FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ no: 2378/2006

PARTIES:

JAMES KOBI **APPLICANT**

AND

MACFOAM MACLEAR **1ST RESPONDENT**

MARIA PATRONELLA SCHIMDT **2ND RESPONDENT**

REFERENCE NUMBERS -

- Registrar:
- Magistrate:
- EASTERN CAPE PROVINCIAL DIVISION:

DATE HEARD: **22/02/07**
DATE DELIVERED: **08/03/07**

JUDGE(S): **PIET VAN DER BYL AJ**

LEGAL REPRESENTATIVES -
Appearances

:

- for the State/Applicant(s)/Appellant(s): **ADV SD NDENGEZI**
- for the accused/respondent(s): **ADV J.M PATERSON**

Instructing attorneys:

- Applicant(s)/Appellant(s):**MAFUNGO TSHAKA INC. c/o LESELE MLONYENI INC.**
- Respondent(s): **NETTLETONS**

CASE INFORMATION -

- *Nature of proceedings* : Civil Action

- *Topic*:

- Keywords:

IN THE HIGH COURT OF SOUTH AFRICA

(*EASTERN CAPE DIVISION*)

CASE No. 2378/2006

In the matter between:-

JAMES KOBI Applicant

and

MACFOAM MACLEAR (PTY) LTD First Respondent

MARIA PETRONELLA SCHMIDT Second Respondent

JUDGMENT

Van der Byl, AJ:-

Introduction

[1] In this matter it is the Applicant's case that he on 5 September 1994 concluded an agreement of sale with the First Respondent, represented by a certain Mr W W Schmidt ("*Mr. Schmidt*") who was at the time the sole shareholder and director of the First Respondent, in terms of which a property, Erf 923 situated at Moolman Street, Maclear ("*the property*"), was sold to him for R100 000.

[2] At the time a firm of attorneys, Hills & Partners, which has since ceased to practise, acted on behalf of the First Respondent through its representative, Mr.

Schmidt who has since passed away.

[3] In an affidavit filed by Mr. Hills who was at the time connected with that firm of attorneys, it is confirmed that the property was so sold by the First Respondent, that the money was paid over to Mr. Schmidt and that the Applicant was given occupation of the property pending registration.

[4] It also appears from the affidavit of Mr. Hills that because of the retirement of Mr. Schmidt's auditor, a certain Mr. T Lategan of the firm Hoek, Wiehann and Cross, the company documents could not be traced in order to proceed ("*voort te gaan*") with the registration of the transfer of the property in THE name of the Applicant.

[5] It, furthermore appears from the papers that a firm of attorneys, Notaries and Conveyancers, Bowes, McDougal Inc, which have been instructed by the First Respondent to take care of the registration of the transfer of the property, on 13 December 1996 addressed a letter to Mr. Schmidt to which a "*Declaration by Purchaser*" signed by the Applicant was annexed and in which he was requested to attend to the local Transitional Local Council to have the Declaration endorsed with the municipal valuation thereon.

According to Mr. Hills the file containing the correspondence exchanged at the time has unfortunately gone lost so that he was unable to report on the response received from Bowes, McDougal Inc in that regard, but has indicated that according to his recollection it was at the time pointed out to Bowes, McDougal Inc that further documents, including the company documents, could not have been traced.

[6] On 20 October 1997 an attempt was made by the Applicant through his attorneys, S C Nontenya Attorneys, by way of a letter addressed to Mr. Schmidt to obtain registration, but without any success.

[7] Mr Hills, furthermore, contends that he, apparently still acting on behalf of the First Respondent, was at the time he deposed to his affidavit (ie., 4 October 2005) still attempting to trace the relevant documents, including "*die akte van die betrokke eiendom*" and that he will make it available to Second Respondent as soon as he has

done so, and that he is also awaiting a report from Bowes, McDougal Inc who has undertaken to search in their archives for copies of the relevant deed of sale.

