THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1242/2016

In the matter between:

GLENWIN FRIESLAAR NO	**FIRST APPELLANT**
ANGELINE FRIESLAAR NO	**SECOND APPELLANT**
G & I PLUMBERS CC	**THIRD APPELLANT**

and

PETRUS ANDRE ACKERMAN	**FIRST RESPONDENT**
ADLU PROJECTS CC	**SECOND RESPONDENT**

Neutral citation: *Frieslaar NO v Ackerman* (1242/2016) [2017] ZASCA 03 (02 February 2018)

Coram: Ponnan, Seriti, Petse and Mocumie JJA and Mokgohloa AJA

Heard: 21 November 2017

Delivered: 02 February 2017

Summary: Prescription: extinctive prescription: Prescription Act 68 of 1969, ss 10, 11 and 12: obligation to pay transfer costs and to transfer property sold constituting a debt which is susceptible to prescription: date of commencement of the running of prescription: running of prescription commences once the creditor has acquired right to claim the debt.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Gutta J, Hendricks and Gura JJ concurring sitting as court of appeal).
The appeal is dismissed with costs.

JUDGMENT

Petse JA (Seriti and Mocumie JJA and Mokgohloa AJA concurring):

[1] This appeal, once again, raises the perennial issue of when a debt falls due for purposes of prescription as contemplated in s 12(1) of the Prescription Act 68 of 1969 (the Prescription Act). The proceedings emanated in an action instituted by the first and second appellants in their capacities as trustees of the Frieslaar Family Trust (the Trust) jointly with the third appellant, G & I Plumbers CC against the first respondent, Mr Petrus Andre Ackerman and alternatively against the second respondent, Adlu Projects CC, in which the appellants sought the following relief:

'1. An order in terms whereof it is declared that the purported cancellation by the first [respondent] alternatively second [respondent] of the agreements in relation to the Kaldi Place properties and the Barrish Place properties were not validly effected;

2. The further agreements in relation to the Kaldi Place properties and the Barrish Place properties are valid and binding between the parties thereto;

3. The first and/or second [respondents] are ordered to take all such steps required in order to give transfer of ownership in relation to the Kaldi Place properties and the Barrish Place properties to the first and second [appellants], alternatively that the sheriff of [the court below] is authorised to take all such steps in order to effect transfer of ownership to the first and second [appellants];

4. In the alternative to prayer 3 above, the first/second [respondent] are ordered to make payment to the first and second [appellants] in the sum of R2, 160, 000;
. . .'

[2] As is apparent from the relief sought in terms of prayer 4 above, the appellants also claimed, in the alternative, payment of damages in the sum of R2 160 000 with interest of 15.5% per annum. The damages claim represented moneys allegedly owed by Adlu Projects CC to G & I Plumbers CC in respect of material supplied and services rendered by the latter to the former. In either event, the appellants, in addition, claimed costs of suit. Several grounds were relied upon in support of the claim. The appellants' summons was served on the respondents on 7 March 2013. In what follows I shall, for the sake of convenience, refer to Ackerman and Adlu Projects CC collectively as the respondents.

[3] The action related to four pieces of immovable property sold by the respondents to the Trust pursuant to agreements of sale couched in identical terms, concluded on 25 February 2010. The respective agreements of sale, inter alia, contained the following terms:

'15.2 Possession of the properties would be given to the Trust and the Trust would be obliged to take possession thereof on 1 March 2010 from which date the Trust would be liable for all municipal rates and taxes and body corporate levies, and /or fees payable on the properties, and from which date the properties would be the sole risk, profit or loss of the Trust; and

15.3 The parties agreed that the agreement constituted the entire agreement between the parties and that there would be no other conditions, stipulations, warranties or representations whatsoever made, other that such as which was included in the agreement and signed by the parties.'

[4] Clause 7.1 of the agreements also contained the following term and obligation imposed on the respondents as the sellers and enforceable by the Trust as the purchaser:

'The Seller shall be liable for all transfer costs, transfer duty, stamp duty, . . . and transfer of the property into the name of the Purchaser by the conveyancers of the Seller, and the conveyancing shall only commence after such costs have been paid by the Seller.'

It is necessary to record that the purchase price was, in terms of the agreements of sale concerned, to be set off against the sum of R2 160 000 allegedly owed to G & I Plumbers CC by the respondents.

[5] The Trust alleged that on 4 July 2012 and in breach of the agreements, the respondents purported to cancel the agreements, which cancellation the Trust did not accept. The respondents resisted the claims. They raised a special plea of prescription asserting that the claim of the appellants had arisen on 25 February 2010 (when the agreements were concluded) and that the appellants' summons was served on them on 7 March 2013, more than three years after the date on which the claims arose. The respondents also relied on additional defences which are not material for present purposes.

