THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 681/2022

In the matter between:

GIDEON JAKOBUS PETRUS STEMMET	**FIRST APPELLANT**
ELAINE STEMMET	**SECOND APPELLANT**

and

TSELISO JAMES MOKHETHI	**FIRST RESPONDENT**
MMAKWELENG NAOMI MOKHETHI	**SECOND RESPONDENT**

Neutral citation: *Stemmet and Another v Mokhethi and Another* (681/2022) [2023] ZASCA 127(04 October 2023)

Coram: MAKGOKA, MATOJANE, WEINER and MOLEFE JJA and MALI AJA

Heard: 25 August 2023

Delivered: 04 October 2023

Summary: Civil procedure – Prescription Act 68 of 1969 – knowledge of minimum facts required for prescription to start running.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Matshaya AJ with Mbhele AJP concurring and Daffue J dissenting, sitting as a court of appeal):

1 The appeal is upheld with costs.

2 The order of the full court is set aside and replaced with the following:

'1. The appeal is upheld with costs.

2. The order of the magistrate's court is set aside and replaced with the following:

"The defendants' special plea of prescription is upheld and the plaintiffs' claim is dismissed with costs".'

JUDGMENT

Weiner JA (Makgoka, Matojane and Molefe JJA and Mali AJA concurring):

Introduction

[1] This is an appeal against the judgment and order of the majority of the full court of the Free State Division of the High Court, Bloemfontein (the full court). The appeal is with the special leave of this Court. The matter concerned the prescription of a claim which Mr and Mrs Mokhethi (the respondents) had instituted against Mr and Mrs Stemmet (the appellants). The claim involved latent and undisclosed defects

(the defects) which the respondents discovered some time after they had purchased the appellants' property situated in Fichardt Park, Bloemfontein (the property). The respondents had viewed the property on two separate occasions. They were impressed with the condition of the property and an agreement of sale was concluded on 24 May 2013. The purchase price was R1 290 000. A mortgage bond over the property was registered in favour of Absa Bank (Absa) for the purchase price.

[2] After payment of the purchase price by the respondents, the property was transferred to the respondents on 22 July 2013, on which day the respondents took occupation of the property. Several months after taking occupation, but prior to 24 June 2014,

[3] the respondents noticed the following defects on the property:

(a) structural cracks:

(i) in the main, second and third bedrooms,

(ii) along the rafters in the northern gable wall,

(iii) in the bathroom and kitchen,

(iv) in the ceiling in the passage, and

(v) in the outside walls of the living room, garage and dining-room; and

(b) windows and cornices detaching from the walls.

[4] On 24 June 2014, the respondents lodged a claim with Absa, which, as part of its financing of the purchase price of the property, had insurance cover over the property. On 12 August 2014, Absa declined the claim on the basis that 'the defects were old and gradual, had been previously patched and were caused by the expansion and retraction of the clay upon which the property was built'.

[5] On 19 July 2017, the respondents issued summons against the appellants in the magistrate's court for damages. They alleged, in their amended particulars of claim, that, at the time of the purchase: the appellants knew of the defects and failed to disclose them and/or concealed them; the appellants knew or ought to have known that the property was built upon clay, which expanded and retracted during wet and dry conditions; and that the foundation was not adequately underpinned and supported. These problems caused structural cracks to manifest. The appellants, alleged the respondents, had a duty to inform them of the latent defects and they failed to do so. The respondents relied on delict in the form of fraudulent non-disclosure of the defects and/or the fraudulent concealment of the defects, which induced them to purchase the property, which they would not have done had they been aware of the defects.

[6] In anticipation of a possible special plea of prescription, the respondents averred that they obtained 'knowledge of the cause of and the existence of the defects and/or latent defects' on 12 August 2014, when they were informed by Absa that the said defects were 'old and gradual, had been previously patched and were caused by . . . [active] clay'. The respondents claimed a sum of R128 423.26, being, inter alia, the cost of repairs to the property. The summons was served on the appellants on 27 July 2017.

[7] Together with their amended plea, the appellants raised a special plea of prescription. They averred that the respondents were aware of the defects by June 2014, by which time, the running of prescription had already commenced. As summons was only served on 27 July 2017, the claim had prescribed. In their replication to the appellants' special plea, the respondents did not join issue with the appellants' special plea of prescription.

