


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 4783/2020

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
(3)	REVISED: <u>Yes</u>
<u>18/03/2024</u>	
DATE	SIGNATURE

In the matter between:

MODISAOTSILE EDZARD TSIE
(Registration No. 1967-01032-07)

Applicant

and

ELINOR BRENNER

First Respondent

LEWIS GOLDEN

Second Respondent

MASTER OF THE HIGH COURT, PRETORIA

Third Respondent

CREST CAR HIRE CC

Fourth Respondent

JUDGMENT

C BESTER AJ:

Summary:

Extinctive Prescription – a right to claim performance under a contract becomes due according to the terms or, if the contract is silent, within a reasonable time, which in appropriate circumstances, can be immediately. Where a debtor refuses to perform after the debt becomes due according to the terms of the contract, the failure to perform does not constitute a new debt unless the creditor cancels the contract, in which event, a new debt is created comprising the right to claim restitution and/or damages which becomes due when the right of cancelation is exercised. If the creditor does not exercise the election and the contractual relationship remains intact, the breach of contract does not create a new cause of action for specific performance with a claim for specific performance remaining one based on the contents of the contract. Reliance on section 12(2) of the Prescription Act 68 of 1969 must be specifically pleaded.

Introduction

- [1] The applicant seeks an order authorising him to amend "*the directorship of Crest Car Hire CC*" to reflect him as a "*director*" of the close corporation together with an order directing the first respondent "*to remove her name from the directorship of Crest Car Hire CC*".¹

- [2] Although not pleaded with a modicum of clarity, I will assume in favour of the applicant that this relief was intended to refer to the members interest in Crest Car Hire.

- [3] He further claims an order directing the third respondent not to accept the first and final liquidation and distribution account prepared and submitted by the first and second respondents in their capacities as the duly appointed executors of the late Ernst Leon Brenner who previously held the members interest in a Crest Car Hire.² The applicant also seeks an order declaring that "*the agreement entered into between the parties is a valid agreement in terms whereof the close corporation was purchased by the Applicant*".³ The applicant in the final instance,

¹ Notice of Motion, prayers 1 and 2, 001-5.

² Notice of Motion, prayer 3, 001-5.

³ Notice of Motion, prayer 4, 001-6.

seeks an order declaring that the sale of business agreement included as its subject matter the close corporation that is Crest Car Hire.⁴ The agreement referred to is a sale of business agreement concluded between the applicant and Crest Car Hire in early 2013 to which I shall return below.

The Facts

- [4] To understand the context within which the relief is pursued, it is necessary to provide a brief overview of the salient facts.
- [5] Crest Car Hire owned and conducted a car rental business from certain premises situated in Rockey Street, Yeoville, Johannesburg. Brenner was the sole member of Crest Car Hire and owned these premises in his personal capacity. The applicant was in the employ of Crest Car Hire for many years. Brenner who was already of advanced age, developed a close relationship with him, and when Brenner's health began to deteriorate, the applicant expressed an interest to acquire the business of Crest Car Hire. Brenner was prepared to sell the business at a discounted price to the applicant, presumably to reward a longstanding and loyal employee.
- [6] The upshot was the conclusion of a sale of business agreement on 24 January 2013 between the applicant and Crest Car Hire in terms of which the applicant acquired the business of Crest Car Hire as a going concern inclusive of all stock, assets and goodwill. The purchase consideration was R84 000.00 and there is no dispute that the applicant had paid this sum in full.
- [7] Following the conclusion of the sale of business agreement, the applicant operated the business from the Rockey Street premises which he rented from Brenner without any obligation to pay rental in terms of an oral agreement concluded with Brenner that required the applicant to assume the role of caretaker and collect rental from other tenants situated on the premises. He was also required to collect rental and fulfil the role of caretaker in relation to the premises situated at no. 76, Webb Street, Yeoville that was registered in the name of Crest Car Hire.

