

**REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
LIMPOPO DIVISION, POLOKWANE**

**CASE NO: 4955/2019**

In the matter between:

**JOHANNES VAN DER HEEVER**

**PLAINTIFF**

**And**

**ELMARIE HERMIE BIERMAN**

**DEFENDANT**

**JUDGEMENT**

**KGANYAGOJ**

- [1] On 10<sup>th</sup> August 2010 the plaintiff purchased the immovable property described as Farm Kareebosch [...], Portion [...], Molemole Local Municipality, Registration Division LS, Limpopo (Kareebosch farm) from Sunset Point Properties 212 cc (Sunset Point). The conveyancer who had attended to the transfer of Kareebosch farm into the names of the plaintiff was the defendant.
- [2] On 30<sup>th</sup> November 2010, whilst the plaintiff was awaiting the transfer of the Kareebos farm into his names, he was visited by one attorney Mr Bosman and advocate Nel who enquired from the plaintiff whether he was aware of the pending liquidation of Sunset Point. Mr Bosman had initiated the liquidation of Sunset Point, which application had been dismissed by the magistrate on 13<sup>th</sup> July 2010.

By then Mr Bosman had lodged an appeal against the judgment of the magistrate.

- [3] With that information, the plaintiff consulted with his attorneys. The defendant assured the plaintiff's attorneys that there was no liquidation application pending against Sunset Point. However, the defendant went on to inform the plaintiff's attorneys that the liquidation application of Sunset Point had been dismissed on 13<sup>th</sup> July 2010, and that an appeal has been lodged against the dismissal order. The defendant further informed the plaintiff's attorneys that a date of appeal had not yet been determined, that the appeal will be vigorously opposed, and also that the solvency of Sunset Point had been confirmed by the magistrate.
- [4] Based on that assurance from the defendant, the plaintiff proceeded with the sale and Kareebosch farm was transferred into the names of the plaintiff on 11<sup>th</sup> February 2011. On 14<sup>th</sup> February 2011, an urgent application was served on the plaintiff's attorneys, in which Mr Bosman acting in his capacity as executor of a deceased estate of one Mr Jones, sought an urgent interdictory relief interdicting and restraining the defendant from proceeding with the transfer pending the finalisation of the appeal. The plaintiff did not oppose the application since there was no relief that was sought against him.
- [5] The plaintiff did not participate in the appeal against the dismissal of the liquidation order by the magistrate. The appeal was duly heard in the Gauteng Division, Pretoria, on 9<sup>th</sup> February 2012. The full bench of the Gauteng Division upheld the appeal, and set aside the magistrate order, and substituted it with an order winding-up Sunset Point. That resulted in the liquidators of Sunset Point instituting proceedings seeking an order that the sale of Sunset Point to the plaintiff be declared void, as well as relief ancillary thereto.
- [6] The application by the liquidators was served on the plaintiff on 11<sup>th</sup>

September 2013. The plaintiff opposed the liquidators' application, and also filed a counterclaim seeking an order that the court validate the sale. On 12<sup>th</sup> December 2016 the High Court in Gauteng Division granted orders in favour of the liquidators. The plaintiff appealed against the judgment of the Gauteng Division to the Supreme Court of Appeal (SCA). The SCA dismissed the plaintiffs appeal with costs on 20<sup>th</sup> March 2018.

- [7] During April 2019 the plaintiff reached an agreement with the liquidators of Sunset point to remain the registered owner of Kareebosch farm against payment of the sum of R1 491 915.94. On 8<sup>th</sup> August 2019 the plaintiff instituted an action against the defendant for the recovery of the damages he might have suffered as result of the sale of Sunset Point been declared void. The defendant has defended the plaintiffs action and has also raised a special plea of prescription.
- [8] At the hearing of the matter the parties agreed to dispose the plea of prescription first, and also to dispose it by way of a stated case without leading any oral evidence. They have also agreed during the pre-trial that the onus relating to prescription rest upon the defendant. The joint chronology of events agreed upon by the parties were: (i) the record of appeal presented to the SCA in the matter between Van den Heever v Louis Marius Taljaard N.O. and Others, subject to the qualification that defendant only admits the authenticity of same to the extent that the documents forming part thereof are what they purport to be, but without admitting the contents of any documents as necessarily being true and correct; (ii) the Court is asked to determine, whether, in view of the chronology of events, and the evidence as reflected in the record presented to the SCA, with inclusion of the judgments by Judge AC Sasson in the matter in the Gauteng Division, Pretoria, case number 54704/2013 and of LE Leach JA in the SCA, the claim of the plaintiff has prescribed; and (iii) the parties further agreed that the facts referred to in the chronology of events be accepted as correct and admitted.
- [9] The defendant's main contention is that by not later than November

