THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 307/2017

LEONIE LOGIE KELBRICK	**FIRST APPELLANT**
ANTONIUS GERHARDUS VAN DEN BERG	**SECOND APPELLANT**
MARGIE VAN DEN BERG	**THIRD APPELLANT**

and

NELSON ATTORNEYS	**FIRST RESPONDENT**
PIERRE KITCHING ATTORNEYS	**SECOND RESPONDENT**

Neutral citation: *Kelbrick & others v Nelson Attorneys & another* (307/2017) [2018] ZASCA 55 (16 April 2018)

Coram: Shongwe ADP, Wallis, Dambuza and Van der Merwe JJA and Makgoka AJA

Heard: 12 March 2018

Delivered: 16 April 2018

Summary: Prescription : attorney sued for negligence : Prescription begins to run as soon as the creditor acquires knowledge of the facts necessary to institute action:

whether knowledge of delay in constructing a sectional title scheme constituted knowledge of facts constituting a complete cause of action.

ORDER

On appeal from: Eastern Cape Local Division, Port Elizabeth (Tshiki J sitting as court of first instance).

1. The appeal is upheld with costs, including costs attendant upon the employment of two counsel.
2. The order of the court a quo is set aside and replaced with the following:

   'The first defendant's special plea of prescription is dismissed with costs'.

JUDGMENT

Makgoka AJA (Shongwe ADP, Wallis, Dambuza and Van der Merwe JJA concurring)

[1] The appellants sold their immovable properties to a property developer, Headline Trading 124 CC t/a Status Homes (Status Homes). They concluded written agreements on 4 September 2006, in terms of which they sold their immovable properties to Status Homes, each for a purchase price of R1 400 000. Status Homes was not able to comply with the terms of the agreements. It was eventually liquidated, and its sole member was sequestrated. The appellants instituted a claim for damages based on negligence

against the first respondent as the attorneys who had drawn the agreements and acted as conveyancers in the transaction. The first respondent raised a special plea of prescription which was upheld by the court a quo. The appeal is with leave of the court a quo.

[2] The second and third appellants are husband and wife. Where it is necessary to refer to them separately from the first appellant, they are referred to as 'the Van den Bergs'. The second respondent, Pierre Kitching Attorneys, another firm of attorneys, was joined to the proceedings as a second defendant on 4 June 2013. The special plea did not affect it, and it is therefore not part of this appeal. Accordingly, for the sake of convenience, the first respondent is henceforth referred to in this judgment as 'the respondent'.

[3] In terms of the agreements, the appellants' properties and that of another seller, Jonker, would be transferred to Status Homes and consolidated into one property. Status Homes would build 16 upmarket townhouses in a sectional title development on the consolidated property. This entailed that the homes of the appellants and Jonker built on their respective properties had to be demolished. In lieu of payment of the purchase price for the properties, Status Homes would build townhouses for the appellants - one for the first appellant and two for the Van den Bergs. The appellants were apparently attracted to the transaction by the fact that although their properties were worth approximately R500 000 each, the new townhouse units were expected to be worth approximately R1 400 000 each.

[4] In order for the construction to proceed, the properties had to be re-zoned and consolidated; and certain restrictive conditions reflected in the title deeds of the properties, had to be removed. The municipality under which the properties fall, the Nelson Mandela Metropolitan Municipality, consented to the re-zoning of the properties on 28 June 2006. This was subject to, among others, the properties being consolidated and the restrictive conditions being removed. The properties were transferred to Status Homes on 27 July 2007, and were simultaneously consolidated.

[5] The process of removing the restrictive conditions commenced on 15 January 2008 when the respondent, on behalf of Status Homes, launched an application in the Eastern Cape Local Division, Port Elizabeth (the court a quo) for their removal. A provisional order was issued on 15 July 2008, with a return date of 26 August 2008, on which date a final order was made for the removal of the restrictive conditions. The construction of the dwelling units in the development commenced in October 2008, but the development came to a halt in February 2009 when the financiers of the development refused to allow further drawings against the development bond.