[7] At the trial, the parties agreed, pursuant to rule 33(4) of the Uniform Rules of Court, that the special plea of prescription be adjudicated prior to and separately from the remaining issues. The court of first instance (Chwaro AJ), after hearing the parties, dismissed the special plea of prescription with costs. It subsequently granted the respondents leave to appeal to the full court.

[8] On appeal to the full court, however, the order of the court of first instance was reversed, and the special plea of prescription was upheld with costs. This appeal is against that order, special leave to appeal having been granted by this court.

[9] In the court of first instance, the learned judge accepted that it was trite that prescription commences to run as soon as the debt becomes due, meaning that from the date it becomes immediately claimable by the creditor and immediately payable by the debtor. He also accepted, with reference to *Desai NO v Desai NNO & others* [1995] ZASCA 113;1996 (1) SA 141 (SCA) at 146 I-147A, that the respondents' obligation to

transfer the properties to the Trust was a debt as contemplated in s 10 of the Prescription Act. He nonetheless concluded that as the appellants' action was precipitated by the respondents' purported cancellation of the sale agreements on 4 July 2012 – when the three year period from 25 February 2010 had not yet elapsed – the running of prescription was thereby interrupted.

[10] In the course of considering whether the respondents' obligation had become due, the court below said the following (para 16):

'For prescription to commence running there has to be a debt immediately claimable by the creditor or stated in another way, there has to be a debt in respect of which the debtor is under an obligation to perform immediately.' (Citations omitted.)

[11] It then continued in para 20:

'The payment of transfer costs, transfer and stamp duty, deed of sale and transfer of the property are reciprocal obligations which . . . do not delay the running of prescription. As there was no fixed time provided in the agreement when transfer was to be effected, the respondents could have within 3 years from the date the agreement was concluded brought an action to claim specific performance for transfer of the property and they could have simultaneously claimed payment of the transfer and duty costs. The respondents acquired a complete cause of action on the date the written agreement was concluded in that they had all the facts necessary to succeed with their claim and the appellants were obliged to perform immediately.'

[12] Consequently, it concluded that the 'debt arose and became due upon conclusion of the written agreements of sale on 25 February 2010 and accordingly prescribed on 24 February 2013'.

[13] In this court the appellants contended that the obligation undertaken by the respondents to pay the transfer and related costs did not constitute a debt owing to the appellants. In the alternative, the appellants asserted that having regard to clause 7.1 of the agreements there was no obligation on the respondents to perform immediately and that they had an election to perform within a reasonable time. In the further alternative, the appellants contended that prescription would have only commenced to run when the

transfer and incidental costs were paid by the respondents. In sum, the appellants submitted that their claim had not prescribed when summons enforcing the agreements was served on the respondents on 7 March 2013.

[14] On their part, the respondents argued that the appellants had full knowledge of the facts from which their claim arose on 25 February 2010. Thus, they contended, prescription commenced to run from that date when they could and should have instituted action for the transfer of the properties and incidental relief.

[15] The relevant statutory provisions in this case are ss 10(1), 11 and 12(1) of the Prescription Act. Section 10 of the Prescription Act is headed 'Extinction of debts by prescription' and the relevant parts of s 10(1) read:

'. . . a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of prescription of such debt.'

Section 11, in turn, is entitled 'Periods of prescription of debts' which, to the extent relevant for the present purposes, provides:

'The period of prescription of debts shall be the following:

(a) . . .

(b) . . .

(c) . . .

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.'

Section 12 is headed 'When prescription begins to run' and the relevant parts of s 12(1) provide:

'. . .prescription shall commence to run as soon as the debt is due.'

[16] It is apposite at this stage to make some preliminary observations. One of the philosophical justifications for prescription is that 'society is intolerant of stale claims'. Thus, a creditor is required to be vigilant in enforcing his or her rights. If he or she fails to enforce them timeously, he or she may not enforce them at all. (See in this regard: *Cape Town Municipality v Allie NO* 1981 (2) SA 1 (C) at 5G-H; *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 (1) SA 571 (A) at 578F-H.)

In *Duet and Magnum Financial Services CC (In liquidation) v Koster* [2010] ZASCA 34; 2010 (4) SA 499 (SCA), para 9, Nugent JA said that prescription 'is about rights that have come into existence but have ceased to exist by the passage of time'.

