

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

REPORTABLE

CASE NO: A359/06

In the matter between

JUBEIDA KHATUN BANDERKER N.O

First Appellant

FATIMA DHANSAY N.O Second Appellant

JUBEIDA KHATUN BANDERKER

Third Appellant

FATIMA DHANSAY

Fourth Appellant

MASTER OF THE HIGH COURT

Fifth Appellant

and

MOHAMMED IQBAL GANGRAKAR N.O

First Respondent

MOHAMMED IQBAL GANGRAKAR Second Respondent

COURTENAY DANIEL ULYATE N.O Third Respondent

JUDGMENT DELIVERED ON 22 FEBRUARY 2008

ZONDI, J

INTRODUCTION

[1] In the Court *a quo* the respondents brought an application in which they sought an order,

inter alia:

1. setting aside the refusal by the Master to sustain objections by the respondents

to the amended liquidation and distribution account in the estate of the late Jameela Omar Dawood filed by the first and second appellants;

2. directing the first and second appellants to effect transfer to the third respondent of the 25% interest in Erven 988 and 1021 Simonstown in the name of Jameela Omar Dawood.

[2] In terms of his last will and testament dated 7 October 1942, the late Omar Dawood, appointed his children as “the sole and universal heirs in equal shares of all” of his estate. He had four children, namely Dawood Omar Dawood, Sulaiman, Jameela and Kulsum. The estate of Omar Dawood comprised mainly the remaining extent of the property called “Constantia”, known as Erf 988, Simonstown, situate at 130 St. George’s Street, Simonstown, and Portion 1, Portion of Lot, known as Erf 1021 Simonstown, situate at 128 St. George’s Street, Simonstown. These erven were duly registered in equal undivided shares in the names of the late Omar Dawood’s four children and they remain so registered.

[3] Jameela died on 6 December 1964 and was survived by her minor daughters Jubeida, born on 10 July 1950, and Fatima, born on [day/month] 1956, who are the appellants in the present appeal. In her will dated 26 March 1954, Jameela appointed Jubeida and Fatima as her heiresses and Sulaiman as their guardian and the executor of her estate. She gave Sulaiman the right at any time, within three years of her death, to purchase any immovable property she might have at the municipal valuation thereof.

[4] Sulaiman was duly appointed as the executor of Jameela’s estate on 1 February 1965. As an executor of Jameela’s estate Sulaiman duly filed a liquidation and distribution account dated 22 May 1967.

[5] In the account, the following statement appears:

“In terms of the Will of the deceased the brother Sulaiman Omar Dawood is given the right to purchase and the said Sulaiman Omar Dawood has now exercised this right and will purchase the within immovable properties for the amounts disclosed, namely at a quarter of the municipal valuation”

He also annexed a document to the liquidation and distribution account which reads:

“ I, the undersigned, Sulaiman Omar Dawood hereby exercise the option granted me by my sister the late J.O. Dawood, as set out in clause three of her Will dated the 26th March, 1954”

[6] The only asset in the account was Jameela's 25% undivided share in the two erven and this is what Sulaiman awarded to himself. Sulaiman did not take transfer of the said share as the properties were situated in an area which had been proclaimed a white group area. His attorneys then wrote to the Master suggesting that the 25% undivided share remain registered in the name of the estate and that the matter be kept in abeyance. The Master appeared to have accepted the suggestion and in the circumstances Jameela's estate was not finally wound up.

[7] Perhaps it is more apposite at this stage to deal briefly with the provisions of the Group Areas Act 36 of 1966 and how they affected the rights of the beneficiaries to acquire their respective interest in the relevant immovable properties.

[8] The Group Areas Act, no 41 of 1950 repealed several portions of statutes which had imposed restrictions on ownership or occupation of land by members of certain race groups. The Group Areas Act 41 of 1950 and amendments to that Act were repealed by the Group Areas Act 77 of 1957 which itself was repealed by the Group Areas Act 36 of 1966.

[9] In terms of the Group Areas Act, 1966 the State President was vested with the power to declare by Proclamation in the Government Gazette that as from a specific date, a defined area was to be either an area for occupation by members of a specific group; or an area for ownership by members of a specific group; or for both occupation and ownership by members of a specific group. In terms of the Group Areas Act certain persons defined as “disqualified persons” were prohibited from acquiring immovable property except under the authority of a permit.

[10] In terms of Proclamation no. 202 of 1967, published in the Government Gazette dated 1 September 1967, the area in which the immovable properties under discussion were situated was declared in terms of section 23 (1)(b) of the Group Areas Act to be a group area for ownership and occupation by members of the white group.

[11] The effect of the Proclamation was to prohibit Sulaiman, being a disqualified person as defined in section 1 of the Group Areas Act, from acquiring his share from the estate of Jameela, by registration of the transfer thereof into his name, except under the authority of a permit issued to him in pursuance of the provisions of the Act. The Group Areas Act was subsequently repealed by the Abolition of Racially Based Land Measures Act 108 of 1991.

