IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

Case no: 9071/07

In the matter between:

REGINALD CHARLES VAN REENEN	First Applicant
PEARL JEAN VAN REENEN	Second Applicant
and	
FERROL WALLES VAN REENEN	First Respondent
MARY MIRIAM VAN REENEN	Second Respondent
REGISTRAR OF DEEDS, CAPE TOWN	Third Respondent

JUDGMENT: 22 FEBRUARY 2011

Schippers AJ

[1] This is an application for an order declaring that the applicants are entitled to the registration of transfer into their names of the first and second respondents' undivided half-share in certain property, known as Portion 7 (portion of Portion 4 of the farm *"Myrtle Grove"* No. 824 situate in the Sir Lowry's Pass Local Area, Division of Stellenbosch, Western Cape (*"the property"*); and directing the first and second respondents to take the necessary steps give effect to that registration of transfer.

[2] The first and second applicants are married to each other in community of property, as are the first and second respondents. The first applicant and the first respondent are brothers. Their father, the late Rudolph C. Van Reenen (*"the deceased"*), in his will bequeathed the property to them in equal shares. In January 1986 and in accordance with the provisions of the deceased's will, the property was transferred into the names of the applicants and the respondents who have since been registered as the joint owners of the property in equal and undivided shares.

[3] The applicants' claim is founded on a written agreement which they allege they entered into with the respondents on 15 April 1982 (*"the agreement"*). The applicants say that in terms of the agreement, drawn up by the first applicant's former attorney, Mr. G. Malherbe (*"Malherbe"*), they purchased the the respondents' undivided half-share in the property for R4 000.00; that the purchase price was paid then and there; and that during the negotiations, it was agreed that the first respondent would be entitled to occupy the house on the property in which he was living at that stage for the rest of his life. A reading of the agreement reveals that it is a redistribution agreement entered into between the first applicant and the first respondent. The relevant provisions are these:

> *"NADEMAAL die partye 'n ooreenkoms aangegaan het met betrekking tot die verdeling van 'n sekere erfporsie van hulle synde 'n Gedeelte Grond geleë in die Afdeling van Stellenbosch, Gedeelte 7 van die Plaas Nr. 824,*
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> ...
>
> *EN NADEMAAL die partye voorts ooreengekom het met betrekking tot 'n herverdeling van hulle erfporsie*
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> ...

2. *Dit word ooreengekom dat REG [Reginald Charles Van Reenen] ''n bedrag van R4000 (VIER DUISEND RAND) sal betaal aan FERROL [Ferrol Walles Van Reenen] in volle en finale vereffening van enige erfporsie of eis op erfporsie wat FERROL mag hê en eis ten opsigte van die EIENDOM, ten opsigte van die boedel van sy wyle Vader en Moeder.*

3. *Die bedrag van R4000,00 (VIER DUISEND RAND) sal betaal word deur REG aan FERROL gelyktydig met ondertekening hiervan, en die ondertekening hiervan deur FERROL is ook 'n erkenning van ontvangs van betaling.*

4. *Hierdie ooreenkoms sal voorts ook voldoende kwitansie wees met betrekking tot die ontvangs van gemelde FERROL van sy erfporsie in die gemelde boedel en so ook sy porsie van die EIENDOM."*

[4] The respondents deny that they entered into the agreement. They say that there were no negotiations between them and the applicants regarding the purchase of the first respondent's his half-share of the property; that they did not sign the agreement; and that they did not receive the sum of R4 000 from the applicants.

[5] It is convenient to deal firstly with the respondents' contention that there are substantial legal impediments to the relief sought by the applicants. These are that the applicants' claim has prescribed; and that the alleged agreement is void for want of compliance with the provisions of section 2(1) of the Alienation of Land Act 68 of 1981 (*"the Alienation of Land Act"*).

Prescription

[6] The agreement does not stipulate any date for the transfer of the first respondents' half-share of the property to the first applicant. It is settled law that if a contract does

not stipulate a date for performance, the debtor is obliged to perform forthwith, alternatively within a reasonable time.[1]

[7] The agreement was concluded on 15 April 1982. Transfer of the property from the deceased's estate into the names of the applicants and the respondents jointly, was effected on 29 January 1986. The respondents therefore contend that a reasonable period for the implementation of the agreement has elapsed and that any claim based on the agreement has prescribed in terms of the Prescription Act 68 of 1969 (*"the Prescription Act"*).

