

MAASDORP, C.J., and
WARD, J.
Mar. 12th, 1912.

42. CP 227.

DE KLERK vs. SEGGIE.

Prescription.—Actio Redhibitoria.—Reasonable Time.

Where three cows had been purchased by S from K on the 17th May, 1911, and K had warranted that one would calve early in June and the other two in July, and S claimed a refund of the purchase price on the ground that two of the cows had not calved till September and October respectively and the third had never calved at all, summons being served on January 5th, 1912:—Held, on appeal, that S had brought his action within a reasonable time and none of the causes had become prescribed.

(*Christie vs. Etheridge*, 19 S.C. 367, followed).

Appeal from a decision of the R.M. of Winburg.

The respondent (plaintiff below) had sued the appellant for damages on the ground of failure of an express warranty given him by the appellant on the purchase of three cows at an auction sale held on the 17th May, 1911. The cows had been sold separately and the appellant had personally guaranteed that the first cow would give 22 bottles of milk a day and would calve early in July, 1911; that the second would give 18 bottles of milk a day and would calve early in June and the third would give 18 bottles a day and would calve in July. The first cow had calved on the 30th September, the second never calved at all and the third calved on the 23rd October. The respondent's original claim in his summons was in the form of the *actio quanti minoris* in respect of the first cow and in the form of the *actio redhibitoria* in the case of the other two cows. At the suggestion of the magistrate the respondent's attorney agreed to change the form of action in the case of the first cow and to claim a re-fund of the whole purchase price by the *actio redhibitoria* in all three cases. The appellant thereupon raised the exception that the action had been prescribed as it had not been instituted within six months, the summons having been served

1912.
Mar. 12.
de Klerk vs.
Seggie.

1912.
Mar. 12
de Klerk vs.
Seggie.

on the 5th January, 1912. The magistrate dismissed the exception without taking evidence on the point and then heard the case on the merits and gave judgment for the respondent.

H. F. Blaine, K.C., for the appellant: The only ground of appeal is the dismissal of the exception that the action had been prescribed. The period of six months for prescription in the case of the *actio redhibitoria* began on the 17th May and consequently ended on the 16th November. The delay in failing to institute proceedings till January was unreasonable. The respondent should have sued as soon as it was certain that the cows would not calve on the dates guaranteed. See *Hairside vs. Jordan* (20 S.C., at p. 153); and *Christie vs. Etheridge* (19 S.C., at p. 370).

[MAASDORP, C.J.: Would not the period of prescription run from the date on which it was certain that the warranty would fail and not from the date of the sale?]

The cases all show that the period must date from the sale. See *Durr vs. Bam* (8 S.C. 22) and *O'Brien vs. Palmer* (2 E.D.C. 344).

P. U. Fischer, for the respondent: See *Nourse vs. Malan* (1909, T.S., at p. 204). The parties had practically agreed to look upon all three transactions as one. There was *justa causa* for the delay. See *Maasdorp's Institutes of Cape Law* (Vol. III. p. 176).

H. F. Blaine, K.C., in reply.

MAASDORP, C.J.: The general principle as laid down by law, which is referred to in the case of *Christie vs. Etheridge* (19 S.C. 367), is that the period of prescription is not to be regarded as a fixed period, but rather as the time within which it is reasonable that the action should be brought. This appeal is brought in respect of the sale, by de Klerk to Seggie, of three cows under certain guarantees. The first cow was guaranteed to calve in July—we will say before the 1st of August—and, when she had calved, to produce 22 bottles of milk per diem.

As a matter of fact she did not calve until the 30th of September. The question arises: When would it have been reasonable for Seggie to proceed with his action? He might have proceeded immediately after the 1st of August in respect of this guarantee, but it seems quite reasonable that he should say to himself "I will wait to see how far the next guarantee goes, whether the cow calves and gives the guaranteed quantity of milk; she may exceed that quantity; I will wait with my action." Therefore there was no necessity for Seggie to take proceedings until the 30th of September, because his cause of action would only begin then and he would have three months to proceed in. As to the second cow, the guarantee was that she would calve early in June and give 18 bottles of milk. As a matter of fact this cow did not calve at all. Supposing the purchaser said to himself "Well, I will wait to see when she does calve; I will see what quantity of milk she gives, and I will act according to what I discover then." He would have the right to wait till the end of nine months for the cow to calve and that period would have been considerably longer than in the first case. Then with regard to the third cow, she was guaranteed to calve in July and to give 18 bottles of milk. She only calved on the 23rd of October. The same reasoning applies here as in the first case. So that it was quite reasonable for the purchaser to wait in all three cases before he took action. The exception of prescription therefore does not apply.

The appeal is dismissed with costs.

WARD, J., concurred.

[Appellant's Attorneys, MARAIS & DE VILLIERS.]
[Respondent's Attorneys, BOTHA & GOODRICK.]

[Reported by R. C. STREETEN, Esq., Advocate.]

1912.
Mar. 12.
de Klerk vs.
Seggie.