[8] It is, furthermore, not disputed that the Applicant, having been given occupation of the property, has leased the property to a certain Mr. F J J van Niekerk ("*Mr Van Niekerk*") for his own account without any interruption or interference by the First Respondent.

[9] Notwithstanding the demands to obtain, and attempts to effect, registration and despite the fact that the Applicant was allowed by the First Respondent to act as if he were the owner of the property or as having an entitlement to lease the property, the First Respondent, as represented, because of her husband's death, being the sole shareholder and director of the First Respondent, by the Second Respondent in this matter, on 26 August 2005 instituted action in the magistrate's court against Mr. Van Niekerk for his eviction from the property and on 29 November 2005 obtained in circumstances which seem to me to have been due to the gross negligence of the attorneys involved and because of the fact that the Applicant was, in my view irregularly, not cited as a party therein, an order to that effect by default.

Although the Second Respondent concedes that Mr. Van Niekerk is or was so occupying the property through a lease granted by the Applicant, no attempt is made to explain the circumstances under which the proceedings in the magistrate's court was launched and why she failed to have cited the Applicant in those proceedings.

I may mention that the Notice of Motion in the magistrate's court proceedings is annexed to the Respondents' papers, but for some reason the affidavit filed by the Second Respondent in support of that application has been omitted from the papers.

[10] An application for rescission of that judgment was, once again for reasons which seem to me to be attributed to the negligence of the attorney, dismissed with costs by the magistrate on 14 March 2006.

[11] An appeal noted on 5 April 2006 against the dismissal of the application for rescission of the default judgment was, however, never prosecuted and seems to have lapsed.

[12] The Applicant then lodged this application in which he sought -

(a) an interim order -

(i) that the eviction order issued by the magistrate be suspended

and that the Sheriff be prohibited from evicting Mr. van Niekerk from the property pending "*the finalisation of these proceedings*"

(ii) that the prosecution of the appeal noted against the aforesaid order of the magistrate be suspended (*sic*) pending the finalization of this matter;

(b) a final order that it be declared and determined who the rightful and actual owner of the property is or, alternatively, that it be ordered that the property be transferred to the Applicant after the necessary requirements have been complied with.

[13] At the hearing of this matter Mr. Ndengezi who appeared on behalf of the Applicant limited the Applicant's case to the aforesaid final order sought.

[14] The Second Respondent, now, because, as I have already indicated, of her husband's death, being the sole shareholder and director of the First Respondent vehemently opposes this application.

[15] Apart from denying any knowledge of the transaction concluded between the Applicant and her late husband, the deponent on behalf of the First Respondent raises various defences some of which seem to be of a mere technical nature.

[16] In relation to the final relief sought Mr Paterson who appeared on behalf of the Respondents in effect advanced two submissions, namely -

(a) **firstly**, that the Applicant failed to prove that there was ever a written agreement of sale as required by section 2(1) of the Alienation of Land Act, 1981 (Act 68 of 1981); and

(b) **secondly**, that the claim to demand transfer is a debt as envisaged in the Prescription Act, 1969 (Act 68 of 1969), and that the three year period referred to in section 11(d) of that Act has expired and that the claim is accordingly prescribed.

[17] In my view both these submissions are unfounded.

[18] I deal with these submissions *seriatim*.

Proof of the existence of a deed of sale

[19] Mr. Paterson's submission in this regard is based on various passages from the founding papers.

[20] In this regard I was referred to the following:-

In **the first place** I was referred to the Applicant's contention in paragraph 7 of his founding affidavit in which it is stated that he on or about 5 September 1994 "*bought*" the land in question from Mr. Schmidt for R100 000, which, so it was contended, did not contain any direct allegation that he signed a deed of sale as envisaged in section 2(1) of the Alienation of Land Act, 1981.

In **the second place** I was referred to the Applicant's allegation contained in paragraph 11 of the founding affidavit that after he paid the sum of R100 000 he did not do anything further to ensure that the property is duly transferred to him, because of ignorance on his part and "*that there was a lot of confusion and misplacing of files when the offices of Messrs Hills and Partners were no longer functioning*".