2010, alternatively by 18 January 2011, alternatively by 14 February 2011, alternatively by 9 February 2012, alternatively by September 2013, alternatively by October 2013, further alternatively by November 2014, plaintiff had obtained knowledge, alternatively reasonably ought to have obtained knowledge, of all the material facts necessary to sustain and complete the cause of action instituted against the defendant. That the debts forming part of the plaintiff's claims had become due on the abovementioned dates, in consequence whereof prescription of the plaintiffs aforesaid claims had started to run by no later than on/during any of the aforesaid dates/periods. Therefore, according to the defendant, the plaintiffs claims had become prescribed prior to the plaintiff having served his combined summons on defendant on 8<sup>th</sup> August 2019, the aforesaid date being more than three years since prescription had started to run.

- [10] The plaintiffs main contention is that similar as in the case of an exception, all allegations relating to the merits of the matter in the particulars of claim should be deemed as correct for purposes of deciding a special plea. That prescription cannot run against a creditor before his cause of action is fully accrued, that is before he is able to pursue his claim. That plaintiff simply had no claim (cause of action) against the defendant before the invalidation of the sale agreement was ordered by the Gauteng Division of the High Court on 12<sup>th</sup> December 2016. That payment by plaintiff of the amount of R1 491 915-95 to retain ownership of Kareebosch, and payment of the liquidators' costs of R1 616 828-88 all occurred after 20<sup>th</sup> March 2018 when the appeal against the judgment of the order of Gauteng Division, was dismissed with costs. That the harm and damages suffered by plaintiff only realised after 20<sup>th</sup> March 2018. It is therefore, the plaintiff's contention that the period of 3 years had not lapsed when on 8<sup>th</sup> August 2019 the combined summons was served upon defendant.

- [11] This court is called upon to determine whether the plaintiffs claim has prescribed as pleaded by the defendant in her special plea. In this

case the applicable period of prescription is three years as provided for in section 11(d) of the *Prescription Act*<sup>1</sup> (Act). Section 12 of the Act provides as follows:

"(1) Subject to the provisions of subsection (2), (3), and (4), prescription shall commence to run as soon as the debt is due.

(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

(4)... "

[12] In the case at hand, the identity of the debtor is not in dispute. The defendant had given several dates which she submits as the dates which the plaintiff is deemed have had knowledge of the facts from which the debt arose. In *Minister of Finance and Others v Gore NO*<sup>2</sup> Cameron JA et Brand JA said:

"This Court has, in a series of decisions, emphasised that time begins to run against a creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case comfortably."

[13] The plaintiff bought Kareebosch farm from Sunset Point on 17<sup>th</sup> August 2010, and it was transferred into the names of the plaintiff by

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<sup>1</sup> 68 of 1969

the defendant on 11<sup>th</sup> February 2011. At the time the plaintiff bought Kareebosch farm, there was a pending liquidation application against Sunset Point which factor the plaintiff was not aware of. Even though the liquidation application was dismissed by the magistrate on 13<sup>th</sup> July 2010, the attorneys of the creditors of Sunset Point had appealed that order. The liquidation application has been lodged with the magistrate court on 7<sup>th</sup> April 2010. The appeal by the creditors of Sunset Point was upheld by the North Gauteng High Court on 9<sup>th</sup> February 2012, and granted an order for the winding-up of Sunset Point. The effect of the order of 9<sup>th</sup> February 2012 was that the winding-up of Sunset Point was deemed to have commenced on 7<sup>th</sup> April 2010. Therefore, Kareebosch farm was transferred to the plaintiff while Sunset Point was deemed to have been in the process of winding-up.