[8] Section 12 of the Prescription Act 68 of 1969 (the Act) provides:

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

(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be 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.'

[9] In due course the matter came before the magistrate's court for trial. The first respondent testified on behalf of the respondents. With regard to prescription, his evidence can be summed up as follows. Several cracks began appearing on the walls of the property some time before 24 June 2014, and he concluded that the property was 'falling apart' and not fit for habitation. This resulted in the respondents lodging a claim with Absa, their insurer on that date. On 12 August 2014, Absa repudiated the claim, as mentioned.

[10] In explaining when he first noticed the defects, the first respondent made several statements in his testimony, which bear repeating:

(a) He was a qualified engineer, although he hadn't practised as such for many years.

(b) He purchased the property because of the excellent condition it was in.

(c) Prior to June 2014, when he submitted the claim to Absa, there were problems with doors jamming, after which cracks began appearing above these doors, which cracks grew bigger and bigger.

(d) About a month or two before June 2014, he realised that the cracks were growing bigger and were structural.

(e) He took photographs of the defects and made inscriptions on them, before he submitted the claim to Absa. The photographs were taken at different times. The inscriptions refer to large structural cracks, which were either horizontal, vertical or diagonal. The cracks were detected both inside and outside, with one in the main bedroom going 'through the 200m wall from the inside to the outside of the property'.

(f) The patchwork became visible – it was clear that cracks had been covered up.

(g) He had knowledge, because of his profession, of what structural cracks were and that they were different to plaster cracks. He described a structural crack as, '. . . it goes through the wall, it goes through the structure. . . They will say it's a structural crack, because the structure is cracking and not the plaster is cracking'. They were not hairline cracks.

(h) On the diagram of the property, forming part of the bundle of photographs, he had indicated that the cracks were 'literally everywhere' and 'developing every day'. As the cracks were growing bigger every day, he reported the matter to Absa.

(i) He took the photographs '[b]asically to make a case . . . in terms of the structure falling apart'.

(j) All of the instances above were known to him before he submitted the claim to Absa on 24 June 2014. He did not, however, according to him, know the cause of the cracks.

[11] In its judgment, the magistrate's court reasoned that the respondents could only have acquired the minimum facts to interrupt prescription on 12 August 2014. This was the date on which Absa declined their claim and provided the reason for its decision. It accordingly dismissed the special plea of prescription and went on to

consider the merits of the respondents' claim. It granted judgment against the appellants on the merits.

[12] The appellants appealed to the high court. They did not appeal the finding on the merits of the claim. The parties thereafter settled the quantum at R128 423.26.[1] The only issue before that court was whether the special plea of prescription had been correctly dismissed by the magistrate's court. The appeal initially served before two Judges. They did not agree on the outcome of the appeal. As a result, a third Judge was called in. This is how the matter came to be heard by the full court.

[13] The full court was not unanimous. The majority dismissed the appeal, while the minority would have upheld the appeal, having found that the respondents' claim had prescribed. The majority relied upon several authorities dealing with prescription.[2] It is trite that the debt becomes due (and prescription begins to run) when the creditor has the minimum facts necessary to institute action. In *Minister of Finance v Gore*, this Court held that '[t]he running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case "comfortably"'.[3] However, the majority and minority differed on what constituted the minimum facts in the present case for prescription to have started running.

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[1] This amount included the fees of the respondents' experts for the inspection of the property and the compilation of the reports.

[2] *Truter and Another v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) (*Truter*); *Anglorand Securities Ltd v Mudau and Another* [2011] ZASCA 76 (SCA); *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A); *Minister of Finance and Others v Gore NO* [2006] ZASCA 98; [2007] 1 All SA 309 (SCA); 2007 (1) SA 111 (SCA); *Macleod v Kweyiya* [2013] ZASCA 28; 2013 (6) SA 1 (SCA); *Links v MEC, Department of Health, Northern Cape* [2016] ZACC 10; 2016 (5) BCLR 656 (CC); 2016 (4) SA 414 (CC) (*Links*).

[3] *Gore* supra para 17.