[12] Sulaiman and Dawood controlled the properties for themselves from the time of Jameela's death, maintaining them, paying levies and charges in respect thereof, letting portions thereof and collecting rentals in respect thereof. On 1 July 1960 Sulaiman made a will in which he appointed Dawood Omar Dawood the sole heir and executor together with one Ernest Harry Bloch, of his estate. Sulaiman died on 28 October 1968.

[13] At the time of his death Sulaiman was married in community of property to Zaynab Hoosain Dawood with the result that Dawood in fact only inherited from him an undivided half share of the joint estate. On 20 March 1974 Dawood and Zaynab concluded a redistribution agreement in terms whereof all immovable properties in Sulaiman's estate were to be transferred to Dawood.

[14] Dawood's final liquidation and distribution account in Sulaiman's estate dated 15 August

1990 made provision for the transfer to Dawood of half of the undivided shares in the properties, being Sulaiman's 25% undivided share and the 25% undivided share he had purchased from Jameela's estate. It is common cause that Dawood did not apply for a permit in terms of the Group Areas Act to have the property transferred to him. As the properties were still situated in an area that had been proclaimed a white group area and Dawood was a member of the Asian group, the transfer could not be registered.

[15] Dawood died intestate on 1 April 1998 and the second respondent is his heir.

[16] It is clear from these facts that after the death of Sulaiman on 28 October 1968 there was no executor in Jameela's estate until 31 October 1980 when Dawood was appointed sole executor. There was again a vacancy in the office of executorship in Jameela's estate after the death of Dawood on 1 April 1998 until 12 March 2003, when the first and second appellants were appointed.

[17] After their appointment as executrices of Jameela's estate, Jubeida and Fatima filed an amended liquidation and distribution account in Jameela's estate, awarding Jameela's 25% undivided share in the relevant properties to themselves as heiresses.

[18] The respondents objected to the amended liquidation and distribution account filed with the Master on the ground that Sulaiman had purchased Jameela's undivided share in the immovable properties in terms of the option which Jameela had granted to him in terms of her Will dated 26 March 1954 but which he could not take transfer of as he was prohibited to do in terms of the Group Areas Act. The Master did not sustain the objection and advised the applicants to bring the dispute before the Court.

[19] It is against this background that the respondents brought the application to the Court *a quo*. The matter came before Motala, J who found in favour of the respondents. With the leave of appeal having been granted by the Court *a quo* on some of the issues which it had decided in favour of the respondents, the appellants now appeal to this Court. The appellants attack the judgment of the Court *a quo* on the following grounds:

“13.1 Whether the finding of extinctive prescription not running during the period that the claimant to the share and the executor of the estate being the same person was correct;

13.2 *That the Honourable Court having found that the option was validly exercised, erred in not finding that it was imperative for the claimant and/or the executor of the estate (as the debtor) to have immediately applied for a permit in terms of the Group Areas Act in order to enforce such right acquired;*

13.3 *That the Honourable Court had erred in attaching no and/or insufficient weight to the consequences relating to Sulaiman's and/or the executor of his estate's failure and/or omission to apply for a permit in terms of the*

Group Areas Act and not to merely speculate at the reasons of the failure of the aforementioned persons to apply for a permit;

13.4 *That the Honourable Court had erred in not finding that on a balance of probabilities the aforesaid Sulaiman Dawood and/or the executor of his estate could have acquired a permit under the Group Areas Act in order to obtain transfer of Jameela's shares in the relevant properties;*

13.5 *That the Honourable Court had erred in finding that even if Jameela's estate at all times had an executor not the same person as the claimant, the latter could not have successfully sued for transfer-even if he had a Group Area's permit;*

13.6 *That accordingly the Honourable Court had erred in not finding that, in the circumstances, the claimant's right to claim transfer had become prescribed;*

13.7 *That the Honourable Court had erred in not finding that at the time the option was exercised, a conflict of interest arose in that the said Sulaiman Dawood was also the executor of Jameela's estate and the guardian of the respondents".*

Extinctive Prescription

[20] In the Court *a quo* the appellants had argued that Sulaiman's claim for transfer of the share in the properties had prescribed. The Court *a quo* rejected the appellants' contention, finding that extinctive prescription did not run during the period that the claimant and the executor of the estate were one and the same person. It is this finding which the appellants are challenging on appeal.

[21] *Mr Uijs* who together with *Mr Banderker*, appeared for the appellants, submitted that Sulaiman's right to claim transfer of Jameela's 25% undivided share in the relevant erven prescribed in terms of the Prescription Act, 68 of 1969. He argued that the fact that Sulaiman or his successor in title was both the executor and the beneficiary in Jameela's estate did not interrupt the running of prescription.

[22] He submitted that the Court *a quo* was wrong in relying upon the English case of (**Binns v Nichols** [1886] LR2 Eq. 256) which is authority for the proposition that prescription does not run during the period that the person entitled to receive a legacy is also the personal representative who is liable to pay it. He argued that the fact that Sulaiman was both an executor and beneficiary in Jameela's estate did not prevent him from instituting a claim against Jameela's estate for the transfer of Jameela's 25% undivided share in the properties. In *Mr Uijs*' view Sulaiman could have relinquished his position as an executor and thereafter instituted a claim in his capacity as a creditor.

