009, the Defendant sold the Oyster Bay property to a third party, *alternatively*;
- 15.2. on or about May 2009, the Defendant evicted the Plaintiff from the Oyster Bay property *alternatively*;
- 15.3. denied the Plaintiff further use of the Oyster Bay property;

15.4. which repudiation the Plaintiff has accepted.

16.

Defendant admits that the sale as referred to above occurred during 2009, but pleads that the "*evicted Plaintiff from the Oyster Bay property*" and the "*denied Plaintiff further use of the Oyster Bay property*" that are referred to in paragraph 12, occurred on the 8th of April 2008. Plaintiff admitted in evidence that the incident referred to in paragraph 12 of the particulars of claim, actually occurred on 8 April 2008.

17.

The question of prescription depends upon the date upon which the debt became due. If it became due on 8 April 2008, the debt clearly prescribed, as the Plaintiff's summons was served more than three years after 8 April 2008.

18.

In paragraph 4.3 of the pre-trial held on 28 April 2016, the parties recorded as follows:

"4.3 *The parties are in agreement that the crisp issue between the parties pertained to the date when Defendant repudiated the contract between the parties. Should the Court find in favour of the Defendant, it will follow that the plea of prescription should be upheld.*"

19.

Before determining when the Defendant has repudiated his contractual obligations it is opportune to reiterate the requirements for repudiation of contractual obligations as referred to in Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd 2001 (2) SA 284 (CSA) at 294 (E – H):

"Conceivably, it could therefore happen that one party, in truth intending to repudiate (as he later confesses), expressed himself so inconclusively that he is afterwards held not to have done so; conversely, that his conduct may justify the inference that he did not propose to perform even though he can afterwards demonstrate his good faith and his best intentions at the time. The emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred intention accordingly serves as the criterium for determining the nature of the threatened actual breach."

20.

Apart from the reliance in paragraph 12 of the particulars of claim by the Plaintiff on eviction from the property, *alternatively* denying the Plaintiff the further use

of the property as proper repudiation, the Plaintiff (Mr Bedwell) in his evidence, confirmed that the discussion he had on 8 April 2008 with Mr Pretorius, led him to believe that Mr Pretorius is no longer intending to comply with his obligations in terms of the contract. But, says Mr Bedwell, he never understood from the discussion of Mr Pretorius, that Pretorius would be entitled to sell the house and not comply with the requirement that the house is to be transferred back to the Plaintiff once he is in a position to obtain a bond in his own name.

21.

The problem of course for the Plaintiff is that he relied on repudiation of the contract of sale by the Defendant, which he accepted and which would then in turn entitle the Plaintiff to cancel the agreement and claim damages from the Defendant. This the Plaintiff indeed did.

22.

Whatever the reasons of the Defendant were to deny the Plaintiff any further access or occupation to the property, the subjective intention of the Defendant matters not. The enquiry is how a reasonable person in the position of the Plaintiff, perceived the discussion and instructions of the Defendant to the Plaintiff. The Plaintiff himself described the "*instructions*" of the Defendant to the Plaintiff to vacate the property and deny him any further access to the property, as "*threats*". He recorded these "*threats*" in the letter quoted above.

23.

Paragraph 12 of the particulars of claim describes the conduct of the Defendant as a repudiation of the contract. The repudiation under these circumstances, is a matter of perception of a reasonable person placed in the position of Bedwell. Bedwell himself understood that performance by Pretorius of his obligations in terms of the contract, would not be forthcoming. He admitted as much. The fact that he did not understand Pretorius to then be entitled to sell the property, is neither here nor there. Apart from the fact that this is not contained in the contract, once repudiation of a contract is alleged by the Plaintiff and accepted as it is by the Plaintiff in this instance, it is the end of the contract in its entirety and prescription would start running.

24.

The obligation of Pretorius to grant Bedwell unrestricted access and occupation of the property constitutes a debt for purposes of the determination of prescription. The word 'debt' clearly includes any liability arising from and being due to or owing under a contract. See Leviton and Son v de Klerk's Trustee 1914 CPD 685 at 691, HMBMP Properties (Pty) Limited v King 1981 (1) SA 906 (N) at 909 A - B.

25.

The Plaintiff relies on the explicit terms of the contract as recorded in paragraph 18 of the rectified contract that reads:

*"Nieteenstaande transport van die eiendom sal die verkoper in
okkupasie van die eiendom bly en ongestoorde besit van die*

eiendom geniet tot op tydstip van terug transporterings van die eiendom aan die verkoper deur die koper soos hierin later voorsien."