[14] The majority agreed with the magistrate's court. They concluded that the respondents only acquired knowledge of the basis of their cause of action, for the purposes of prescription, when the respondents received the letter from Absa on 12 August 2014. It was only in such letter that they were informed that the cracks were due to 'active clay and it was previously patched, the damage was deemed old and gradual'. Alternatively, they only acquired such knowledge when their experts informed them of their opinion on the cause of the damage to the property on 30 September 2014.

[15] The majority found that, in June 2014, the respondents could not have known whether their debtor was the appellants, the insurer or a builder. Conversely, the minority found that there could not have been a doubt that the appellants were liable either in contract or delict. In addition, having noticed the structural cracks, and informing Absa that the property was 'falling apart', in June 2014, they were in possession of the minimum facts necessary to institute action. The existence of the clay conditions and unstable foundations, which the experts testified about, was a matter for evidence and the respondents were not required to have this knowledge to institute the action.

[16] The question that arises is: when did the respondents become aware of the existence of the defects and the damages arising therefrom to satisfy section 12(2) of the Act and did they, at that stage, know the identity of the person responsible for their damage, to satisfy the requirement in section 12(3) of the Act?

[17] It is convenient to first dispose of the second requirement of s 12(3), ie knowledge of the identity of the debtor. In this regard, the respondents could not have had any doubt that it was the appellants. It is from the appellants that they had

purchased the property, in seemingly perfect condition, newly painted and neat. Within a few months, the doors began jamming, cracks began appearing and continued to emerge and worsen as time went on until it reached the point that the property was 'falling apart'. Who else, it can be asked, under these circumstances, could the respondents look to for their damage, other than the appellants? At that stage, it would not matter to the respondents what the cause of the defects was. The cause of the defects as later determined in the opinions of experts, was not required at that stage to complete the cause of action. That was a matter for evidence.

[18] I turn to the first requirement. The onus is on the appellants to show that the respondents were, three years prior to 27 July 2017, in possession of sufficient facts to cause them, on reasonable grounds, to believe that they had a claim against the appellants and that the appellants were aware of the defects, but failed to disclose them and/or that such defects were concealed by the appellants.[4] Thus, it must be determined as to precisely when the respondents had acquired the minimum knowledge necessary to institute action against the appellants. This is a factual enquiry. It is to that aspect that I turn.

[19] The respondents contended that they only became aware of the cause of the latent defects, which would form the basis of their cause of action, on receipt of Absa's letter on 12 August 2014. Thus, by the time the summons was served upon the appellants on 27 July 2017, the claim had not prescribed. The respondents also relied upon expert reports which they received on 30 September 2014, to allege, in the alternative, that the claim only prescribed three years after 30 September 2014.

[4] *Links* supra para 42.

[20] It is common cause that the defects started to manifest some time before 24 June 2014, when the respondents lodged the claim with Absa. Thus, at that stage, the respondents were aware that there were structural problems with the property. What they did not know, was the cause thereof. The question is whether they needed to know the cause of the defects, to complete the minimum facts necessary for prescription to run. The majority answered that in the affirmative. It concluded that, until the respondents knew what the cause of the defects was, prescription could not begin to run. The issue on appeal is whether that conclusion was correct.

[21] In *Truter and Another v Deysel*,[5] this Court stated that in a delictual claim, the requirements of fault and unlawfulness do not constitute the factual ingredients of the cause of action, but are legal conclusions to be drawn from the facts. The facts in that case are significant and apposite in the present case. The plaintiff had a surgical procedure in 1993, but only received a medical report of negligence in 2000. The high court had held that it was only when the plaintiff received the medical report that prescription began to run. This Court upheld the appeal on the basis that the facts which the plaintiff requires are those which he can prove and which support his right to judgment. '*It does not comprise every piece of evidence which is necessary to prove each fact*'.[6] (Emphasis added.) It was held further that:

'In a delictual claim, the requirements of fault and unlawfulness do not constitute *factual* ingredients of the cause of action, but are *legal* conclusions to be drawn from the facts:

"A cause of action means the combination of *facts* that are material for the plaintiff to prove in order to succeed with his action. Such facts must enable a court to arrive at certain *legal conclusions regarding unlawfulness and fault, the constituent elements of a delictual cause of*

[5] *Truter* supra para 19
[6] *Truter* supra para 19.

action being a combination of factual and legal conclusions, namely a causative act, harm, unlawfulness and culpability or fault".'[7] (Original emphasis.)

