

**NOT REPORTABLE**

**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

**Case no: 2645/2011  
Date heard: 16<sup>th</sup> November 2016  
Date delivered: 2<sup>nd</sup> March 2017**

**In the matter between:**

**LEONIE LOGIE KELBRICK** **First Plaintiff**

**ANTONIUS GERHARDUS VAN DEN BERG** **Second Plaintiff**

**MARGIE VAN DEN BERG** **Third Plaintiff**

**vs**

**NELSON ATTORNEYS** **First Defendant**

**PIERRE KITCHINGS ATTORNEYS** **Second Defendant**

---

**JUDGMENT**

---

**TSHIKI J:**

[1] In this matter the three plaintiffs herein have sued the defendants claiming damages arising from an alleged breach of a duty of care.

[2] On the 4<sup>th</sup> September 2006, the plaintiff concluded a written agreement of sale with a developer known as Status Homes in terms of which the plaintiffs sold their immovable properties situated in Cosmos Street, Westering to Status Homes. In terms of the agreements, the plaintiffs' properties and the immovable property of one *Jonker* would be transferred to Status Homes, and would be consolidated into one property and townhouses would be constricted on the consolidated property.

And *in lieu* of payment Status Homes would construct dwellings for the plaintiffs' in the development on the consolidated property.

[3] In order for the construction of townhouses on the consolidated property to proceed the following had to occur:

[3.1] the property would have to be re-zoned in order to allow for a development of the following nature:

[3.2] the consolidation would have to take place;

[3.3] certain restrictive conditions reflected in the title deed of the property would have to be removed.

[4] The Nelson Mandela Metropolitan Municipality consented to the re-zoning of the properties of the plaintiffs on the 28<sup>th</sup> June 2006 subject, *inter alia*, to the following conditions:

[4.1] that the properties had to be consolidated;

[4.2] the restructure conditions referred to in [3.3] above being removed.

[5] The properties of the plaintiffs and that of *Jonker* were transferred to Status Homes on the 27<sup>th</sup> July 2007 and, simultaneously, were consolidated.

[6] The defendant, on behalf of Status Homes, launched an application for the removal of the restrictive conditions contained in the title deed of the consolidated property.

[7] In the founding affidavit it was stated, on behalf of Status Homes that it was its intention to proceed with a townhouse development on the consolidated property pursuant to the abovementioned application a provisional order was granted on the 15<sup>th</sup> July 2008, returnable on the 26<sup>th</sup> August 2016. *Mr Nelson* of the defendant attorneys deposed to an affidavit in the abovementioned application describing his actions to give effect to the provisional order obtained.

[8] *Mr Nelson* states that “certain restrictions appearing in the Title Deed of the consolidated property need to be removed in order for our client to proceed with the development.” This letter is indicative of an intention by Status Homes, on the 13<sup>th</sup> August 2008, to still continue with the development.

[9] In paragraph 23 of their particulars of claim the plaintiffs plead that the defendant owed them a duty of care, in the following terms:

“23. By virtue of the defendant drafting the agreements Annexures “LLK1” and “LLK2” hereto and acting as conveyancer with instructions to attend to the transfer of the properties of the plaintiffs to the close corporation in terms of annexure “LLK1” and “LLK2” hereto, the cancellation of the bonds of the property over the first plaintiffs’ property as consolidated with other immovable properties and the defendants’ appointment as conveyancer to attend to the transfer of the completed units in the development to the respective plaintiffs, the defendant owed the plaintiffs a duty of care.”

[10] In its response to the plaintiffs’ particulars of claim, the defendants on the merits they denied that it negligently breached the duty of care. In addition, the defendant also raised a special plea of prescription which is couched as follows:

- [10.1] the summons was served on the defendant on the 1<sup>st</sup> September 2011;
- [10.2] the properties were transferred to the developer on the 27<sup>th</sup> July 2007;
- [10.3] by the 27<sup>th</sup> July 2008 (that is, a year later), it must have been apparent to the plaintiffs that no construction was going to commence and that the developer was in material breach of the Memoranda of Agreement and that they would suffer material damages as a result of the breach;
- [10.4] as at the date of transfer, there was no further duty of care on the defendant and any relevant act on the part of the defendant would have had to occur prior to the 27<sup>th</sup> July 2007 (the date of transfer).

[11] For that reason, by the 27<sup>th</sup> July 2008 the plaintiffs had a completed cause of action. They had three years from this date to issue summons which should have been issued on or about the 26<sup>th</sup> July 2011. However, the summons was only served on the defendant on the 1<sup>st</sup> September 2011. According to the defendant the claim against it had prescribed. In the alternative the defendant pleaded that the claim became prescribed on the 3<sup>rd</sup> September 2011, the Memoranda of Agreement between the plaintiffs and the developer having been signed on the 4<sup>th</sup> September 2006.