⁴ Notice of Motion, prayer 5, 001-6.

- [8] Brenner passed away on 23 June 2015. The first and second respondents were appointed as the executors of his deceased estate. The first respondent was his wife and the sole heir of his estate.
- [9] The status *quo* of the contractual regime agreed upon between the applicant and Brenner continued after his death with the only difference that Brenner had been replaced by the first and second respondents in their capacity as executors. In July 2018, the first respondent and her son Jeffrey Brenner, learnt for the first time that the applicant had been short paying the rental that he collected.
- [10] This led to the termination of his mandate as caretaker of the Rockey Street premises and no. 76, Webb Street while his authority to collect rental was also revoked. He was then required to pay a R1000.00 a month for the use of the Rockey Street premises and except for September and October 2018, he made no further rental payments.
- [11] As the sole heir to Brenner's estate, the first respondent was bequeathed the Rockey Street premises and his membership interest in Crest Car Hire which was transferred to the first respondent on 10 July 2018 when the change in membership of Crest Car Hire was officially reflected for the first time in the records of the Companies and Intellectual Property Commission.
- [12] The applicant considered this to constitute an unlawful act. He explains himself as follows in his founding affidavit:
- a. *"The First Respondent has unlawfully amended the Founding Statement of the close corporation and has now put her name as the sole member and/or directors of the said close corporation irrespective of the fact that she knows down [sic] well that that I have purchased the said close corporation as a going concern including all its assets therein";⁵*
 - b. *"The Said First Respondent and the Second Respondent at the time they drew the First and Final Liquidation and Distribution Account in the estate of the Late Mr Brenner they [sic] knew for a fact that the close corporation was already purchased by me before the death of Mr Brenner and that the*

⁵ FA, para 8.10, CaseLines 01-11 to 01-12.

said close corporation was not an asset in the estate of the late Mr Brenner.”⁶

- [13] The crux of his case is that the applicant believes that he is entitled to the benefit of the members interest in Crest Car Hire as part of the subject under the sale of business agreement entered with the close corporation in January 2013.
- [14] The first and second respondents opposed the application on various grounds including the non-joinder of Crest Car Hire, the prescription of the claim, raised by way of a point *in limine*, and on the basis that the interpretation of the sale of business agreement did not support the relief.

Procedural History

- [15] The applicant did not actively prosecute the application and failed to deliver heads of argument in time. On 8 March 2022, the matter came before Opperman J who ordered the applicant to deliver his heads of argument by no later than 10 May 2022. He failed to do so and took no further steps to prosecute the application. His attorneys withdrew on 14 April 2023 but came on record again on 7 November 2023, six days before the hearing was scheduled to proceed on the opposed motion roll.
- [16] I allocated the matter for hearing on Thursday 16 November 2023 and on 14 November 2023, the applicant brought an application to join Crest Car Hire to the proceedings. When the matter was called, Ms Matome, who appeared for the applicant, requested that the matter be postponed *sine die* to allow the first and second respondents to deal with the joinder application.
- [17] Mr Hollander who appeared for the first and second respondents as well as Crest Car Hire, met the application for a postponement by stating that his clients consented to the joinder application and did not intend to file any further affidavits. He recorded that his clients were ready to proceed with the application and anxious to finalise the proceedings which had been delayed since their institution in 2020. He proposed that the applicant be afforded an opportunity to

⁶ FA, para 8.11, CaseLines 01-12.

deliver heads of argument which his clients would respond to whereafter judgment could be delivered without the need for further argument.

