THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 20546/2014

In the matter between:

KOSMOS X6 HOMEOWNERS ASSOCIATION	**APPELLANT**
and	
LEOPONT 64 PROPERTIES (PTY) LTD	**FIRST RESPONDENT**
JACOBUS JOCHUM GRABE	**SECOND RESPONDENT**

Neutral Citation:	*Kosmos v Leopont* (20546/2014) [2016] ZASCA 48 (31 March 2016).
Coram:	Lewis, Willis, Dambuza and Mathopo JJA and Plasket AJA
Heard:	3 March 2016
Delivered:	31 March 2016

Summary: Prescription – when does prescriptive period commence – agreements of sale of erven not yet created – appellants claimed specific performance of ancillary obligations under the agreements – special plea of prescription raised – respondent contended that prescription commenced on conclusion of the agreements – prescription could only commence when sale agreements enforceable – special plea of prescription dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mabuse J sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.
2 The order of the trial court is set aside and is replaced with the following:
'The special plea of prescription is dismissed with costs, including the costs of two counsel.'
3 The matter is referred back to the trial court for adjudication of all the appellants' claims, including whether Lombard and Partners' letter to Len Dekker and Associates, dated 4 June 2007, contains a binding undertaking to perform the obligations listed therein.

JUDGMENT

Dambuza JA (Lewis, Willis and Mathopo JJA and Plasket AJA concurring):

[1] The issue to be determined in this appeal is when prescription commences in a claim for specific performance under a contract of sale that was not enforceable for a substantial period after its conclusion. The appeal is with the leave of the Gauteng Division of the High Court, Pretoria (Mabuse J), against its judgment dismissing the appellant's claim against the first respondent for specific performance, on the basis that the claim had prescribed.

[2] The appellant, Kosmos X6 Homeowners Association (Kosmos), was incorporated in terms of s 21 of the Companies Act 61 of 1973.[1] Its members were owners of properties located within Kosmos Extension 6 Township (also known as the Falcon View Estate) situated along Kosmos Drive, in Hartebeespoort, in the North West Province. During 2004 the first respondent, Leopont Properties 64 (Pty) Ltd (Leopont), was the owner of a property, then known as Portion 176 (a portion of Portion 64) of the Farm De Rust 478, situated in the North West Province (the farm). Leopont intended developing, on the farm, the township that would be known as Kosmos Extension 6 Township. At the time the farm comprised four erven.

[3] During the period 31 March to 1 May 2004 Leopont concluded agreements of sale with various purchasers in terms of which they bought a number of erven in the proposed township. The purchasers were represented by Ivor Ichikowitz (on behalf of Umhlaba Projects (Pty) Ltd and Harts Falcon View (Pty) Ltd), and Petronella Schroeder (on behalf of Sarpro Investments (Pty) Ltd, Stasec 120 (Pty) Ltd and the JCLR Trust). The second respondent, Mr Jacobus Grabe represented Leopont.

[4] In terms of s 67 of the Town Planning and Township Ordinance 15 of 1986 (the Ordinance) the sale, exchange, alienation or disposal of or granting of an option to purchase or otherwise acquire an erf in a township is prohibited, after an owner of land has taken steps to establish a township on his land, until the township is declared an approved township. However, in terms of s 97(1) of the Ordinance, a local authority may grant consent for pre-proclamation acquisition of erven, subject to any condition it may deem expedient.

[5] The Kosmos township had not yet been proclaimed when the sale agreements were concluded, but the Local Municipality of Madibeng (the Municipality), under whose jurisdiction the farm fell, granted consent to Leopont, in

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[1] See: 'Schedule 5 to the Companies Act 71 of 2008 – Transitional arrangements, item 4(1)*(a)*:
Memorandum of incorporation and rules. – (1)
Every pre-existing company
(a) Incorporated in terms of section 21 of the previous Act is deemed to have amended its memorandum of Incorporation as of the general effective date to expressly state that it is a non-profit company and to have changed its name in so far as required to comply with section 11 (3); …'. Essentially this means that the company's name should now end in 'NPC'.

terms of s 97(1) of the Ordinance, to enter into pre-proclamation contracts of sale of the proposed erven.

[6] On 31 May 2005 the township was declared in terms of s 103 of the Ordinance. In October 2005 the Municipality authorised the subdivision of the farm into erven. On 8 December 2005 the General Plan, providing for the further subdivision of the farm, was approved by the office of the Surveyor General. The erven sold were finally transferred to the purchasers on 16 August 2006. The purchasers then ceded their rights under the agreements to Kosmos.

