THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 969/2020

In the matter between:

JOHANNES G COETZEE & SEUN	**FIRST APPELLANT**
DANIEL CORNELIUS COETZEE	**SECOND APPELLANT**

and

PIETER PAUL LE ROUX	**FIRST RESPONDENT**
JOHANNA CATHARINA LE ROUX	**SECOND RESPONDENT**

Neutral citation: *Johannes G Coetzee & Seun and Another v Le Roux and Another* (969/2020) [2022] ZASCA 47 (8 April 2022)

Coram: MOCUMIE, SCHIPPERS, DLODLO, CARELSE and HUGHES JJA

Heard: 22 February 2022

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 8 April 2022.

Summary: Prescription – extinctive prescription – 'facts from which the debt arises' in terms of s 12(3) of the Prescription Act 68 of 1969 – knowledge of legal consequences not required by s 12(3) of the Prescription Act – Alienation of Land Act 68 of 1981 – failure to comply with s 2(1) of the Alienation of Land Act.

ORDER

On appeal from: Northern Cape Division of the High Court, Kimberley (W J Coetzee AJ, sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the high court is set aside and substituted with the following:

'The special plea of prescription is upheld with costs and the plaintiffs' action is dismissed with costs.'

JUDGMENT

Mocumie JA (Schippers, Dlodlo, Carelse and Hughes JJA)

[1] This appeal is about extinctive prescription, in particular whether the creditor must be aware of the full extent of its rights before prescription may start running against it.

[2] The first and second respondents, Mr Pieter Paul le Roux and his wife, Ms Johanna Catharina le Roux, who were the plaintiffs in the Northern Cape Division of the High Court, Kimberley (the high court), instituted action against the first and second appellants, Johannes G Coetzee & Seun and Mr Daniel Cornelius Coetzee, who were the defendants therein, and which were the respondents' erstwhile attorneys. The respondents sued the appellants for damages suffered as a result of a breach of a mandate. For convenience, hereafter the parties will be referred to as they were in the high court.

[3] The plaintiffs alleged that the defendants were negligent in carrying out their mandate to exercise an option to purchase a farm in Calvinia, in the Northern Cape (the property), from the late Mr Jan Harmse Steyn (the deceased), who had concluded the option to purchase (the option) with the plaintiffs. Notwithstanding the existence of the option and unknown to the plaintiffs, on 8 July 2003, the deceased and his wife concluded a written deed of sale with Mr Paul Nel (Mr Nel) in terms of which the

deceased sold the property to Mr Nel at a purchase price of R141 000. On 13 September 2003, the deceased passed away. On 16 September 2003, the property was transferred to Mr Nel.

[4] On 14 October 2004, in an attempt to enforce the option, the plaintiffs issued summons against Mr Nel, as the first defendant therein, and Mr Alwyn Johannes Müller NO, the attorney of the deceased's estate, as the second defendant therein, claiming transfer of the property and damages. Mr Nel pleaded to the summons admitting receipt of the second plaintiff's letter purporting to exercise the option, but disputing the validity thereof. On 11 September 2009, Williams J (Northern Cape high court) dismissed the action with costs on the basis that the option was not executed in terms of the provisions of s 2(1) of the Alienation of Land Act 68 of 1981. The plaintiffs unsuccessfully appealed against the judgment of Williams J in this Court.[1] Subsequently, on 29 September 2009, the plaintiffs issued summons against the defendants in the high court in respect of the matter which forms the subject of this appeal. In this action, the defendants delivered a special plea in terms of which they pleaded that the plaintiffs' claim had prescribed. Thereafter, the parties agreed to submit a special case on prescription for adjudication, first, in terms of rule 33(4).[2]

[5] Before the high court, in their special plea of prescription, the defendants alleged that the plaintiffs' claim had prescribed for the following reasons: more than three years had elapsed since the debt became due before summons was served; that the content of Mr Nel's plea (para 4) in respect of the action before Williams J should have alerted the plaintiffs to the nature of the defendants' breach and the fact that the option was not exercised in terms of the provisions of s 2(1) of the Alienation of Land Act; and that had their new attorneys, NME Nilssen & Associates, conducted themselves in the manner expected of reasonable attorneys, they would have become aware of the plaintiffs' claim against the defendants.