- [18] After I had made an order joining Crest Car Hire as the fourth respondent, the applicant found himself somewhat off guard. Ms Matome argued that a postponement was still necessary as the applicant had not pleaded the material facts of his cause of action against Crest Car Hire.
- [19] Mr Hollander opposed a further postponement of the matter on behalf of the first, second and Crest Car Hire on the basis that not only was there no basis to delay the matter any longer, but no postponement application had been brought. It was not clear what further allegations the applicant wished to make against Crest Car Hire when the issues in dispute were clear from the papers. Ms Matome was not clear on what further submissions the applicant wished to make.
- [20] Following further debate with counsel, Ms Matome wisely elected not to seek a further postponement of the matter, which I was not inclined to entertain. She advised that her instructions were to instead allow the Court to decide the application on the merits.
- [21] I directed the applicant to deliver his heads of argument by 1 December 2023. The first, second and Crest Car Hire were allowed to deliver supplementary heads of argument by no later than 15 December 2023 which they did.

Identification of the Issue

- [22] In view of the approach, I adopt to the matter, the application turns on whether the applicant's claims have prescribed which is dispositive of the relief.
- [23] It is unnecessary, given the conclusion I have come to concerning the issue of prescription, to consider whether the applicant is entitled to the relief on a proper interpretation of the relevant provisions of the sale of business agreement.
- [24] I shall assume for purposes of the judgment, that his interpretation is the correct one and that the subject of the sale includes the members interest of the close corporation but I stress that it is not necessary for me to decide the issue.

Prescription

- [25] The applicant disputes that any part of the relief formulated in the notice of motion constitutes a “*debt*” for purposes of prescription.⁷
- [26] It is for this reason necessary to first determine if the claims set out in his notice of motion fall within the purview of the Prescription Act 68 of 1969.
- [27] Section 10(1) of the Prescription Act provides that a “*debt*” shall be extinguished after the lapse of the relevant prescriptive period, which in the case of contractual debts is three years (see section 11(d)). While a “*debt*” is not defined in the statute, it traditionally carried a broad meaning to include any obligation to do something or refrain from doing something.⁸
- [28] The Constitutional Court in **Makate v Vodacom Limited** 2016 4 SA 121 (CC) and **Off-Beat Holiday Club v Sanbonani Holiday Spa Shareblock Limited** 2017 (5) SA 9 (CC) curtailed the expansive meaning previously given to the term in judgments like **Desai NO v Desai and Others** 1996 1 SA 141 (A)⁹ where the term was interpreted to convey a wide and general meaning significantly broader than the payment of money and included an obligation to do something or refrain from doing something. Jaftha J, writing for the majority in **Makate**, criticised the broad interpretation adopted by the Appellate Division in **Desai** on the basis that:
- a. it had the consequence that any claim that required a person to either do or refrain from doing something irrespective of the nature of the obligation would fall within the net of section 10(1);
 - b. a constitutional approach that constructs section 10(1) read with section 11 and 12 in a manner consistent with section 39(2) of the Constitution required the adoption of an interpretation of a “*debt*” that is the least likely to interfere with the right of access to Court enshrined by section 34 of the Constitution;

⁷ CaseLines, RA, para 4.2, 001-117.

⁸ **Oertel en Andere NNO v Direkteur van Plaaslike Bestuur en Andere** 1983 1 SA 354 (A) at 370B; **Desai NO v Desai and Others** 1996 1 SA 141 (A)

⁹ At 147H-I.

- c. the meaning given to “*debt*” in **Desai** was inconsistent with the Appellate Division’s earlier judgment in **Stewarts and Lloyds**¹⁰ which was more circumscribed and holds that a “*debt*” means the discharge of that which is owed or due whether measured in terms of money, goods or services that one person is under an obligation to pay or render to another.

[29] While the majority judgment in **Makate** signalled a clear transformative intent to bring the law of extinctive prescription in line with constitutional values, the facts before the Court in **Makate** ultimately did not require a more precise delineation of what constitutes a “*debt*” as envisaged in section 10 since the claim was one that lay beyond the scope of the term as used in **Stewarts and Lloyds**.¹¹ The definition adopted in **Stewarts and Lloyds** has however withstood constitutional scrutiny from the Courts in both **Makate**¹² and **Sanbonani** and remains good law today with the result that the obligation that underpins a debt represents something more than an obligation to make payment of money.¹³ It includes an obligation arising in contract for specific performance.