[23] *Mr Smalberger*, who appeared for the respondent, submitted that the Court *a quo* was correct in following the **Binns v Nichols** judgment as it would be absurd to hold that prescription

runs against a person in one capacity and in favour of him in another capacity.

[24] It is correct that there is no direct South African authority in point on this issue and I was unable to find any reference to **Binns v Nichols** in the reported South African cases. However, in the United Kingdom it has been followed in various cases (In re **Blachford (Blachford v Worsley)** [1884] L.R 27 Ch.D 676. In re **Pardoe (McLaughlin v Penny)** [1906] I Ch. 265 and In re **Welch (Mitchell v Willders)** [1916] Ch. 375. In these cases the Courts had to consider whether the Statute of Limitations applied in a claim against the estate in circumstances where the executor and the creditor of the estate are one and the same person. Following **Binns v Nichols** it was held that the Statue of Limitations did not apply. In particular Kekewich J in **McLaughlin v Penny** confirmed that **Binns v Nichols** decision was still the law.

[25] In South Africa, the Prescription Act deals with prescription of debts. Sections 10 and 11 of the Prescription Act, 68 of 1969 provide for the extinction of debts by prescription. They provide as follows:

“**10. Extinction of debts by prescription-** (1) Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.

(2) By the prescription of a principal debt a subsidiary debt which arose from such principal debt shall also be extinguished by prescription.

(3) Notwithstanding the provisions of subsections (1) and (2), payment by the debtor of a debt after it has been extinguished by prescription in terms of either of the said subsections, shall be regarded as payments of a debt.

11. Periods of prescription of debts – The period of prescription of debts shall be the following:

- (a) thirty years in respect of –
 - (i) any debt secured by mortgage bond;
 - (ii) any judgment debt;
 - iii) any debt in respect of any taxation imposed or levied by or under any law;
 - iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;
- b) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);

- c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b);
- d) save where an Act of Parliament provides otherwise three years in respect of any other debt.

[26] Section 10(1) of the Prescription Act makes it clear that a debt is extinguished after the lapse of the relevant prescriptive period. Although the term “debt” is not defined in the Act, the Courts have held that it has a wide and general meaning and includes an obligation to do something or refraining from doing something (**Desai NO v Desai and Others** 1996(1) SA 141 (A) at 146 I; and **Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd** 1981(3) SA 340(A)).

[27] It was accordingly submitted on behalf of the appellants that the exercise of the option as set forth in clause 3 of Jameela’s Will imposed, incontrovertibly, upon Sulaiman and his successor—in title the obligation to procure transfer of the relevant share and that his failure to apply for a permit as envisaged by the provisions of the Group Areas Act rendered the right acquired in terms of the Will as extinguished after the expiry of the relevant prescription period.

[28] At the time Sulaiman exercised the option, the Prescription Act of 1943 was applicable to an obligation to procure transfer of the relevant shares. The Prescription Act of 1943 was repealed by the Prescription Act of 1969 which commenced on 1 December 1970. However, in terms of section 16(2)(b) of the Prescription Act of 1969 the provisions of any law which immediately before the commencement applied to the prescription of a debt which arose before the 1969 Prescription Act would continue to apply to the prescription of the debt in all respects as if the 1969 Prescription Act had not come into operation.

[29] In terms of section 3(2) of the Prescription Act, 1943 the period of extinctive prescription was six years in respect of written contracts. Section 7(1)(a) of the 1943 Act suspends the running of extinctive prescription “so long as performance of an obligation is delayed by *vis major* or the debtor is lawfully entitled to delay performance on any other ground”.

[31] The general rule of the common law is that prescription does not run against any person who is not able to bring an action for the recovery of a debt. (**Louw v Louw and Others** 1933 (CPD) 163 at 168.)

[32] Turning to the facts of the present case it is common cause that Jameela’s estate had no executor during the following three periods:

- (a) between 6 December 1964 when she died and 1 February 1965 when Sulaiman was appointed;

(b) between 28 October 1968 when Sulaiman died and 31 October 1980, when Dawood was appointed;

(c) between 1 April 1998, when Dawood died and 12 March 2003 when the appellants were appointed.

[33] I agree with the Court's *a quo* finding that neither Sulaiman nor his successor in title could institute an action during the period that there was no executor. In the absence of an executor he could not institute a claim and in my view that constituted an impediment within the meaning of the 1943 Act. Moreover prescription could not run while Sulaiman or his successor in title was the executor of Jameela's estate because he could not institute an action against himself as an executor of Jameela's estate for transfer of Jameela's 25% undivided share in the properties. In the circumstances I find, following **Binns v Nichols**, that the Prescription Act did not apply while Sulaiman or his successor in title was an executor in Jameela's estate and therefore Sulaiman's rights to acquire Jameela's 25% undivided share in the two relevant erven did not prescribe.

[34] In the light of the conclusion I have reached it then becomes unnecessary to consider the rest of the submissions made on behalf of the appellants.

[35] In the circumstances the appeal is dismissed with costs

ZONDI, J

I agree,

NC ERASMUS, J

I agree,

VELDHUIZEN,