[6] As stated already, the appellants instituted action in the court a quo against the respondent, claiming payment of the amounts they could not recover from Status Homes. The combined summons was served on the respondent on 30 August 2011. In its particulars of claim, the appellants alleged that the respondent owed them a duty of care because it had drafted the sale agreements, and had acted as the conveyancer in the transaction. The appellants alleged that the respondent had breached the said duty of care by failing to advise them of the risks inherent in the transaction and the

development of the sectional title scheme. In its plea to the appellants' particulars of claim, the respondent admitted that it owed the appellants a duty of care in the terms pleaded by the appellants, but denied having breached it.

[7] In addition, the respondent raised a special plea, contending that the appellants' claim had prescribed. The essence of the special plea was the following: the properties were transferred to Status Homes on 27 July 2007. As no construction had taken place for a period of a year since registration, it alleged that it must have been apparent to the appellants that no construction was going to commence and that Status Homes was in material breach of the agreement and that they (the appellants) would suffer damages as a result.

[8] In the circumstances, the first respondent contended that by 27 July 2008 the appellants had a completed cause of action. Accordingly, prescription commenced to run from that date and was completed on 26 July 2011. As the combined summons was served on 30 August 2011, more than three years after 26 July 2008, the appellants' claims had prescribed. In the alternative, the first respondent contended that the appellants' claims prescribed on 3 September 2009, three years after the signing of the agreements. This alternate contention was not pursued with any vigour in argument.

[9] The special plea was argued before the court a quo on 15 November 2016. It is trite that the respondent, as the debtor who invoked the special defence of prescription, bore the onus of establishing 'both the date of the inception and the date of the completion of the period of prescription'. See *Gericke v Sacks* 1978 (1) SA 821 (A) at

827H-828A; *Van Staden v Fourie* 1989 (3) SA 200 (A) at 216B; *Santam Ltd v Ethwar* 1999 (2) SA 244 (SCA) at 256G.

[10] In its endeavour to discharge the onus, the respondent presented the evidence of Mr Charles Nelson (Nelson), an attorney and a member of the respondent. The essence of his evidence was the following. He informed the appellants at length of the risks involved in the transaction and took steps to protect their interests. When the property market crashed, Status Homes found itself in a difficult financial position in that purchasers were cancelling their agreements to purchase units in the development. Status Homes was unable to proceed with the development, as the financing bank refused to release further funds from the development bond.

[11] According to Nelson, as early as May 2007, approximately two months before the transfer of the properties into the name of Status Homes, the Van den Bergs were already expressing concerns and were contemplating cancelling their agreement. He referred to correspondence between the Van den Bergs and the respondent in the period May 2007 to October 2007 in which the Van den Bergs expressed frustration at the lack of progress in the development. He referred, in particular, to a letter dated 26 October 2007 in which the Van den Bergs stated that they would seek independent legal advise.

[12] Nelson further testified that indeed, on 1 September 2008, Pierre Kitching Attorneys on the instructions of the Van den Berg, demanded a written undertaking from Status Homes that the townhouses meant for them would be ready for transfer and

occupation within four months. He understood the correspondence from, and on behalf of the appellants to show that the appellants considered Status Homes to be in breach of the agreements, and that they were suffering damages, as a result of which they would be obtaining independent legal advice in order to protect their interests.

[13] Nelson repeated the assertion in the respondent's special plea that by 27 July 2008 it should have been apparent to the appellants that Status Homes was in breach of the agreements, and that the development would not occur. They were therefore aware that there were problems with the transaction, as evidenced by the correspondence. According to him, the appellants had a completed cause of action against the respondent by 26 October 2007, by virtue of the letter written by Pierrie Kitching Attorneys, referred to above.

[14] Mr Henry Fontini (Fontini) testified on behalf of the appellants. He was the building supervisor of the development. The upshot of his evidence is that the construction of the units could not commence until the restrictive conditions in the title deed were removed. Consistently with this, Nelson conceded under cross-examination that the removal of the restrictive conditions was a pre-requisite for the construction of the dwelling units to commence. According to Fontini, the first order for materials was made in October 2008 and construction commenced shortly thereafter until February 2009. By the time they left the construction site in February 2009, four units had been built but not completed.