[6] In their replication, the plaintiffs alleged that they acquired knowledge of the identity of the debtor and the facts from which the debt arose only in early November

[1] The judgment is reported as *Le Roux and Another v Nel and Another* [2013] ZASCA 109 (SCA).
[2] Rule 33(4) of the Uniform Rules of Court entitles a court to try issues separately in appropriate circumstances. It is aimed at facilitating the convenient and expeditious disposal of litigation.

2007, during the cross-examination of the first plaintiff in the action against Mr Nel; alternatively, on 11 September 2009, when the judgment of Williams J was handed down. Accordingly, they alleged that prescription began to run only in early November 2007, or on 11 September 2009, and that the summons served in October 2009 interrupted prescription.

[7] The high court (Coetzee AJ) found that the alleged 'debt' arose from a breach of an implied term of a mandatory contract;[3] and that from the evidence of the first plaintiff, it was clear that the first plaintiff only came to know of the provisions of s 2(1) of the Alienation of Land Act during the trial in the action instituted by the plaintiffs against Mr Nel, being in early November 2007. Furthermore, the high court held[4] that the non-compliance with the provisions of s 2(1) of the Alienation of Land Act is a fact of which the defendants had to have had knowledge, and not a legal conclusion. Therefore, the high court concluded that '[s]ave for relying on the submission that the plaintiffs should have been alerted to the breach by the contents of Nel's plea, [of 23 December 2004], the defendant[s], bearing the onus, did not place anything before [Coetzee AJ] which justifies a conclusion that the plaintiffs did not act as expected of a reasonable [person]'. Notably, the high court considered the recent judgment of this Court, *Fluxmans Incorporated v Levenson*,[5] and held that it is distinguishable on the facts. It thus dismissed, with costs, the defendants' special plea of prescription.

[8] Before this Court, the parties agreed to have their appeal resolved on the basis of a statement of agreed facts, as the original record was missing. The statement reads:

'33. The Appellants contend that prescription in respect of the Respondents' claim against them began to run as soon [as] the Option expired on 12 November 2003 when they lost their entitlement to acquire the Property at the purchase price stipulated in the Option, alternatively, within a reasonable time, being one month, of the appointment of Nilssens Attorneys as the Respondents' attorneys. The Appellants contend that because the Respondents knew that Mr Coetzee purported to exercise the Option on their behalf and knew that he did not have their written authority to do so, prescription commenced to run from the very moment that the Option lapsed, alternatively, on 23 July 2005 being one month after the appointment of Attorneys

[3] Also called a contract of mandate.
[4] Para 31 of the high court judgment.
[5] *Fluxmans Incorporated v Levenson* [2016] ZASCA 183; [2017] 1 All SA 313 (SCA); 2017 (2) SA 520 (SCA).

Nilssens as the Respondents' attorneys.

34. The Appellants contend that the Respondents' knowledge that Mr Coetzee purported to exercise the Option on their behalf and that he did so without their written authority constituted knowledge of the facts from which the debt arose as contemplated in section 12(3) of the Prescription Act 68 of 1969 ("the Prescription Act") and that the commencement of the running of prescription was not delayed by the provisions of section 12(3). In other words, the Appellants contend that the Respondents' lack of knowledge and/or appreciation that Mr Coetzee's lack of authority amounted to a failure to comply with section 2(1) of the Alienation Act and their lack of knowledge and/or appreciation that such failure to comply with section 2(1) of the Alienation Act had the consequence that Mr Coetzee's purported exercise of the Option on the Respondents' behalf was ineffectual, were not facts contemplated by section 12(3) of the Prescription Act and that the running of prescription would not be delayed until the Respondents became aware of them. They were the legal consequences of the facts which were within the knowledge of the Respondents and were not required to be known by the Respondents before the running of prescription could commence.

35. The Appellants' alternative contention is that, even if it is found that the Respondents' lack of knowledge and/or appreciation that Mr Coetzee's lack of authority amounted to a failure to comply with section 2(1) of the Alienation Act and that it had the consequence that his purported exercise of the Option was invalid, the Respondents could have acquired knowledge thereof by exercising reasonable care on 22 June 2005 when Nilssens Attorneys were appointed as their attorneys, or within a reasonable period thereof, and would be deemed to have such knowledge by virtue of the proviso to section 12(3) of the Prescription Act.'