[7] On 3 May 2007 the attorneys Len Dekker and Associates, acting on behalf of Kosmos, wrote a letter to Leopont's attorneys, Lombard and Partners, setting out a list of snags under the agreement and demanding performance of its obligations not later than 31 May 2007.[2] These related to facilities that Leopont had undertaken to construct within the township. In a letter dated 4 June 2007 Leopont, through its attorneys, undertook to perform its statutory obligations as set out in the service agreement concluded with the Municipality. It also listed certain facilities as 'uitstaande dienste & werke soos op Mei 2007'. The list was attached to the letter of 4 June 2007. Leopont's attorneys advised in their letter that an amount of R1 754 386 was held in trust, presumably for installation of the facilities. Of the stated amount, R250 000 was reserved for setting up the gardens. Apart from a few exceptions, the items listed by Leopont's attorneys were, by and large, the same as listed in the letter from Kosmos' attorneys of 3 May 2007.

[8] On 18 August 2008 Kosmos issued a summons against Leopont, seeking an order of rectification of the agreements and an order of specific performance in respect of certain obligations under the agreements which it alleged Leopont had failed to perform. It also sought, in the alternative, payment of the damages it had suffered as a result of the failure by Leopont to perform the obligations. In the summons Kosmos pleaded that certain terms relating to Leopont's obligations to build facilities within the township were express, alternatively, implied, alternatively tacit. These related to installation of security features on the estate, the nature or

[2] With the exception that some, such as the development of the waterfront and the gardens, could be constructed and finalised within a reasonable period that would be agreed on between the parties.

theme of the estate, including landscaping and provision of parks thereon, compliance with various Municipal requirements, and provision of water drinking troughs for animals on the estate.

[9] Kosmos contended that the parties to the agreements had intended that Leopont perform further obligations which were erroneously omitted from the agreements. They were that Leopont would build a parking area, a circle road around the sewerage pump station, a security wall between the waterfront area and the waterfront erven, an embankment and a launching ramp for boats next to the dam, an electric fence on top of the palisade fence around the sewerage purification works, a sewerage plant that would be built in accordance with an environmental scoping report, a recreation area and an ablutions facility. The development of a recreation area included taking all the necessary steps to secure a lease of certain identified land from the government for that purpose.

[10] According to Kosmos, the failure to include these terms in the agreements was a result of an error common to all parties. This was the basis upon which it sought rectification of the agreements. It then sought an order of specific performance, alleging that Leopont was in breach of the agreements as it had failed to construct certain facilities. Specifically, Kosmos alleged that Leopont had failed to erect the perimeter wall, the animal drinking troughs, the sewerage station and water purification works, the parking area, the recreation area, the security fencing between the waterfront area and the waterfront erven, the circle road around the sewage pump, the earth embankment and launching ramp for boats, the ablution facility and the fence around the purification works. A further obligation that Leopont had allegedly failed to perform was to install a concrete sump to facilitate the flow of water from a chlorine tank into a reservoir for distribution to various points within the township, such as the water troughs and water features on the estate. This was stipulated in the environmental scoping report. The requirement arose because the erven near the water edge were too low to allow gravity feed into the sewage plant. The sewage feed therefore needed to be pumped to the different points within the estate.

[11] Kosmos further contended that the contents of the two letters exchanged between the attorneys either constituted an agreement that Leopont would perform the obligations set out therein, or, that in the letter from its attorneys, Leopont gave a binding undertaking to perform the 'uitstaande dienste and werke…'. Mabuse J decided the first issue against Kosmos but has still not decided whether the letter of Lombard and Partners contains a binding undertaking. He must still do so. (The court a quo did not consider whether the letter from Leopont's attorney constituted an interruption of prescription, which it would certainly have been in respect of some of the obligations undertaken. It is not necessary to consider this point given the conclusion I reach below.)

[12] Leopont raised a special plea of prescription, contending that all Kosmos' claims became due more than three years before service of the summons on it.[3] The argument was that prescription commenced to run from 31 March 2004 to 31 April 2004, when the agreements were concluded. As to the merits, Leopont pleaded, amongst other things, that the agreements were invalid for being in contravention of s 67 of the Ordinance because a condition set by the Municipality for security to be furnished was not met. However, the court a quo made no finding in this regard and there is nothing to suggest that the terms of the authority were not met. It was also part of Leopont's case that Mr Grabe had no authority to conclude the agreements. It successfully sought the joinder of Mr Grabe as the third party in the court a quo.[4] Leopont denied that it had undertaken to perform its obligations and maintained that the contents of the letter from its attorneys constituted a counter-offer to the demands made on behalf of Kosmos. Accordingly, it was argued, since Kosmos had not accepted the counter-offer, no contractual obligations arose from the letters.

[13] Although extensive evidence was led before the court a quo, the court decided the matter purely on the basis of prescription. The judge a quo found that prescription commenced on conclusion of the agreements between 31 March and 1 May 2004. However, he reasoned further that because the agreements stipulated

[3] Leopont had excepted to the original summons served on 20 August 2008. The amended summons was served on 29 May 2009. Initially Leopont contended that service of the original summons on 20 August 2008 did not interrupt prescription. However this argument was not advanced before us. In any event nothing turns on the different dates of service.