In **the third place** reference was made to certain passages in the affidavit of Mr. Hills from which an inference was sought that no written deed of sale had been concluded.

In this regard I was referred to -

(a) paragraphs 3 and 4 of his affidavit in which it is stated that he "*wel bewus*

was van die feit dat wyle Mnr. Schmidt namens die maatskappy, erf 932 (sic) verkoop het aan 'n sekere mnr. Kobi en wel op 5 September 1994 vir 'n bedrag van R100 000.00" and that at the request of Mr. Schmidt the sum was paid over to him and that Mr. Kobi then obtained possession and use ("*besit en gebruik*") of the property pending registration of transfer in the name of Mr. Kobi;

(b) paragraph 5 of that affidavit in which it is stated that, due to the retirement of the late Mr. Schmidt's auditor, "*die Maatskappy dokumente*" could never be traced to continue with the registration of the transfer;

(c) paragraph 6 thereof in which it is stated that because of the long delays the Applicant approached the attorneys Bowes McDougal Inc, whereupon, "*sekere dokumente aan mnr. Schmidt gestuur (is) vir ondertekening in die verband*".

(I may mention that no point has been made that the property has been described by Mr. Hills as Erf 932 whilst it would seem that the property concerned is indeed Erf 923)

No reference was, however, made to paragraph 11 of Mr. Hills' affidavit in which he reiterated that "*dat daar dus wel a koopkontrak was tussen Applikant en mnr. Kobi*". (I need to point out that the reference to "*Applikant* " in this passage is an obvious reference to the First Respondent in this matter as the affidavit of Mr. Hills was obviously made for purposes of the eviction proceedings in the magistrate's court).

In **the fourth place** I was referred to the letter, Annexure B to the affidavit of Mr. Hills, addressed by the Applicant's attorneys, S C Nontenja Attorneys, to Mr. Schmidt on 29 October 1997 in which a title deed of the property was demanded from him.

[21] Even if the Applicant succeeded in proving that a deed of sale had been concluded, the Applicant was still bound, so the argument went, to adduce evidence in which the absence of the original must be satisfactorily explained (***Schwikkard Van der Merwe, Principles of Evidence, Second Edition, at 374***).

In so far as this allegation may be relevant to these proceedings, it is in my view apparent from the papers that the deed of sale together with other relevant documents were never in the Applicant's possession, but have gone astray in the hands of Hills and Partners and Bowes, McDougal Inc, being legal representatives appointed by the First Respondent to procure registration of the transfer of the property.

[22] The rest of Respondents' answering affidavit consists, nitpicking on alleged deficiencies in the founding papers of the Applicant which was obviously not prepared with any diligence, of various technical and other defences in an attempt to escape any liability towards the Applicant.

[23] It is not and in my view cannot be disputed that the Applicant had indeed paid a sum of R100 000 towards the sale of the property, but the Respondents have in any event decided to bring eviction proceedings against Mr. Van Niekerk.

[24] I am for the following reasons satisfied that a deed of sale had indeed been concluded between the Applicant and Mr. Schmidt acting on behalf of the First Respondent.

[25] **Firstly**, I am satisfied that, in so far as Mr. Hills has indicated in his affidavit that "*wyle Mnr Schmidt namens die maatskappy, erf 932 (sic) verkoop het aan 'n sekere Mnr J Kobi en wel op 5 September 1994 vir 'n bedrag van R100 000*", he would, being the attorney who acted on behalf of the First Respondent, bearing in mind the provisions of section 2(1) of the Alienation of Land Act, 1981, in terms of which no alienation of land shall be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto, not have described the transaction as a "*verkoop*", unless the parties had signed a deed of sale.

It is also apparent from paragraph 9 of the affidavit of Mr. Hills that he must have been aware of a written deed of sale in so far as he contends therein that he was at the time he deposed to his affidavit, still waiting for a report from Messrs Bowes McDougal Inc who has undertaken "*om hulle argiewe na te gaan om vas te stel of hulle nie moontlik in besit is van afskrifte van die betrokke koopakte nie*".