[9] To the contrary, the plaintiffs contend that:

'36. [T]hey only became aware that Mr Coetzee had breached his mandate when the consequences of his failure to comply with the requirements of section 2(1) of the Alienation Act, and of the fact that Mr Coetzee's attempted exercise of the Option on their behalf was invalid, were for the first time drawn to the attention of the First Respondent during his cross examination early in November 2007. The Respondents furthermore contend that the failure to comply with section 2(1) and the resulting invalidity of the exercise of the Option are *facts* of which the Respondents were required to be aware in order for the running of prescription to commence in terms of section 12(3) of the Prescription Act. The Respondents therefore contend that prescription did not commence to run against them until November 2007.

37. The alternative contention is disputed on the basis that [the] Appellants seek to impute to the Respondents the knowledge and conduct of their agent (Nilssens Attorneys) for the purpose of the enquiry in terms of section 12(3) of the Prescription Act. The Respondents contend that this is not permissible. Additionally, the Appellants have failed to establish a

factual foundation for their alternative contention.'

[10] This appeal, therefore, calls for an examination of s 12(3) of the Prescription Act 68 of 1969, which 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.

(4) . . .'

[11] The words 'debt' and 'the debt is due' are not defined in the Prescription Act. Neither are the words 'knowledge of . . . the facts from which the debt arises'. All of these terms, however, have been given meaning and defined in context by this Court and the Constitutional Court, and are followed by courts in general. In *Mtokonya v Minister of Police*,[6] Zondo J states the following at para 36:

'Section 12(3) does not require the creditor to have knowledge of any right to sue the debtor nor does it require him or her to have knowledge of legal conclusions that may be drawn from "the facts from which the debt arises". Case law is to the effect that the facts from which the debt arises are the facts which a creditor would need to prove in order to establish the liability of the debtor.'[7]

[12] In *Minister of Finance and Others v Gore NO*,[8] this Court said:

'This Court has in a series of decisions emphasised that time begins to run against the creditor when it has the *minimum facts that are necessary to institute action*. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights . . . .'[9] (My emphasis.)

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[6] *Mtokonya v Minister of Police* [2017] ZACC 33; 2017 (11) BCLR 1443 (CC); 2018 (5) SA 22 (CC).
[7] See also *Links v Department of Health, Northern Province* [2016] ZACC 10; 2016 (5) BCLR 656 (CC); 2016 (4) SA 414 (CC) paras 30-35; and *Truter v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) paras 16-19.
[8] *Minister of Finance and Others v Gore NO* [2006] ZASCA 98; [2007] 1 All SA 309 (SCA); 2007 (1) SA 111 (SCA).
[9] Ibid para 17.

[13] In *Yellow Star Properties 1020 (Pty) Ltd v MEC: Department of Development Planning and Local Government, Gauteng*,[10] this Court, *inter alia*, said: 'It may be that the applicant had not appreciated the legal consequences which flowed from the facts, but its failure to do so does not delay the date prescription commenced to run'.[11]

[14] In *Claasen v Bester*,[12] this Court had to consider the same issue. It referred to its previous decisions in *Truter and Another v Deysel*[13] and *Gore*,[14] and said that these cases:

'[Made] it abundantly clear that knowledge of legal conclusions is not required before prescription begins to run. . .. The principles laid down have been applied in several cases in this court, including most recently *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng* [2009] 3 All SA 475 [2009 (3) SA 577 (SCA)] para 37 where Leach AJA said that if the applicant "had not appreciated the legal consequences which flowed from the facts" its failure to do so did not delay the running of prescription.'[15]

[15] In *Fluxmans*,[16] this Court confirmed that s 12(3) of the Prescription Act does not require knowledge of legal conclusions on the part of a creditor before a debt can be said to be due. Both the majority and the minority judgments were agreed on this: that an agreement being invalid is not a fact, but a legal conclusion.[17] That seems to be the same as to say that conduct that is wrongful and actionable is a legal conclusion and not a fact.

[16] Recently, in *MEC for Health, Western Cape v M C*,[18] this Court stated:

'Prescription begins to run when the debt in question is due, that is, when it is owing and payable. . . .

. . . [O]nly the requirement of knowledge of "the facts from which the debt arises" needs to be considered. These are the minimum essential facts that the plaintiff must prove in order to succeed with the claim. See *Truter and Another v Deysel* [2006] ZASCA 16; 2006 (4) SA 168

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[10] Y*ellow Star Properties 1020 (Pty) Ltd v MEC: Department of Development Planning and Local Government, Gauteng* [2009] ZASCA 25; [2009] 3 All SA 475 (SCA); 2009 (3) SA 577 (SCA).
[11] Ibid para 37.
[12] *Claasen v Bester* [2011] ZASCA 197; 2012 (2) SA 404 (SCA).
[13] *Truter and Another v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA).
[14] Footnote 10 above.
[15] Ibid para 15.
[16] Footnote 4 above.
[17] Ibid paras 10, 32 and 40-44.
[18] *MEC for Health, Western Cape v M C* [2020] ZASCA 165 (SCA) paras 6-7.