[4] Incidentally Mr Grabe was also a property owner in the Kosmos Township and therefore a member of the appellant.

that the payment of the balance of the purchase price was only due within one month of proclamation of the township, (which fell on 30 June 2005), performance of the obligations listed in the summons became due on 1 July 2005. Consequently, the court held, when the summons was served on Leopont on 20 August 2008, the claims had indeed prescribed. The court also found that no agreement had been concluded as a result of the letters exchanged by the attorneys and dismissed Kosmos' claims summarily (without considering whether Leopont had, nevertheless, made the undertakings as contended by Kosmos).

[14] Before us Kosmos submitted that the date on which provision of the facilities under the agreements became due, was 16 August 2006, when the properties were transferred to the purchasers. But it advanced its case based on the earliest date prescription could properly commence under the agreements, being 8 December 2005, when the General Plan which provided for the further subdivision of the farm was approved by the Surveyor General and the individual erven were created. The distinction in the two dates is inconsequential for determination of prescription in this appeal.

[15] Section 12(1) of the Prescription Act 68 of 1969 provides that:

'Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due.'[5]

The Prescription Act contains no definition of the term 'due'. The basic principle on the running of prescription is that the debt will be due and the prescription period commences to run as soon as there is a completed cause of action, with a plaintiff who can sue and a defendant who can be sued.[6] Completion of the cause of action is 'when everything has happened which would entitle the creditor to institute action to obtain judgment'.[7] See also *Minister of Finance v Gore NO*[8] where this court said that until a creditor has the minimum facts that are necessary to institute action, prescription does not begin to run.

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[5] The qualification is that the creditor must have knowledge of the identity of the debtor.
[6] M M Laubser *Extinctive Prescription* (1996) 47.
[7] *Truter & Another v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) para 16.
[8] *Minister of Finance v Gore NO* [2006] ZASCA 98; [2007] 1 All SA 309 (SCA); 2007 (1) SA 309 (SCA) para 17.

[16] Thus our law distinguishes between the concept of a debt arising and a debt becoming due, although the dates on which the debt arises and when it becomes due may coincide.

'The difference relates to the coming into existence of a debt, on the one hand, and the recoverability thereof, on the other. This distinction is recognised in the 1969 Prescription Act in so far as s 12 provides that prescription begins to run as soon as the debt is due, whereas s 16, which deals with the application of Chapter **III** of the Act (the chapter on extinctive prescription), provides that the Act applies to any debt **arising** after the commencement of the Act. A debt may come into existence (**arise**) at the time when a debtor undertakes to pay at a certain date, but the debt will only be **due** when that date arrives.'[9]

[17] The agreements became binding on their conclusion. However, Leopont's principal obligation was to effect transfer of the erven once the township had been proclaimed and the erven registered in the Deeds Registry.[10] It is therefore only after 8 December 2005 that the purchasers' cause of action in respect of the erven became complete and Leopont's obligation arose. Given that the facilities were secondary to the main object of the agreements, it would have made no sense for the purchasers to be entitled to delivery of the facilities even before they were entitled to the erven. By their nature, the facilities were intended to be enjoyed as accessories to the erven. We do not even know when Leopont's obligations to provide the facilities and services arose.

[18] Indeed, there was neither an express time for performance nor an express condition upon which performance was made dependent in the agreements. That, however, does not detract from the intrinsic nature of the agreements. There could be no breach of collateral obligations prior to the main object of the agreements being realised. I agree, therefore, that at the earliest, performance of the obligations relating to the facilities could be due only from 8 December 2005 when the erven came into existence. The claim had therefore not prescribed on 16 August 2008 when the summons was served. In any event, the plea of prescription could not apply to the claim for rectification of the agreements in this case.[11]

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[9] Laubser; *Extinctive Prescription* above p 51.
[10] In terms of s 46 of the Deeds Registries Act 47 of 1937 a township is declared when the general plan on which the erven are shown is registered and a register opened of registrable transactions.
[11] *Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd* 2009 (3) SA 447 (SCA) para 13.

[19] Consequently the following order is granted:

1 The appeal is upheld with costs, including the costs of two counsel.
2 The order of the trial court is set aside and is replaced with the following:
'The special plea of prescription is dismissed with costs, including the costs of two counsel.'
3 The matter is referred back to the trial court for adjudication of all the appellants' claims, including whether Lombard and Partners' letter to Len Dekker and Associates, dated 4 June 2007, contains a binding undertaking to perform the obligations listed therein.

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JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	A J Louw SC, M F Ackerman, Instructed by: Len Dekker & Associates, Pretoria c/o Rosendorff Reitz Barry, Bloemfontein
For the Respondent:	P Ellis SC, A P Ellis Instructed by: Lombard & Partners, Pretoria c/o McIntyre & Van der Post, Bloemfontein