As a matter of fact he in any event explicitly states in paragraph 11 of his affidavit, as I have already indicated, "*dat daar wel 'n koopkontrak was*" obviously between the parties.

[26] **Secondly**, I cannot accept that the Applicant's attorneys would have allowed the amount to be paid over to Mr. Schmidt unless a deed of sale had been duly concluded and signed between the parties.

[27] **Thirdly**, if regard is had to the letter dated 13 December 1996 addressed to Mr. Schmidt by the firm of attorneys, Bowes, McDougal Inc., who, according to all indications, were charged on behalf of the First Respondent to procure the registration of the transfer of the property, it would appear that the Applicant had already signed a so-called "*Declaration by Purchaser*".

I may mention that the "*Declaration by Purchaser*" seems to be a declaration prescribed and described as Form B by the Commissioner of the South African Revenue Service ("*SARS*") in terms of section 14 of the Transfer Duty Act, 1949 (Act 40 of 1949), and contained in the regulations made under the said section 14 and published in Government Notice R.940 of 12 May 1978. Part 11 of Form B indeed

requires the municipal valuation of the property to be endorsed on the form obviously with a view to the determination by SARS of the fair value of the property for purposes of transfer duty.

It is in my view apparent that such a declaration could not have been signed unless a written deed of sale existed.

[28] **Fourthly**, there is a letter dated 29 October 1997 addressed by the Applicant's attorneys, S C Nontenja Attorneys, to Mr. Schmidt in which the Applicant demanded a "*a Title Deed for this piece of land*" and to which Mr. Schmidt seems not to have responded which one would not have expected if no deed of sale was concluded and signed by the parties.

[29] **Fifthly**, there is the fact that the Applicant in response to an allegation in the Respondent's answering affidavit that the Applicant made no allegation that he signed a written deed of sale, expressly states in his replying affidavit that he has indeed signed a deed of sale and that he has for that reason paid transfer fees.
Mr. Paterson objected against this evidence on the grounds thereof that the Applicant was required to have made out his case in his founding affidavit.

The facts relevant to this allegation made in the replying affidavit are the following:-

In paragraph 13 of his founding affidavit the Applicant contended that the Second Respondent knows that he paid the sum of R100 000 towards the purchase of the property and added that after he made the payment they gave him a sheep as appreciation for him having purchased the property. In his replying affidavit it is further contended that the Second Respondent was present most of the time when the sale was discussed during which she also served tea and food to him and her husband.

In the Respondent's answering affidavit the Second Respondent states in response to that paragraph that she has no knowledge of these averments and that she no longer possesses the financial records of her husband for the relevant period and that in any event the transaction could not have been concluded by her husband

personally since the property was at all material times owned by the First Respondent.

It was in response to this allegation that the Applicant replied in paragraph 7 of his replying affidavit, confirming in effect what Mr. Hills had stated in his affidavit, that a deed of transfer was signed and that it was for that reason that "*transfer fees had to be paid*" (a similar allegation is contained in paragraph 5 of the replying affidavit from which it appears that he paid a sum of R5 294,30 to Bowes, McDougal Inc who seems to have then been briefed by the First Respondent to effect the registration, apparently towards the costs owing in respect of the transfer).

I do not believe the Second Respondent in so far as she alleges that she was at all times unaware that her husband, representing the First Respondent, and the Applicant concluded an agreement of sale in respect of the property, that the Applicant had indeed paid the selling price of R100 000, that occupation of the property was given to the Applicant and that the Applicant had leased the property to Mr. Van Niekerk for a period of at least six years during which period, incidentally, neither of the Respondents has taken any steps until the magistrate's court proceedings were launched some 11 years later in which the eviction of Mr. Van Niekerk was sought.