[30] The first three prayers of the notice of motion can loosely be described as orders that owe their genesis to the contractual rights the applicant believes he enjoys under the sale of business agreement to insist on a transfer of the members interest in Crest Car Hire. They seek to give practical effect to this right.

[31] A proper characterisation of the relief leads to the conclusion that the claim is one for specific performance of a contractual obligation that entitled the applicant to demand the registration of the members interest in his name on his interpretation of the agreement.

[32] The fact that the right concerns an incorporeal movable¹⁴ that finds expression in the members interest of a close corporation does not alter the fact that the

¹⁰ **Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd** 1981 3 SA 340 (A) at 344F-G;

¹¹ The majority in **Makate** at paragraph 92 characterised the claim as one for an order forcing Vodacom to commence negotiations with Makate to determine the amount of compensation due to him for the use of his idea which turned out to be financially rewarding.

¹² At 150B-H.

¹³ At 17G-H.

¹⁴ See section 30(1) of the Close Corporations Act which defines a members interest as movable property comprising a single interest expressed as a percentage. See also **Carlzeil Properties (Pty) Limited v Goncalves and Others** 2000 (3) SA 739 (T).

contractual obligation to effect transfer, assuming for a moment the applicant is correct in his interpretation, constitutes a “*debt*” within the meaning of the Prescription Act.¹⁵

- [33] Prescription begins to run as soon as the debt is due, but as provided in section 12(3) of the Prescription Act, a debt does not become 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.
- [34] When does a claim for specific performance fall due? Our law recognises a general principle that a right to claim performance under a contract becomes due according to the terms of the contract or, if the contract is silent on this score, within a reasonable time, which in appropriate circumstances, can be immediately.¹⁶
- [35] To the sale of business agreement, I turn.
- [36] As emerges from clause 4.1, Crest Car Hire sold to the applicant who purchased the subject matter of the sale as a going concern under one indivisible transaction with effect from the “*Effective Date*” which was defined in clause 2.26 to mean 1 August 2012, from which date the risk and benefit attaching to the subject matter passed to the applicant.¹⁷
- [37] The purchase price of R84 000.00 was payable over a period of twenty-four months but this did not suspend the right of the applicant to insist on transfer of the *merx*. Clause 9 bears repetition in full:

“9.1 On the *Effective Date*, the Seller shall:

9.1.1 Place the Purchaser in occupation, possession and effective and legal control of the Subject Matter;

9.1.2 Deliver to the Purchaser all available documents constituting evidence of ownership of the assets by the Seller;

¹⁵ See also the later decision of the Constitutional Court in **Ethekekwini Municipality v Mounthaven (Pty) Limited** 2019 (4) SA 394 (CC) at 400A.

¹⁶ See the decision of Wunsh J in **Munnikhuis v Melamed NO** 1998 (3) SA 873 (W) at 887E-F. The full Court also comprised Cameron J (as he then was) and Fevrier AJ.

¹⁷ Clause 4.1.3, 001-19.

9.1.3 *The Seller and/or the Purchaser shall sign such documents and do all such steps that may be necessary or desirable generally to facilitate the implementation of this Agreement and all achievement of its intent and purpose."*