[14] Even though at the time of the conclusion of the sale agreement, the plaintiff was unaware that there was a pending liquidation application against Sunset Point, during the period November 2010 and February 2011 before Kareebosch farm was transferred into the names of the plaintiff, it was brought to the attention of the plaintiff personally by Mr Bosman and advocate Nel representing the creditors of the pending liquidation application. Even though at that stage the application has been dismissed, there was a pending appeal. The plaintiff was assured by the defendant that there was no liquidation application pending as that has been dismissed on 13<sup>th</sup> July 2010. However, in the same breath, the defendant brought it to the attention of the plaintiff that there was a pending appeal which she will vigorously oppose.

[15] At the time it was brought to the attention of the plaintiff that there was a pending appeal against the order of the magistrate, Kareebosch farm has not yet been transferred into the names of the plaintiff, and Sunset Point has not yet received the purchase price. The plaintiff sought advise from the defendant regarding the pending liquidation of Sunset

and when informed that there was no pending liquidation, the plaintiff decided to proceed with the sale. By seeking advice from the defendant, the plaintiff was aware of the consequences of proceeding with the sale with a company which was deemed to be in the process of winding-up. At that stage the plaintiff knowing the consequences of proceeding with the sale had the opportunity of resiling from the agreement, or take a chance and proceed with it with the hope that the appeal will fail. The plaintiff chose the latter.

[16] With the assurance that the plaintiff received from the defendant that there was no pending liquidation application, that would have made the plaintiff to believe that all was well, especially that it was not expected of the defendant who is an officer of the court to have misled her fellow colleagues. That would have put the plaintiff at ease to proceed with the sale. The plaintiff was not a party to the appeal process and did not take part in the appeal process. There is no evidence that the plaintiff was updated of the progress of the appeal.

[17] After the order of the magistrate was successfully appealed, on 3<sup>rd</sup> September 2013 the joint liquidators of Sunset Point launched an application for a declaratory order that it be declared that the disposition by Sunset Point of Kareebosch farm be declared to be void. The plaintiff was a party to the proceedings as the first respondent and was duly served with papers. On 25<sup>th</sup> October 2013 the plaintiff deposed his answering affidavit to the joint liquidators' application. The plaintiff in his answering affidavit has also included a counterclaim in which he was seeking the validation of the agreement of sale of Kareebosch farm. The answering affidavit together with the counterclaim was duly served on defendant on 28<sup>th</sup> October 2013.

[18] On receipt of the application from the joint liquidators by the plaintiff during October 2013, it was now clear to the plaintiff that there was a problem with the sale agreement he had entered into with Sunset Point. If there was still any uncertainty with regard to the sale, that

has been cleared, hence the plaintiff counterclaim of seeking to validate the sale. That shows that the plaintiff was fully aware of the consequences to follow should he not follow that route of trying to validate the sale agreement. For the plaintiff to file such a counterclaim shows that he had minimum facts (if not full), which were necessary for him to institute an action against the defendant. However, he chose the route of opposing the joint liquidators' application and also of bringing a counterclaim.

[19] On 12<sup>th</sup> December 2016 the High Court in Gauteng Division, Pretoria declared the sale by Sunset Point to the plaintiff void, and authorised the liquidators of Sunset Point to take all steps necessary to procure the re-transfer of Kareebosch farm from the plaintiff. The plaintiff appealed the judgment and order of the Gauteng Division Pretoria, to the SCA, which appeal was dismissed on 20<sup>th</sup> March 2018 with costs. That prompted the plaintiff to enter into negotiations with the joint liquidators in order for him to retain ownership of Kareebosch farm. That resulted in the joint liquidators and the plaintiff agreeing on payment of an amount of R1 491 915-95 together with liquidators' costs of R1 616 828-88 by the plaintiff.