[8] Section 10(1) of the Prescription Act provides that a debt shall be extinguished by prescription after the lapse of the relevant period, which in this case is three years. The first question that arises is whether the applicants' claim constitutes a *"debt"* as contemplated in the Prescription Act. Mr. Brown, who appeared for the applicants, submitted that the case does not concern enforcement of a contractual debt, as the respondents sold their personal right to claim transfer of the property from the estate to their co-heirs, the applicants. The applicants' performance was payment of the purchase price. By providing the applicants with the signed deed of sale, the respondents performed in terms of the agreement and ownership in the personal right to registration of transfer passed to the applicants. He contended that once the parties have performed, the administrative requirements of winding up the estate and registering transfer are then required to take place. These requirements, it was submitted, do not constitute obligations on the part of parties to a contract.

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1 *Nel v Cloete* 1972 (2) SA 150 (A) at 169E-G.

[9] The argument cannot be sustained. Although the Prescription Act does not define the term *"debt"*, it has a wide and general meaning and includes whatever is due from any obligation.[2] More specifically, an obligation to pass transfer of land is a *"debt"* as contemplated in section 10(1) of the Prescription Act.[3] So too, a claim for the enforcement of an owner's rights to property.[4] In the instant case the redistribution of the property was brought about by a sale agreement.[5] The applicants are claiming performance of the very obligation or debt due under clause 2 of that agreement. It follows that the applicants' claim to the undivided half-share of the property, constitutes a debt as envisaged in section 10(1) of the Prescription Act.

[10] The next question is from what date prescription began to run. Section 12(1) of the Prescription Act provides that prescription shall commence to run as soon as the debt is due. A debt is due when the creditor has the basic facts necessary to institute a claim. The running of prescription is not postponed until the creditor becomes aware of the full extent of its rights, neither until a creditor has evidence to enable it to prove its case comfortably.[6]

[11] In terms of clause 2 read with clause 4 of the agreement, the first respondent was not obliged to perform immediately. At the earliest, performance would have been due when the property was transferred from the estate to the applicants, in accordance

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2 *Electricity Supply Commission v Stuarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) at 344F-G.
3 *Desai NO v Desai and Others* 1996 (1) SA 141 (A) at 146H-147A.
4 *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) 313 (SCA) para 19.
5 *Klerck NO v Registrar of Deeds* 1950 (1) SA 626 (T) at 629.
6 *Nedcor Bank Bpk. v Regering van die Republiek van Suid-Afrika* 2001 (1) SA 987 (SCA) paras 11 and 13; *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA) para 17.

with clauses 2 and 4 of the agreement. An intermediate transfer by the estate to the heirs would not have been necessary, by virtue of section 14(1)(b)(iii) of the Deeds Registries Act 47 of 1937.[7] Ordinarily, performance under a redistribution agreement of the kind in question takes place when the estate is wound up, more specifically, when the details of the property and its award are included in the distribution account; and the property has to be distributed by the executor in accordance with a redistribution agreement.[8] There are two liquidation and distribution accounts attached to the founding papers dated 26 March and 20 August 1979, respectively. These obviously do not include a reference to the agreement entered into on 15 April 1982. It is not clear from the papers whether a further liquidation and distribution account was submitted to the Master in respect of the deceased's estate. It thus cannot be determined precisely when prescription began to run. However, nothing turns on this as it is common cause that on 29 January 1986, the property was transferred from the estate into the names of the applicants and the respondents. The right to claim transfer of the first respondent's half-share of the property would thus have been enforceable on 29 January 1986 at the earliest, when prescription began to run.

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7 Section 14 of the Deeds Registries Act reads inter alia as follows:
"14(1). Save as is otherwise provided in this Act or in any other law or as directed by the Court-
(a) transfers of land ... shall follow the sequence of the successive transactions in pursuance of which they are made ...;
(b) it shall not be lawful to depart from any such sequence in recording in any deeds registry any change in the ownership in such land ...;
Provided that-
(i) ...
(ii) ...
(iii) if in the administration of the estate of a deceased person any redistribution of the immovable property in such estate takes place among the heirs of the deceased ... the executor or administrator of such estate may transfer or cede the property direct to the persons entitled thereto in terms of such redistribution."

8 See-in this regard regulation 5(1)(e)(iii) of the Regulations in terms of section 103 of the Administration of Estates Act 66 of 1965.