[22] This Court in *Macleod v Kweyiya*, in dealing with this issue stated:

'In order to successfully invoke s 12(3) of the Prescription Act, either actual or constructive knowledge must be proved. Actual knowledge is established if it can be shown that the creditor actually knew the facts and the identity of the debtor. The appellant places no reliance on actual knowledge but on constructive knowledge. Constructive knowledge is established if the creditor could reasonably have acquired knowledge of the identity of the debtor and the facts on which the debt arises by exercising reasonable care. The test is what a reasonable person in his position would have done, meaning that there is an expectation to act reasonably and with the diligence of a reasonable person. A creditor cannot simply sit back and "by supine inaction arbitrarily and at will postpone the commencement of prescription". What is required is merely the knowledge of the *minimum facts* that are necessary to institute action *and not all the evidence* that would ensure the ability of the creditor to prove its case comfortably.'[8] (Emphasis added.)

[23] The Constitutional Court's conclusion in *Mtokonya v Minister of Police*[9] sets out clearly the requisites relating to when a claim arises, and prescription begins to run:

'Furthermore, to say that the meaning of the phrase "*the knowledge of . . . the facts from which the debt arises*" includes knowledge that the conduct of the debtor giving rise to the debt is wrongful and actionable in law would render our law of prescription so ineffective that it may as well be abolished. I say this because prescription would, for all intents and purposes, not run against people who have no legal training at all. That includes not only people who are not formally educated but also those who are professionals in non-legal professions. However, it would also not run against trained lawyers if the field concerned happens to be a branch of law with which they are not familiar. The percentage of people in the South African population against whom prescription

[7] *Truter* supra para 17.
[8] *Macleod* supra para 9.
[9] *Mtokonya v Minister of Police* [2017] ZACC 33; 2017 (11) BCLR 1443 (CC); 2018 (2) SA 22 (CC).

would not run when they have claims to pursue in the courts would be unacceptably high. In this regard, it needs to be emphasised that the meaning that we are urged to say is included in section 12(3) is not that a creditor must have a suspicion (even a reasonable suspicion at that) that the conduct of the debtor giving rise to the debt is wrongful and actionable but we are urged to say that a creditor must have knowledge that such conduct is wrongful and actionable in law. If we were asked to say a creditor needs to have a reasonable suspicion that the conduct is or may be wrongful and actionable in law, that would have required something less than knowledge that it is so and would not exclude too significant a percentage of society.'[10]

[24] From the common cause facts, it is clear that, as early as June 2014, the respondents were in possession of sufficient facts to cause them, on reasonable grounds, to believe that there had been attempts by the appellants to cover up latent defects in the property. In this regard, it is important to bear in mind that, according to the first respondent's evidence, and from the photos submitted in evidence, the patchwork on the cracks was evident before the respondents lodged the claim with Absa on 24 June 2014. The attempt to patch up the cracks would have immediately led to a reasonable belief that the respondents had fraudulently misrepresented the facts to them. That apprehension was sufficient to complete their cause of action against the appellants. They thus had knowledge of sufficient facts which would have led them to believe that the defects existed when they purchased the property from the appellants, and that they were fraudulently concealed by the appellants.[11]

[25] It follows that the conclusion of the majority that the respondents only had the necessary knowledge of the minimum facts, on becoming aware of the cause of the defects, is at odds with established applicable legal principles referred to above. It

[10] Ibid para 63.
[11] *Links* supra para 42.

also did not take account of the material facts, including the first respondent's evidence, set out above.

[26] The appeal must succeed. Costs should follow the result.

[27] The following order is granted:

1 The appeal is upheld with costs.

2 The order of the full court is set aside and replaced with the following:

'1. The appeal is upheld with costs.

2. The order of the magistrate's court is set aside and replaced with the following:

"The defendants' special plea of prescription is upheld and the plaintiffs' claim is dismissed with costs".'

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S E WEINER

JUDGE OF APPEAL

Appearances

For the appellants:	J Ferreira
Instructed by:	Stander and Associates, Bloemfontein
For the respondents:	J J Buys
Instructed by:	Willie J Botha Inc, Bloemfontein