- [38] Mr Hollander submitted that performance was immediately due by Crest Car Hire, which in this case was the effective date of 1 August 2012. There is merit in this submission, particularly if regard is had to clause 9.1.3 which obliged Crest Car Hire to take all necessary steps to implement the sale of business agreement from 1 August 2012.
- [39] It follows that delivery of the subject matter of the sale was not suspended until a later date, but became immediately claimable at the instance of the applicant from 1 August 2012. The facts are therefore to be distinguished from those instances where the right to claim performance only arises upon the occurrence of some future event, such as the expiry of a maintenance contract as was the case in **Stewarts and Lloyds** or the payment of the purchase price in full.
- [40] In her heads of argument, Ms Matome submitted that the debt only became due on 10 July 2018 when the members interest in Crest Car Hire was transferred to the first respondent with the result that the commencement of this application was within three years thereafter and had the effect of interrupting the running of prescription. When distilled to its essence, the argument treats the transfer of the membership interest to the first respondent as Brenner's heir as having created a new debt.
- [41] I am not persuaded that these submissions are correct.
- [42] Where a debtor refuses to perform after the debt becomes due according to the terms of the contract, the failure to perform does not constitute a new debt unless the creditor cancels the contract, in which event, a new debt is created comprising the right to claim restitution and/or damages which becomes due when the right of cancelation is exercised – that is, when the election to cancel is communicated to the debtor.¹⁸ If the creditor does not exercise the election and the contractual relationship remains intact as was the case here, the breach

¹⁸ **Munnikhuis** at 887I to 888A; **HMBMP Properties (Pty) Limited v King** 1981 (1) SA 906 (N) at 912H; see also Christie's Law of Contract in South Africa, Eighth Edition, page 600.

of contract does not create a new cause of action for specific performance with a claim for specific performance one rooted in the contents of the contract, although instituted upon the counterparty's failure to perform.¹⁹

- [43] As the contractual obligation which the applicant considers to be due to him to give effect to the transfer of the members interest in Crest Car Hire at all times remained extant since the applicant did not cancel the sale of business agreement, no new debt was created on 10 July 2018. This is even in the face of what the applicant considers to have been a breach of contract on this date when the members register of the close corporation was impermissibly amended according to him to reflect the first respondent as the member.²⁰
- [44] The debt that forms the subject of the application was immediately claimable on 1 August 2012 and it was incumbent on the applicant to take steps to interrupt the running of prescription through the service of a legal process on Crest Car Hire within three years from this date to demand transfer of the members interest into his name when he had knowledge of the identity of his true debtor and the facts from which the debt arose. He could not defer the running of prescription by refraining from making demand for specific performance.²¹
- [45] Neither does it assist the applicant to argue that proceedings were commenced in 2020 which had the effect of interrupting the running of prescription. It will be recalled that the proceedings brought in 2020 were only instituted against the first and second respondents and the Master. Service of the application on the first and second respondent acting in their capacities as executors of Brenner's estate did not have the effect of interrupting the running of prescription against Crest Car Hire.
- [46] Service of process on a member of a close corporation does not interrupt the running of prescription where the debtor is the corporation and the argument to the contrary which the applicant appears to advance, ignores the separate juristic

¹⁹ **Munnikhuis** at 887J.

²⁰ FA, para 8.12 and para 8.13, 00-12.

²¹ **Mahomed v Yssel and Others** 1963 (1) SA 866 (D) at 870G.

personality of a close corporation which enjoys statutory in section 2 of the Close Corporations Act. The section holds that a close corporation formed in accordance with the statute is on registration a juristic person and continues to exist as a juristic person, notwithstanding changes in its membership.

- [47] For this reason, there is no merit in Ms Matome's alternative argument that the death of Brenner on 23 June 2015 delayed the running of prescription. Section 13(1)(h) deals with the delay in the running of prescription where the creditor or the debtor is deceased and an executor of the estate has not yet been appointed but is of no application here. Neither Brenner nor his executors are debtors of the applicant since the only parties to the sale of business agreement were the applicant and Crest Car Hire.
- [48] Ms Matome finally made what can only be described as a courageous argument in her heads of argument to bring her client within the ambit of section 12(2) of the Prescription Act which delays the running of prescription if the debtor wilfully prevents the creditor from coming to know of the existence of the debt until such time as the creditor becomes aware of the existence of the debt.
- [49] There is no evidence that Crest Car Hire wilfully prevented the applicant from learning of the existence of the debt. Indeed, the viability of such a construct appears implausible because the claim is one for specific performance with the facts surrounding the transfer of Brenner's members interest to the first respondent on 10 July 2018 not an element of the claim for specific performance that arose on 1 August 2012. Whether the events of 10 July 2018 were wilfully concealed or not, even on a most benevolent construction and when these facts came to the attention of the applicant, is irrelevant.
- [50] The more fundamental difficulty facing the applicant is that the facts that underpin the applicant's reliance on section 12(2) have not been pleaded in response to the defence of prescription.
- [51] Where an applicant wishes to mount a cognisable response to a special plea or point *in limine* that raises prescription as a defence, it is necessary if a finding of prescription is to be avoided, that the supporting facts intended to meet the prescription defence be pleaded with sufficient particularity. This not only assists