[12] With a view to proceed with the issue of prescription which was allegedly prescribed the defendant had to prove the prescription of the claim of the plaintiff. *Mr Jooste* who appeared for the defendant, called the evidence of *Mr C.A. Nelson* to prove the prescribed plea of the plaintiffs. There was no representative for the second defendant, *Messrs Pierre Kitchings Attorneys*. By the 27<sup>th</sup> July 2008, a year later, it must have been clear to the plaintiffs that no construction was going to

commence. And that the developer was in material breach of the Memoranda of Agreement. It was, therefore, clear that they would suffer material damages as a result of the breach of contract. By the 27<sup>th</sup> July 2008, the plaintiffs had a completed cause of action and that the three years from this date to issue summons which should have been issued on or about the 26<sup>th</sup> July 2011, but have not been issued as yet. The summons were only served on the defendant on the 1<sup>st</sup> September 2011 by that time it was, therefore, become prescribed. In the alternative, the defendant pleaded that the claims became prescribed on the 2<sup>nd</sup> September 2009.

[13] Another problem facing the plaintiffs is that the agreements were subject to the following conditions precedent set out in clause 2 of the Agreement.

[14] During the trial the defendant raised a special plea of prescription and the special plea was based on the following facts:

[14.1] the plaintiff has issued out of the above Honourable Court on the 29<sup>th</sup> August 2011 a combined summons which was thereafter served on the defendant on the 1<sup>st</sup> September 2011;

[14.2] the properties as set out in this action and in the particulars of claim were transferred to the purchaser, States Homes, on the 27<sup>th</sup> July 2007;

[14.3] by the 27<sup>th</sup> July 2008 it must have been apparent to the plaintiffs that no construction was to commence and that Status Homes were in material breach of the agreement and that the plaintiffs would suffer damages as a result of their delay. Therefore, the defendant would have no further duty of care. The defendant therefore has argued that by the 27<sup>th</sup> July 2008 the plaintiffs had a completed cause of action which date falls prior to a period

calculated as three years before the combined summons was issued. The plaintiff has not taken any action until the lapse of at least three years before it has filed its combined summons. It, therefore, follows as contended by the defendants that the plaintiffs claim has not instituted action against the defendants until the claim has prescribed.

[15] In view of the fact that the defendant has filed a special plea of prescription which, in my view, has merit, I agree with the defendant that the plaintiffs' claim has since prescribed. The defendants' alternative view and contention is that the plaintiffs' claim had become prescribed on the 3<sup>rd</sup> September 2009 for the reasons that the agreements "LLK1" and "LLK2" signed on the 3<sup>rd</sup> September 2006 having been signed on the 4<sup>th</sup> September 20006 have since prescribed.

[16] in terms of section 11(d) of the Prescription Act 68 of 1969 a contractual debt is completely extinguished after the expiry of the prescription period for that debt. According to *Christie's Law of Contract in South Africa* 17<sup>th</sup> ed by GB Bradfield: "the complete extinction of the obligation has the effect that, unlike the position under the previous legislative dispensation no natural obligation remains and the extinguished debt cannot be resurrected by an acknowledgement of liability (see **ATB Chartered Accountants (SA) v Bonfiglio** 2011 (2) ALL SA 132 (SCA)).

[17] In my view, the special plea is dispositive of the plaintiffs' action in that the plaintiff did not issue summons against the defendant until the expiry of three years which the plaintiff has been aware of. A creditor shall be deemed to have such knowledge if he or she could have acquired it by exercising reasonable care (**Minister of Finance and Others v Gore NO** 2007 (1) ALL SA 309 (SCA)). In our

case, the plaintiffs have been aware or at least were expected to have been aware of the debt long before it prescribed but they decided not to take action until the debt had prescribed.

[18] In the result, I am of the view that the plaintiffs' claim has prescribed and therefore they cannot succeed in their action.

[19] Therefore, the plaintiffs' claim is dismissed with costs.

---

P.W. TSHIKI  
JUDGE OF THE HIGH COURT

For the plaintiff	:	Adv Ronaasen
Instructed by	:	Roelofse Meyer Inc PORT ELIZABETH Ref: L. Meyer/et/K1027

For the defendant	:	Adv Jooste
Instructed by	:	Joubert Galpin & Searle Inc PORT ELIZABETH Ref: S Munshi/ATT1/0058