[12] Given that the right to claim transfer of the half-share of the property was enforceable as from 29 January 1986, it cannot sensibly be disputed that a reasonable period for performance of the obligation contained in clause 2 of the agreement has long since elapsed. But the applicants say that it was only in mid-2005 that they discovered that the agreement had not been implemented by their attorneys. They contend that the debt should be deemed not to be due as envisaged in section 12(3) of the Prescription Act. Section 12(3) reads:

> *"A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and 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."*

[13] The purpose of the Prescription Act, with reference to section 12(3), in the words of Schutz JA in *Nedcor*,[9] is this:

> *"Wat die Wet nastreef, is 'n gulde middeweg tussen die onbillikheid aan die een kant, dat 'n potensiële skuldenaar 'n ewigheid na die plaasvind van die gewraakte gebeure skielik met hofverrigtinge bedreig word en die onbillikheid, aan die ander kant, dat 'n potensiële skuldeiser sy aanspraak op regshulp bloot vanweë tydsverloop verbeur waar hy, sonder enige verwyt aan sy kant, nie oor die nodige inligting beskik om sodanige hofverrigtinge inmiddels van stapel te stuur nie."*[10]

[14] The requirement that the creditor shall be deemed to have the requisite knowledge if he could have acquired it by exercising reasonable care, requires diligence, not only in ascertaining the facts underlying the debt, but also in relation to the evaluation of

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9 *Nedcor Bank Bpk. v Regering van die Republiek van Suid-Afrika* 2001 (1) SA 987 (SCA).

10 *Nedcor* n 9 para 9.

those facts. Put simply, a creditor is deemed to have the requisite knowledge if a reasonable person in his or her position would have established the identity of the debtor and the facts from which the debt arose.[11]

[15] In the founding affidavit, the first applicant states that he understood that transfer of the property in terms of the agreement had in fact been registered; that he recalls that Malherbe had advised him that registration of transfer had taken place; that he did not receive a copy of the deed of transfer; and that he and the second applicant were entirely unaware that the respondents were in fact reflected as co-owners of the property in the Deeds Registry. The applicants say that they accepted that their attorneys had followed their instructions to implement the agreement, and that they and the respondents had acted as if the applicants were the owners of the property. It was only in the middle of 2005 that the applicants were informed of the true state of affairs. This happened at a meeting at the offices of Morkel & De Villiers, the first applicant's erstwhile attorneys. The first and second respondents were present at this meeting, as was Ms. S. Carelse (*"Carelse"*), the first applicant's older sister, and the first respondent. The first applicant was shown a copy of the title deed of the property and told that in the process of preparing the first respondent's will, it was discovered that the applicants and the respondents were joint owners of the property.

[16] As regards their acceptance that transfer of the property in terms of the agreement had in fact taken place, there is an insurmountable hurdle in the path of the applicants. It

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11 *Drennan Maud & Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) at 209F-G.

is that prescription is not interrupted where a creditor incorrectly believes that the debt has been discharged.[12]

[17] In *Munnikhuis*, a full bench of the WLD, held that because section 12(3) of the Prescription Act refers only to *"facts from which the debt arises"*, ignorance of the non-performance of an obligation is irrelevant;[13] and that the Act does not provide that prescription is suspended for so long as the creditor incorrectly believes that the debt has ceased to exist because it has been discharged. Neither does the Act in these circumstances vest an equitable discretion in the court. [14] The court concluded as follows:

> *"Section 12(3) therefore does not assist a creditor who, knowing of the existence of a debt, abstains from taking action to enforce it because it mistakenly believes that the debt has been performed. In* Umhlebi v Estate of Umhlebi and Fina Umhlebi *(1909) 19 EDC 237 at 250 and 252, Kotzé JP thought that as ignorance of a person's right to sue prevented him from initiating proceedings, prescription should not run until he became aware of his rights, referring to Dig 3.6.6 (Gaius) – 'for where he does not know that there is reason for suit to be brought against him, he is held not to have the power of bringing one' (S P Scott's translation). But lack of knowledge is of avail now only to the extent that s 12(3) or any other statutory provision grants relief."*[15]

[18] Mr. Brown however submitted that *Munnikhuis* was wrongly decided and urged me to depart from it. In my view, the reasoning in *Munnikhuis* is sound and founded on principle. Prescription of a debtor's duty to perform under a contract runs from the moment that the obligation falls due. Since a creditor cannot be said to be unaware of

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12 *Munnikhuis v Melamed NO* 1998 (3) SA 873 (W) at 890F per Cameron J, Wunsh J and Fevrier AJ.
13 *Munnikhuis* n 12 at 890F.
14 *Munnikhuis* n 12 at 891C-D.
15 *Munnikhuis* n 12 at 893H-I.