[15] In a judgment delivered on 2 March 2017, the respondent's primary contention – that the appellants had a completed cause of action by 27 July 2008 – found favour with the court a quo. In the result, it held that the appellants' claims had prescribed, and accordingly dismissed those claims with costs. The issue in the appeal is whether the court a quo was correct in finding that the appellants' claims had prescribed.

[16] A convenient starting point is s 12 of the Prescription Act 68 of 1969 (the Prescription Act), the relevant parts of which read:

'(1) Subject to the provisions of subsections (2) and (3), 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.'

[17] In *Truter & another v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) para 15 this court held that:

'For the purposes of the Act, the term 'debt due' means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words,

when everything has happened which would entitle the creditor to institute action and to pursue his or her claim'. (Footnote omitted.)

[18] This court therefore has to determine the nature of the claim being advanced by the appellants and when it arose, before considering whether the appellants had actual knowledge of 'the facts from which the debt arises' from 27 July 2008 as alleged by the respondent. In my view, the court a quo failed to have regard to the evidence before it. Had it done so, it would have been apparent to it that the removal of the restrictive conditions was a critical consideration. This aspect received no attention at all in the judgment of the court a quo.

[19] That the construction of the townhouses could not commence without the removal of the restrictive conditions on the title deed of the consolidated property, was common cause. As stated earlier, Nelson conceded that much during cross-examination. The restrictive conditions were only removed on 26 August 2008. Therefore, on 28 July 2008, the date on which the respondent contended was the inception date of the prescriptive period, the construction could not have commenced. Nelson conceded further that in view of this fact, had the appellants approached him before 26 August 2008 with complaints about the development not commencing, he would have informed them to be patient as it was Status Homes' intention to commence construction once the restrictive conditions had been removed.

[20] Indeed, that intention is manifest from objective sources. For example, on 13 August 2008, Nelson wrote a letter to a landowner whose property adjoins the

consolidated property, and conveyed Status Homes' intention to erect the townhouses on the consolidated] property. He further mentioned a need to remove the restrictive conditions for the development to proceed. Also, on 20 August 2008 Nelson deposed to an explanatory affidavit in support of a final order for the removal of the restrictive conditions, explaining the steps he had taken to give effect to the provisions of the provisional order. Once the restrictions were removed, the construction commenced shortly thereafter.

[21] In the founding affidavit in support of the application, the sole member of Status Homes stated that the removal of the restrictive conditions was necessary for the development to commence on the consolidated property. The application culminated in the order of 26 August 2008. According to Nelson, he attended to, and secured the removal of the restrictive conditions within a reasonable time after the conclusion of the agreements.

[22] I have gone to great length, perhaps unnecessarily, on the removal of the restrictive conditions. This is to demonstrate the importance of this issue for the determination of the special plea. It must also be borne in mind that the provisional order for the removal of the restrictive conditions was granted at the instance of the respondent, incidentally, on 15 July 2008, just over a week before 27 July 2008 - the respondent's chosen date for the prescriptive period to commence.

[23] The respondent's main difficulty is this: during July and August 2008 it was engaged in efforts to remove the restrictive conditions so that construction could

commence. It is therefore difficult to see how a court can hold that by 27 July 2008, notwithstanding those efforts, there was no prospect that construction would go ahead and that the appellants had a completed claim against the respondent for alleged negligence. Even if the court could reach that conclusion, on the basis that the application to remove the restrictive conditions was a desperate last attempt by the developer, there is no basis on which it could be concluded that the appellants would have had knowledge of that fact. On the contrary, the respondent's efforts would have given assurance to the appellants that once the restrictions were removed, construction would commence. This is in fact what happened. It is an untenable proposition, which in my view, exposes the flawed premise of the respondent's argument.

[24] As a matter of fact, construction could not legally commence on 27 July 2008. As a result, the removal of the legal impediment occurred after the respondent's 'cut-off' date. Nelson could not adduce any evidence that on 27 July 2008 the appellants had actual knowledge of all the requisite facts contemplated in s 12(3) of the Prescription Act. Indeed, as the very existence of the claims depended upon the failure of the development project, it is debatable whether the pleaded claims could have arisen before the conditions were removed, but if they did there is no reason to think that the appellants were aware of the facts giving rise to that claim.