The law relating to the introduction of new matter by way of replying affidavits is contained in many leading cases (see: ***Titty's bar and Bottle Store (Pty) Ltd v A.B.C Garage and Others, 1974(4) SA 362 (T) at 368G; Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1), 1978(1) SA 173 (W) at 177G; Baeck & Co. v Van Zummeren and Another, 1982(2) SA 112 (W) at 116A-D; Leonard Light Industries (Pty) Ltd v Wright and Others, 1991(4) SA 628 (W) at 631I-632F; Mauerberger v Mauerberger, 1948(3) SA 731 (C)*** **at 732**; ***Director of Hospital Services v Mistry, 1979(1) SA 626 (A) at 635H - 636A****; Shephard v Mitchell Cotts Seafreight (SA) (Pty) Ltd, 1984(3) SA 202 (T) at 205F; Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd, 1984(4) SA 87 (T) at 91C - 93E****; Bowman NO v De Souza Roldao, 1988(4) SA 326 (T) at 327D-H***).

As is also apparent from some of these decisions this is, however, not an absolute rule for the court has a discretion to allow new matter in a replying affidavit.

In my view this is a matter where I can exercise my discretion in favour of the Applicant. It would not appear to be the Respondents' case that no such an agreement had ever been concluded. The Respondents merely by way of an opportunistic approach towards the Applicant's case raised the contention that the Applicant failed to proof that a written agreement had been concluded between him and the First Respondent, as represented by Mr. Schmidt. There is, bearing in mind the whole approach of the Respondents, not the slightest possibility that the Respondents can be prejudiced by this allegation. As a matter of fact, as I have already indicated, there are overwhelming indications that such an agreement had indeed been concluded.

As I have already indicated, Mr Hills has in any event explicitly stated in his affidavit forming part of the founding papers that there was a deed of sale between the parties.

[30] In my opinion it is by clear implication obvious from the papers that the parties had indeed signed a deed of sale.

The defence of prescription

[31] In relation to the defence of prescription the question arises whether the obligation of a seller of immovable property to take such steps as may be necessary to ensure that the property is transferred to the purchaser, is a "*debt*" as envisaged in the Prescription Act, 1969, and, if so, when did prescription commence to run.

Mr Paterson who appeared on behalf of the Respondent submitted was unable to refer me to any authorities in this regard, but submitted that such an obligation is indeed a "*debt*" as so envisaged. When I asked him whether he has any authorities supporting that submission he was unable to refer me to any, but nevertheless submitted that there are such authorities. In so far as the obligation to pay the price is a debt, so the argument went, the obligation to enable the purchaser to obtain registration must accordingly also be regarded as a debt.

Having researched the issue on my own I was able to trace the decision in the case of ***Desai NO. v Desai and Others 1996(1) SA 141 (A)*** in which it was held at ***146G*** as follows:

> *"For the reasons which follow I am of the opinion that the appellant's 'debt', ie the obligation to procure registration of transfer in terms of clause 13(d), was indeed extinguished by prescription. Seeing that this finding is decisive of the case, it is unnecessary to consider the other aspects raised in argument, including the submissions relating to the true nature of the agreement and the applicability of s 1(1) of Act 71 of 1969.*
>
> *Section 10(1) of the Prescription Act 68 of 1969 ('the Act') lays down that a 'debt' shall be extinguished after the lapse of the relevant prescriptive period, which in the instant case was three years (see s 11(d)). The term 'debt' is not defined in the Act, but in the context of s 10(1) it has a wide and general meaning, and includes an obligation to do something or refrain from doing something. (See Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd 1981 (3) SA 340 (A) at 344F-G; Oertel en Andere NNO v Direkteur van Plaaslike Bestuur en Andere 1983 (1) SA 354 (A) at 370B.) It follows that the undertaking in clause 13(d) to procure registration of transfer was a 'debt' as envisaged in s 10(1). One should also bear in mind that the Act now provides for a so-called strong prescriptive regime whereby the prescribed debt is in fact extinguished, as opposed to the so-called weak prescription under the old 1943 Prescription Act, which merely provided for the corresponding right to become unenforceable, while the debt itself was extinguished only after 30 years. (See Oertel's case supra at 366F-H; Cape Town Municipality and Another v Allianz Insurance Co Ltd 1990 (1) SA 311 (C) at 329F-G.)*".