the debtor's duty to perform or his or her identity, section 12(3) does not assist a creditor who, knowing of the existence of the debt, takes no steps to enforce it because he or she mistakenly believes that the debt has been performed.[16] The judgment is furthermore consistent with the plain wording of section 12(3); the aim of the Prescription Act as stated in *Nedcor*; and the overall purpose of the Act which provides for a so-called strong prescriptive regime whereby the prescribed debt is in fact extinguished.[17]

[19] Christie suggests that the seemingly inequitable result of treating ignorance of the non-performance of an obligation as irrelevant should be avoided by treating the failure to perform the contractual obligation as one of the facts from which the debt arose.[18] But even if this approach – which I do not accept is correct – is followed in this case, in my view, the applicants could by the exercise of reasonable care have established that the property had not been transferred in accordance with the agreement. There are a number of reasons for this.

[19.1] The applicants' ignorance of the fact that the property was not transferred into their names should not arise out of their own failure to exercise reasonable care. If they could have acquired this knowledge by acting diligently, their inertia will not excuse their delay.[19] In 1986 Malherbe advised the first applicant that registration of transfer of the property had taken place. A copy of the title deed had been sent by Morkel & De

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16 Van der Merwe et al (eds) *Contract: General Principles* (3rd ed 2007) 561.
17 *Desai* n 3 at 147A.
18 Christie: *The Law of Contract in South Africa* (5th ed 2006) 488.
19 *Gericke v Sack* 1978 (1) SA 821 (A) at 832C-D.

Villiers to Malherbe. The first applicant says that he did not receive a copy of the deed of transfer. But he did not ask for it either. Nor did he make any enquiries as to whether the property had been transferred in terms of the agreement. The applicants could easily have established that the respondents were part owners of the property by referring to the public documents available from the Registrar of Deeds or by simply contacting either of the firms of attorneys who had been involved in the transfer of the property. Moreover, the first applicant admits having received a summons during 1998 in which the first respondent was cited as a co-defendant in a claim by the relevant municipality for arrear rates and taxes owing in respect of the property. The first applicant also admits having received a similar summons in 2002. A reasonable person acting diligently would have been alerted to the fact that the property was also registered in the name of the respondents, or would have made enquiries regarding its ownership.

[19.2] The first applicant was the executor of the deceased's estate. As such, he was closely involved in the winding up of the estate on an ongoing basis until its finalisation. He knew what winding up an estate entailed. In an undated letter to the transferring attorneys, Morkel & De Villiers, in response to their letter of 27 March 1979, the first applicant wrote, *"I am well aware of the procedure of the administration of an estate"*. The first applicant thus would, and should, have been aware of the fact that in

January 1986 the property had been transferred from the estate into the names of the applicants and respondents.

[19.3] The first applicant's claim that he assumed that the applicants were the registered owners of the property, does not bear scrutiny. First, he himself entered into the agreement with the first respondent and since 1982 was aware of its existence. He says that Malherbe had drafted the agreement and kept the original. However, it appears that Malherbe had advised the first applicant that because the sale of the property had been effected through a redistribution agreement, it could be transferred directly from the estate to the applicants. In his letter dated 1 May 1982 to Morkel & De Villiers, Malherbe wrote:

> *"AGREEMENT : R.C. VAN REENEN / F.W. VAN REENEN*
> *ESTATE LATE R.C. VAN REENEN*
>
> *We refer to previous correspondence and enclose herewith a copy of an agreement concluded between R.C. van Reenen and F.W. van Reenen in terms whereof R.C. van Reenen is to obtain the exclusive ownership in the property.*
>
> *Would you now please urgently advise us regarding progress of the estate and whether it will be possible to pass. transfer of the whole of the property to Mr. R.C. van Reenen without further ado."*[20]

Second, contrary to his assertion, the facts show that the first applicant is not a person who would simply accept that Malherbe would carry out the

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20 The emphasis appears to be in the original.

instruction to transfer the property in terms of the agreement. He did not carry out his functions as executor with ineptitude. For example, in June 1978 he wrote to Morkel & De Villiers advising them that he had prepared the liquidation and distribution account according to his instructions and against their advice. He went on to say that in the event that any objections were lodged to the account, he would not hold the attorneys responsible and would bear the costs if the account had to be redrawn. Likewise, he changed attorneys when Morkel & De Villiers were taking too long to wind up the estate and when, according to him, they disclosed privileged information to Carelse. He then engaged the services of Malherbe. Furthermore, on 1 June 1983 Malherbe wrote to Morkel & De Villiers informing them that the first applicant was pressuring his firm to finalise the matter. In another letter on 22 November 1983 Malherbe informed Morkel & De Villiers that the matter was dragging on and that his clients were becoming extremely impatient. Given the pressure and impatience on the part of the first applicant, it is inconceivable, let alone improbable, that Malherbe would not have informed him of the deed of transfer or its content, nor provided him with a copy of it.