(SCA) paras 16, 18, 19 and 22; *Minister of Finance and Others v Gore NO* [2006] ZASCA 98; [2007] 1 All SA 309 (SCA); 2007 (1) SA 111 (SCA) para 17 and the footnotes thereto; *Mtokonya v Minister of Police* [2017] ZACC 33; 2017 (11) BCLR 1443 (CC); 2018 (5) SA 22 (CC) para 48. Legal conclusions, such as the invalidity of a contract or that the delictual elements of negligence or wrongfulness have been established, are not facts. Neither is the evidence necessary to prove the essential facts. See *Truter v Deysel* paras 17 and 20 and *Mtokonya* paras 44-45 and 50-51.'

[17] More recently, in *McMillan v Bate Chubb & Dickson Incorporated*,[19] this Court held:

'The period of prescription begins to run against a creditor when the creditor has the minimum facts which are necessary to institute action. As this Court recently held in *Fluxmans Incorporated v Levenson*:

"Knowledge that the relevant agreement did not comply with the provisions of the Act is not a fact which the respondent needed to acquire to complete a cause of action and was therefore not relevant to the running of prescription. This Court stated in *Gore NO* para 17 that the period of prescription begins to run against the creditor when it has minimum facts that are necessary to institute action. The running of prescription is not postponed until it becomes aware of the full extent of its rights nor until it has evidence that would prove a case 'comfortably'. The 'fact' on which the respondent relies for the contention that the period of prescription began to run in February 2014, is knowledge about the legal status of the agreement, which is irrelevant to the commencement of prescription. It may be that before February 2014 the respondent did not appreciate the legal consequences which flowed from the facts, but his failure to do so did not delay the date on which the prescription began to run. Knowledge of invalidity of the contingency fee agreement or knowledge of its non-compliance with the provision of the Act is one and the same thing otherwise stated or expressed differently. That the contingency fees agreements such as the present one, which do not comply with the Act, are invalid is a legal position that obtained since the decision of this court in *Price Waterhouse Coopers Inc* and is therefore not a fact which the respondent had to establish in order to complete his cause of action. *Section 12(3) of the Prescription Act requires knowledge only of the material facts from which the prescriptive period begins to run – it does not require knowledge of the legal conclusion (that the known facts constitute invalidity)* (*Claasen v Bester* [2011] ZASCA 197; 2012 (2) SA 404 (SCA))."' (Original emphasis.)

Most recently, similar views were expressed in *Van Heerden & Brummer Inc v Bath*.[20]

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[19] *McMillan v Bate Chubb & Dickson Incorporated* [2021] ZASCA 45 (SCA) paras 38-39.
[20] *Van Heerden & Brummer Inc v Bath* [2021] ZASCA 80 (SCA).

[18] In an application where a special plea of prescription is raised, there are two enquiries that must take place, as set out in *MEC for Health, Western Cape.*[21] First, the determination of the primary facts, on one hand, and on the other hand, the knowledge or deemed knowledge thereof. This means that once the facts from which the debt arose (the primary facts) have been determined, the enquiry turns to the creditor's knowledge of the primary facts. It is important to be cognisant of some overlap of facts between these two distinct enquires postulated in s 12(3) of the Prescription Act.[22]

[19] The case for the plaintiffs on the stated facts is that they only became aware of 'the facts from which the debt arises' when their attention was for the first time drawn to those facts during the cross-examination of the first plaintiff early in November 2007. Thus, prescription did not commence to run against them until November 2007. However, in the particulars of claim it is stated that the plaintiffs' consulted the second defendant on 26 September 2003, after the deceased had passed away on 13 September 2003, to exercise the option on their behalf. And the second defendant had told them he would write to Mr Müller. This is later confirmed in the statements of agreed facts, at paras 9-10 where it is stated that 'on or about 26 September 2003, the [plaintiffs] . . . mandated [Mr Coetzee] . . . to exercise the Option on their behalf. . . . and [Mr Coetzee] said that he would send a letter to [the attorney, Mr Muller]'. Furthermore, that before the plaintiffs left the second defendant's office, Mrs le Roux had asked him whether it was necessary to sign anything, to which the second defendant responded that it was not. These are the primary facts within their specific knowledge.