the Court in understanding the precise outline of the issues in dispute and that it is required to pronounce upon, but speaks to the question of *audi*. The party raising prescription may well want to deal with the facts pleaded in reply that respond to the defence of prescription.

- [52] One can envisage those instances where if reliance is squarely placed on section 12(2) in a replying affidavit, the debtor accused of having wilfully prevented the creditor from coming to know of the existence of the debt, may want to traverse those allegations in an issuable manner by way of a further affidavit. It is difficult to see that this would violate the ordinary practice of three sets of affidavits in motion proceedings as something new emerged in the replying affidavit for the first time which excludes *mala fides* or the need to give an explanation for why this was not raised at an earlier stage.²²
- [53] The debtor is denied the opportunity of dealing with these allegations that rest on section 12(2) if they are not pleaded in the replying affidavit in answer to the defence of prescription.
- [54] Not having raised these allegations in the papers before me, I am not prepared to consider a defence that seeks to overcome prescription based on allegations that speak to the application of section 12(2) of the Prescription Act.
- [55] In view of the conclusion that I have come to, it is not necessary to consider the merits of the declaratory relief claimed in prayers four and five which are rendered academic by the finding of prescription.
- [56] Declaratory orders are discretionary in nature and Courts do not issue them when deciding points that are merely abstract, academic or hypothetical.²³ The practical utility of interrogating whether the sale of business agreement is valid and included as its subject the members interest in Crest Car Hire is rendered

²² See Erasmus **Superior Court Practice** RS 22, 2023, D1 Rule 6-31 regarding the filing of further affidavits.

²³ **Minister of Finance v Oakbay Investments (Pty) Ltd and Others; Oakbay Investments (Pty) Ltd and Others v Director of the Financial Intelligence Centre** 2018 (3) SA 515 (GP) at para 78.

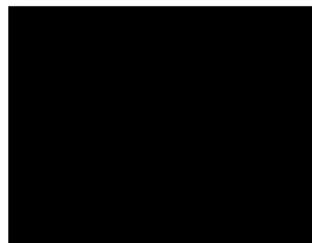
moot as the conclusion I have come to is that the claim to demand transfer of the members interest prescribed three years after 1 August 2012.

[57] As the claim against Crest Car Hire has prescribed with the consequence that any rights arising from the sale of business agreement capable of enforcement have been extinguished, there is no need to say anything further about this part of the relief whether on the merits or for purposes of the declaratory relief. It does not advance the rights of the parties any further.

[58] I can but only add that as there is no privity of contract between the applicant and the first and second respondents, no grounds exist to order any relief against them. I did not understand the applicant's case to be premised on any basis outside the confines of the sale of business agreement.

[59] I accordingly make an order in the following terms:

- [1] The point *in limine* is upheld.
- [2] The application is dismissed with costs.



**C BESTER AJ
JUDGE OF THE HIGH COURT
JOHANNESBURG**

Heard: 16 November 2023

Supplementary Heads of Argument: 6 & 11 December 2023

Delivered: 18 March 2024

For the Applicant:

M Matome

Jurgens Bekker Attorneys

For the First, Second & Fourth Respondents:

L Hollander

Gjersoe Attorneys