[32] On this authority and the authorities quoted by the learned Judge of Appeal I am bound to come to the conclusion that the First Respondent's obligation in this matter to do whatever is required by it to ensure that registration of the transfer of the property can be effected is a "*debt*" as envisaged in the Prescription Act, 1969.

[33] The next question, however, is when did prescription in the circumstances of this case begin to run.

[34] In terms of section 14 of the Prescription Act, 1969, the running of prescription is interrupted by an express or tacit acknowledgement of liability by the debtor.

[35] In this case the Applicant was as from the date on which the R100 000 was paid, which seems to have been the date on which the agreement of sale was concluded or shortly thereafter allowed to take occupation of the property pending registration and to lease the property for his own account as if he were the owner of the property until, for some inexplicable reason, the First Respondent decided, apparently on the basis of a sudden change of heart as to the existence or otherwise of an agreement of sale, to institute action in magistrate's court on 26 August 2005 (ie., almost 11 years after the agreement of sale had been concluded and after the selling price of R100 000 had been paid by the Applicant).

It is, furthermore, provided in the section that if the running of prescription is so interrupted, prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt from the date upon which the debt again becomes due.

[36] In my opinion the fact that -

(a) occupation of the property was given to the Applicant shortly after the deed of sale was concluded;

(b) the First Respondent accepted the selling price from the Applicant;

(c) the Applicant was allowed to remain in occupation unhindered from the beginning and to even lease the property for six years for his own account;

(d) the First Respondent's attorneys continued to procure registration,

constitutes at the very least a tacit acknowledgement of the First Respondent's liability towards the Applicant to procure registration of the property.

This acknowledgement obviously continued until the eviction proceedings were instituted in the magistrate's court on 26 August 2005 during which period prescription was in my view interrupted as envisaged in section 14 if the Prescription Act, 1969.

My opinion in this regard is fortified by the fact that the First Respondent never responded to the letters addressed to Mr. Schmidt demanding registration in circumstances where he never denied any liability.

Costs

[37] In my opinion the institution of the eviction proceedings is unconscionable since the registration could, because of the missing documents not have been

effected in circumstances where the First Respondent's legal representatives were still charged with the registration of the transfer.

[38] This is a matter where I would have, had I been requested to do so, granted costs against the First Respondent on a punitive scale of costs to show my displeasure in the unconscionable manner in which the Respondents have acted in having dealt with this matter. I have, however, not been requested to do so and since the Respondents have not been afforded an opportunity of addressing me thereon, decided not to *mero motu* grant such an order.

Order

In the result the following order is made:-

1. The First Respondent is ordered to take all such steps as may be necessary to procure registration of Erf 923, Moolman Street, Maclear, in the name of the Applicant.

2. Should it, however, appear that, because of the unavailability of any documents necessary to procure such registration or because of the failure or inability of any party to co-operate in the execution of the order made in paragraph 1, leave is granted to the one, the other or all the parties in this matter, to approach this Court on the same papers, supplemented with a report of the Registrar of Deeds and with such other papers as may necessary and relevant, for further directions so as to give effect to the order made in the aforesaid paragraph 1.

3. The First Respondent is ordered to pay the Applicant's costs of this application.

.....
P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF THE APPLICANT	**ADV S D NDENGEZI**
On the instructions of: **c/o MLONYENI, LESELE INC** **119 High Street** **GRAHAMSTOWN** **(Ref: Mr Tshaka - dmvt/NK/vo.13)** **Tel. No. : 047 531 0870**	**MAFUNGO TSHAKA INC**
ON BEHALF OF RESPONDENTS	**ADV T J M PATERSON**
On the instructions of: 118a High Street **GRAHAMSTOWN**	**NETTLETONS** **Ref : Mr. Nettleton/Nicole** **Tel No.: 046 622 7149**
DATE OF HEARING	**22 February 2006**
JUDGMENT DELIVERED ON	**8 March 2006**