[20] To my mind, on the common cause facts gathered from the statement of agreed facts, the pleaded case as reflected in the particulars of claim and the founding affidavit, the plaintiffs had the required knowledge of the facts on or about 26 September 2003. This was when the plaintiffs mandated the second defendant to exercise the option on their behalf and he told them that he would send a letter to the attorney, Mr Müller, and they did not sign anything. Apart from this, they became aware

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[21] Footnote 20 above.
[22] Ibid para 8.

of the essential facts when they suffered damages when the option lapsed on 13 November 2003. Their cause of action against the defendants was thus complete on the latter date. Alternatively, the latest, objectively, that they should reasonably have had the requisite knowledge was when they terminated their mandate with the second defendant and instructed Mr Nilssen, their new attorney, in January 2005. This qualifies as deemed knowledge within the contemplation of s 12(3) of the Prescription Act. That the plaintiffs were unaware of the provisions of s 2(1) of the Alienation of Land Act until early November 2017, cannot be a fact from which their claim arose. But instead, it is a legal conclusion. On this basis, applying the principle extrapolated from the above precedents, the contention that the plaintiffs only became aware of the facts from which the debt arose during the cross-examination in early November 2007 cannot be correct.

[21] In conclusion, on these facts, it is clear that the plaintiffs had the minimum facts from which they needed to institute their claim on 26 September 2003, or when the option expired on 13 November 2003. But even after that date, at the latest, by January 2005. It was not required of them to know more about the Alienation of Land Act and compliance with it. Only that they had mandated the defendants to act on their behalf, and they did not do so. This means that the plaintiffs' claim prescribed before summons was served on 26 September 2009.

[22] The plaintiffs' remaining contention that prescription began to run on 13 September 2009 when the judgment by Williams J was handed down, can be dealt with briefly. The *dictum* by Moseneke J in *Eskom v Bojanala Platinum District Municipality*,[23] applied most recently in *Van Heerden & Brummer Inc*,[24] provides a complete answer, where it is stated that:

'. . . [T]here is no merit in the contention advanced on behalf of the plaintiff that prescription began to run only on the date the judgment of the SCA was delivered. The essence of this submission is that a claim or debt does not become due when the facts from which it arose are known to the claimant, but only when such claimant has acquired certainty in regard to the law and attendant rights and obligations that might be applicable to such a debt. If such a construction were to be placed on the provisions of section 12(3) grave absurdity would arise. These provisions regulating prescription of claims would be rendered nugatory and ineffectual.

[23] *Eskom v Bojanala Platinum District Municipality and Another* 2003 JDR 0498 (T) at 11-12.
[24] Footnote 23 above para 17.

Prescription periods would be rendered elastic, open ended and contingent upon the claimant's subjective sense of legal certainty. On this contention, every claimant would be entitled to have legal certainty before the debt it seeks to enforce becomes or is deemed to be due. In my view, legal certainty does not constitute a fact from which a debt arises under s 12(3). A claimant cannot blissfully await authoritative, final and binding judicial pronouncements before its debt becomes due, or before it is deemed to have knowledge of the facts from which the debt arises.'

[23] These numerous authorities cited indicate that the exercise to determine and distinguish a question of fact from a question of law when determining whether prescription has started to run, is not an easy task that should be dealt with mechanically. It cannot simply be predetermined on the basis of previous cases. Zondo J appreciated this difficulty when he stated as follows in *Mtokonya*:

'The distinction between a question of fact and a question of law is not always easy to make. How difficult it is will vary from case to case.'[25]

[24] In the light of the conclusion that I have reached, it is unnecessary to consider the alternative argument, ie whether the knowledge of their attorney, Mr Nilssen, should be imputed to the plaintiffs.

[25] In the result, the following order is issued:

1 The appeal is upheld with costs.

2 The order of the high court is set aside and substituted with the following:

'The special plea of prescription is upheld with costs and the plaintiffs' action is dismissed with costs.'

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B C MOCUMIE

JUDGE OF APPEAL

[25] Footnote 9 above para 38.

APPEARANCES

For the appellants:	G F Porteous
Instructed by:	Savage Jooste & Adams, Pretoria
	Symington & De Kok Incorporated, Bloemfontein
For the respondents:	C Cutler
Instructed by:	NME Nilssen & Associates, Cape Town
	Mayet & Associates, Bloemfontein