[25] As already stated, the issue is whether the claims advanced in the particulars of claim have prescribed. These claims are in summary that the negligent and wrongful conduct of the respondent caused the appellants to suffer loss as a result of the breach by Status Homes of its obligation to construct the dwellings and make them available to

the appellants. Therefore, the appellants would only have a claim against Status Home when they became aware that it would not construct the dwellings. Their claim against the respondent could not arise any earlier. From the perspective of prescription it was therefore necessary for the respondent to prove that by 27 July 2008 Status Homes would not construct the development and that the appellants were aware of the fact. Working backwards, by February 2009, when construction ceased, they would have known that the development would not go ahead, but in July 2008 they were still awaiting the outcome of the application to remove the restrictive conditions. The respondent did not prove that by July 2008 the development would not proceed, nor that the appellants were aware of that fact. Accordingly, the respondent failed to prove that prescription started to run on 28 July 2008 and that the period of prescription had passed before the service of summons on 30 August 2011.

[26] In sum therefore, I take a view that the respondent's allegation in the special plea that it must have been apparent to the appellants by 28 July 2008 that no construction was going to commence, is unsustainable. The court a quo ought to have found that the respondent had not acquitted itself of the onus to establish the defence of prescription.

[27] Before I conclude, I have to address one aspect. The special plea was adjudicated separately in terms of rule 33(4) of the Uniform Rules of Court in terms of an order made by Beshe J on 15 July 2014, following a substantive application. It is regrettable that this court has, once again, to give guidance on how the procedure set

out in rule 33(4) of the Uniform Rules of Court should be applied.[1] The process of dealing with a matter under rule 33(4) was clarified in *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) para 3:

'Rule 33(4) of the Uniform Rules - which entitles a Court to try issues separately in appropriate circumstances - is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked, even though, at first sight, they might appear to be discrete. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately. But, where the trial Court is satisfied that it is proper to make such an order - and, in all cases, it must be so satisfied before it does so - it is the duty of that Court to ensure that the issues to be tried are clearly circumscribed in its order so as to avoid confusion.'

See also *ABSA Bank Ltd v Bernert* 2011 (3) SA 74 (SCA) para 21 where the following was stated:

'I[f] for no reason but to clarify matters for itself a court that is asked to separate issues must necessarily apply its mind to whether it is indeed convenient that they be separated, and if so, the questions to be determined must be expressed in its order with clarity and precision.'

[1] See for example, *Firstrand Bank v Clear Creek Trading* [2015] ZASCA 6 paras 9-10; *Feedpro Animal Nutrition v Nienaber* [2016] ZASCA 32 para 15; *Cilliers & others v Ellis & another* [2017] ZASCA 13 paras 12-14; and *Transalloys v Mineral-Loy* [2017] ZASCA 95 para 6.

[28] It is by no means clear that these principles informed the decision to separate issues in this matter. In my view, the issue raised in the special plea is inextricably linked with the separated issues of duty of care, negligence, and causation. It seems that Nelson would be a relevant witness in respect of each of the issues in dispute. This should have been clear to the court a quo at the commencement of the hearing of the special plea. In the circumstances, these issues could, and should have been ventilated in one hearing with the special plea, had a vigilant examination of the pleadings been undertaken. An order of separation should not have been made. I appreciate that the decision was made by a different judge. But to my mind, there was nothing that precluded the court a quo from re-visiting the earlier determination by another Judge, if it was of the view that the special plea should be heard in one hearing with the other issues. Had it done so, the inconsistency between Nelson's evidence as to the scope of the legal duty resting on his firm and the admission of a general and unspecific duty in the pleadings could have been clarified.

[29] For the reasons set out above, the appeal should succeed. In the result the following order is made:

1. The appeal is upheld with costs, including costs attendant upon the employment of two counsel.

2. The order of the court a quo is set aside and replaced with the following:

'The first defendant's special plea of prescription is dismissed with costs'.

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T M Makgoka

Acting Judge of Appeal

APPEARANCES

For Appellant:	OH Ronaasen SC (with him A Frost)
	Instructed by:
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For 1st Respondent:	P E Jooste (with him T J D Rossi)
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