[20] I accordingly hold that the applicants' claim has been extinguished by prescription.

Non-compliance with the Alienation of Land Act?

[21] The respondents contend that the agreement is void for want of compliance with section 2(1) of the Alienation of Land Act. Section 2(1) is in these terms:

> *"No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."*

[22] Mr. Van Helden, who appeared for the respondents, submitted that the agreement was invalid for two reasons. The first is that it was not signed by the second applicant and the second respondent or their agents acting on their written authority. The second is that the agreement was signed by the second respondent in her capacity as a witness and not as a party.

[23] In my view, the argument is unsound and must be rejected. The applicants and the respondents, respectively, are married in community of property. The agreement was concluded in 1982 by the first applicant and the first respondent as the representatives, *ex lege*, of the community estate, at a time when the marital power still applied to all marriages in community of property. The marital power was abolished only in 1984 by the Matrimonial Property Act 88 of 1984, which came into force on 1 November 1984. In terms of section 11(1) of that Act, the common law rule in terms of which a husband obtained the marital power over the person and property of his wife, was repealed. Section 11(4) of the Act provides that the abolition of the marital power shall not affect the legal consequences of any Act done before such abolition.

[24] At the time of concluding the agreement therefore, the first applicant and the first respondent, as representatives and administrators of the joint estate had full and absolute powers to alienate immovable property falling within the joint estate, even without the knowledge and consent of their spouses. In my opinion the agreement complies with the provisions of section 2(1) of the Alienation of Land Act.

[25] In the light of the conclusions to which I have come, it is not necessary to deal with the respondents' contention that the application should be dismissed because the applicants, when launching it, should have foreseen that a serious dispute of fact was bound to develop.

[26] What remains, then, is the question of costs. It is trite that all costs are in the discretion of the court.[21] This discretion must be exercised judicially in the light of the facts of each case. In essence it is a matter of fairness to both sides.[22] The general rule is that costs follow the event, but this rule may be departed from where good grounds exist for doing so.[23] Even this general rule is subject to the overriding principle that costs are in the court's discretion.[24] In my view, there are good grounds for departing from the general rule. First, this application arose from the agreement. Although I have made no finding as regards its validity and it cannot be said that the

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21 *Kruger Bros & Wasserman v Ruskin* 1918 AD 63 at 69; *Union Government (Minister of Railways and Harbours) v Heiberg* 1919 AD 477 at 484; Joubert et al (eds) *The Law of South Africa* (2nd ed) 2006 vol 3 Part 2 p 208 para 291 and the authorities there collected.

22 *Gelb v Hawkins* 1960 vol 3 SA 687 (A) at 694A; *Norwich Union Fire Insurance Society Ltd v Tutt* 1960 (6) SA 851 (A) at 854D.

23 *Fripp v Gibbon & Co* 1913 AD 354 at 363; *Sackville West v Nourse and Another* 1925 AD 516 at 529 and 532.

24 *Union Government v Heiberg* n 21 at 484.

respondents brought about the litigation,[25] it appears that the applicants and the respondents were under the impression that the applicants were indeed the owners of the property, and it was necessary for the applicants to approach this Court. Furthermore, the respondents appear *in forma pauperis*. Despite this, in awarding costs, the court should be guided by the same general principles as in non-pauper suits.[26] However, if the purpose of an award of costs is to indemnify a party for the expense which he or she has incurred by having to defend litigation, then any expense which the respondents may have incurred, is minimal. Their attorneys and counsel are not charging for their services and are to be commended for assisting the respondents. Furthermore, the dispute concerns a bitter disagreement between two brothers which has created a rift between them and their respective families that unfortunately seems to have been carried over to the next generation. An adverse costs order is likely to aggravate this situation. For these reasons, I consider an order for costs inappropriate.

[27] The order of this Court is as follows:

(1) The application is dismissed.

(2) There is no order as to costs.

SCHIPPERS AJ

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25 *Merber v Merber* 1948 (1) SA 446 (A) at 453.

26 Cilliers *et al* (eds) *Herbstein and Van Winsen*: *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5th ed 2009) 1599.