This condition as read with paragraph 12 of the particulars of claim (that the Plaintiff may no longer occupy the property) and as read with the fax of the Plaintiff to the Defendant dated 8 April 2008, makes it clear that the Plaintiff is not relying on an implied or tacit term of the contract. The principles of interpretation are set out in Coopers and Lybrand v Bryant 1995 (3) SA 761 (A) at 767 E – 768 E:

"According to the golden rule of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument."

26.

In interpreting the term of the contract, one is reminded never to interpret the particular word or phrase in isolation (*in vacuo*) by itself. See Swart en Ander v Cape Fabrix (Pty) Limited 1979 (1) SA 195 (A) at 202 C (per Rumpff CJ):

" Wat natuurlik aanvaar moet word, is dat, wanneer die betekenis van woorde in 'n kontrak bepaal moet word, die woorde onmoontlik uitgeknipt en op 'n skoon stuk papier geplak kan word en dan beoordeel moet word om die betekenis daarvan te bepaal. Dit is vir my vanse/fsprekend dat 'n mens na die betrokke woorde moet kyk met inagneming van die aard en opset van die kontrak en ook na die samehang van die woorde in die kontrak as 'n geheel."

27.

Although the Defendant's repudiation is explained in paragraph 12 of the particulars of claim, this Court still has regard to the context in which the phrase is used in the contract, and its interim relation to the contract as a whole, including the nature and purpose of the contract. I take cognisance of the background circumstances which explains the purpose of the contract, i.e. to matters probably present in the minds of the parties when they contracted. Both parties gave evidence regarding the background and the purpose of the contract. I have no doubt that the purpose of the contract was to transfer the property in the name of the Defendant and that the Defendant would remain owner of the property for as long as the Plaintiff fails to obtain a bond in his own name and it is only then that the Plaintiff would be obliged to retransfer the property into the name of the Plaintiff.

28.

The Defendant repudiated the contract and according to paragraph 12 of the particulars of claim, the Plaintiff accepted the repudiation. From then (8 April 2008), the impediment to litigation (if ever there was one) was removed and the Plaintiff was entitled to institute legal proceedings forthwith as soon as he has given notice. Accordingly, prescription began to run no later than the giving of notice. The Plaintiff regarded the conduct of the Defendant on 8 April 2008, as a clear indication that he no longer regarded himself as bound by the contract and the Plaintiff accepted this repudiation as such.

29.

Prescription will only be interrupted by service on the Defendant (debtor) of any process whereby action was instituted. In Santam Insurance Company Limited v Vilakasi 1967 (1) SA 246 (A), the majority judgement recorded at 253 H:

"It is clear that the service referred to in Section 6(1)(b) (of the Prescription Act 18 of 1943) which is consistent with the clear wording of Section 15(6) the Act that provides that: 'for the purpose 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 rules of court and any document whereby legal proceedings are commenced' must be service whereby action is instituted in a step in the enforcement of the claim or right. The underlying reason why such a service interrupts prescription, is that the creditor has thereby formally involved his debtor in court proceedings for the enforcement of his claim."

30.

The Plaintiff issued summons against the Defendant on or about 11 October 2011, which is on a date more than three years after the date on which the Plaintiff's claim against the Defendant arose.

31.

Since the repudiation, objectively occurred on 8 April 2008, prescription had commenced to run in respect of the claim of the Plaintiff against the Defendant

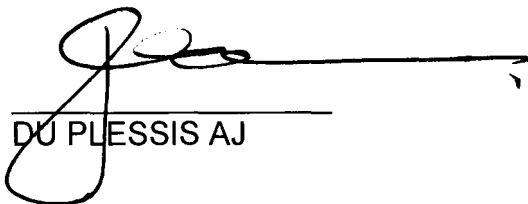
and summons was issued on 11 October 2011, the claim have become prescribed.

32.

As a consequence, I make the following order:

32.1. The Defendant's plea of prescription *in limine* is upheld;

32.2. The Plaintiff's claim is dismissed with costs, such costs consequent upon the employment of Senior Counsel.



DU PLESSIS AJ

Case number : 58497/2011

Matter heard on : 5 May 2016

For the Plaintiff : Adv J Moller

Instructed by : Lourens Attorneys

For the Defendant : Adv BC Stoop SC

Instructed by : Pennels Attorneys

Date of Judgment : 5 September 2015