[20] On 2<sup>nd</sup> August 2019 the plaintiff instituted action against the defendant for the alleged damages he had suffered as a result of the defendant's alleged breach of her legal duty and obligations towards the plaintiff. The plaintiff's combined summons was served on the defendant on 8<sup>th</sup> August 2019. It is the plaintiff's contention that his claim did not arise, and in particular did not become due before 12<sup>th</sup> December 2016, and therefore the prescription period of three years had not elapsed when on 8<sup>th</sup> August 2019 the combined summons was served upon the defendant. The plaintiff submits that the upholding of the appeal against the dismissal of the application for liquidation by the magistrate on 9<sup>th</sup> February 2012 did not cause damages to him, and that it was only on 12<sup>th</sup> December 2016 when the High Court in Pretoria ordered re-transfer of Kareebosch farm, that the plaintiff was deprived ownership, and it became clear that payment of the



purchase price for Kareebosch farm was without any value. The plaintiff further submits that clarity relating to the voidness of the agreement, and the duty to re-transfer Kareebosch farm, was only obtained on 12<sup>th</sup> December 2016, when judgment was granted against the plaintiff.

[21] In *Fluxmans Inc v Levenson*<sup>3</sup> Zondi JA said:

"Section 12(3) of the Prescription Act requires knowledge only of the material facts from which the prescriptive period begins to run – it does not require knowledge of the legal conclusion (that the facts constitute invalidity) (*Claasen v Bester* 2012 (2) SA 404 (SCA) ([2011] ZASCA 197))."

[22] In my view, the application of the joint liquidators that was served on the plaintiff during October 2013 has given the plaintiff minimum facts that the purchase price for Kareebosch farm was without value. Those minimum facts have thus enabled the plaintiff to be in position to draft a counterclaim in order to validate the sale agreement. The same facts which enabled the plaintiff to draft a counterclaim was also necessary to institute an action against defendant, should the plaintiff wished to pursue a claim of the purchase price paid to Sunset Point.

[23] The plaintiff's main claim in his particulars of claim is payment of R1 491 915.96 and R1 616 828.88 which were payments made after he had exhausted his legal remedies. In the alternative to the main claim of R1 491 915.96 he is claiming R3 778 561.46. The alternative claim is the total amount of the purchase price and other amounts paid to defendant as the transferring attorneys. After the plaintiff has exhausted his legal remedies, during April 2019 in an attempt to mitigate his damages, he entered into a partly written oral agreement with the liquidators and creditors of Sunset Point, which resulted in the parties agreeing that the plaintiff would remain the registered owner of Kareebosch farm against payment of R1 491 915.94.

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<sup>3</sup> 2017 (2) SA 520 (SCA) at 537A

[24] The claim of R1 491 915.94 emanate from the agreement which the plaintiff has reached with the liquidators and creditors of Sunset Point during April 2019 and which has created a new cause of action. In my view, the claim that has prescribed is the alternative claim of R3 778 561.46 as the plaintiff had knowledge of material facts which were necessary for him to institute action against the defendant during October 2013. The agreement of April 2019 did not revive the prescribed claim. Payment of R1 616 828-88 was for liquidators' costs which became due and payable after the plaintiff has exhausted his legal remedies. Therefore, the plaintiff's claim of payment of R1 491 915-94 and R1 616 828-88 have not yet prescribed on 8<sup>th</sup> August 2019 when the combined summons was served upon defendant.

[25] Turning to costs, the general rule is that costs follow the suit, and that the issue of awarding of costs is within the discretion of the trial judge. The defendant was partially successful with her special plea of prescription to the plaintiff's alternative claim. It will therefore be fair if each party pays his/her own costs

[25] In the result, I make the following order:

25.1 The defendant's plea of prescription is upheld on the alternative claim of R3 778 561-46, and dismissed on the main claims of the plaintiff.

25.2 Each party to pay his/her own costs.

**KGANYAGOJ**

**JUDGE OF THE HIGH COURT OF SOUTH  
AFRICA, LIMPOPO DIVISION,  
POLOKWANE**

**APPEARANCES:**

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: Adv JG Bergenthuin SC

Instructed by

:Bernhard van der Hooven attorneys

Counsel for the defendant : Adv JC Erasmus  
Instructed by : Elmarie Bierman attorneys

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