[17] In *Road Accident Fund & another v Mdeyide* [2010] ZACC 18; 2011 (2) SA 26 (CC) Van der Westhuizen J explained it thus (para 2):

'In the interests of social certainty and the quality of adjudication, it is important, though, that legal disputes be finalised timeously. The realities of time and human fallibility require that disputes be brought before a court as soon as reasonably possible. Claims thus lapse, or prescribe, after a certain period of time. If a claim is not instituted within a fixed time, a litigant may be barred from having a dispute decided by a court. This has been recognised in our legal system – and, others – for centuries.'

[18] Previously, in *Mohlomi v Minister of Defence* [1996] ZACC 20; 1997 (1) SA 124 (CC), Didcott J, writing for a unanimous court, explained the rationale for extinctive prescription in these terms (para 11):

'Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigation damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.'

[19] The word 'debt' is not defined in the Prescription Act. But it is now trite that the word 'debt' in s 12(1) of the Prescription Act is a wide concept which does not equate to a 'cause of action'. Rather, it includes the broader concept of a 'right of action'. In *Drennan Maud & Partners v Town Board of the Township Pennington* [1998] ZASCA 29; 1998 (3) SA 200 (SCA) Harms JA put it thus (212F-J):

'[I]n short, the word "debt" does not refer to the "cause of action", but more generally to the claim.

. . .

In deciding whether a 'debt' has become prescribed, one has to identify the "debt", or, put differently, what the "claim" was in the broad sense of the meaning of that word.'

[20] In *Barnett & others v Minister of Land Affairs & others* [2007] ZASCA 95; 2007 (6) SA 313 (SCA), para 19, the term 'debt' was given a broad meaning to refer to an obligation to do something, such as payment or delivery of goods or to abstain from doing something.

[21] However, the Constitutional Court has expressed reservations in its recent decisions, notably, *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC) para 87-93, in relation to the precise ambit of the word 'debt' implying that it should be interpreted narrowly. Fortunately though, on the facts of this case, it is not necessary to enter into that debate which must be left for another day when pertinently raised and this court has enjoyed the benefit of full argument on this score for, in the context of the facts of this case, even in adopting a narrow meaning of the word 'debt', the obligations undertaken by the respondents in terms of clause 7.1 constitute a debt. (See also: *Off-Beat Holiday Club & another v Sanbonani Holiday Spar Shareblock Limited & others* [2017] ZACC 15, paras 46-53.)

[22] Similarly, the phrase 'debt is due' is not defined in the Prescription Act. But it is now well settled that the term must be given its ordinary meaning, that is, that a debt owing and already payable or immediately claimable or immediately exigible at the election of the creditor. (See: *Electricity Supply Commission v Stewarts & Lloyds SA (Pty) Ltd* 1979 (4) SA 905 (W) at 908E; *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* [1990] ZASCA 136; 1991 (1) SA 525 (A) at 532H.) Put differently, there must be a debt in respect of which the debtor is under an obligation to perform immediately.

[23] In *List v Jungers* 1979 (3) SA 106 (A) at 121C-D this court stated that there is a difference between when a debt comes into existence on the one hand and when it becomes recoverable on the other hand, although these dates may coincide.

[24] As to when 'a debt is due' this court, in *Truter & another v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) said the following (para 15):

'A debt is due . . . 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.' [Citations omitted.]

(See further in this regard: *I L Back* above at 990D-E; *Evins v Shields Insurance Co Ltd* 1980 (2) SA 814 (A) at 838D-H; and *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd & another* [2016] ZASCA 91; 2017 (1) SA 185 (SCA) para 24.)

[25] More than a decade ago in *Minister of Finance & others v Gore NO* [2006] ZASCA 98; 2007 (1) SA 111 (SCA) the following was stated (at 119J-120A):

'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, nor until the creditor has evidence that would enable it to prove a case "comfortably".'

And as Farlam JA succinctly put it in *Unilever Bestfoods Robertsons (Pty) Ltd v Soomai & another* [2006] ZASCA 144; 2007 (2) SA 347 (SCA) at 359F-H:

'What prescribes in terms of the Prescription Act . . . is a "debt", that is to say, not a "cause of action", but a "claim".'

[26] Against the foregoing backdrop, I revert to a consideration of what lies at the heart of this appeal, namely whether the debt – meaning the obligation of the respondents to pay transfer and related costs and thereafter pass transfer of the properties in question to the Trust, constitutes a debt and, if so, when such debt fell due. In this regard, the respondent asserted that the obligations undertaken by them in terms of the various agreements each constituted a debt as contemplated in s 10(1) of the

Prescription Act. The court of first instance found that these obligations were debts and thus susceptible to prescription. But it nevertheless held that prescription only commenced to run from the date of repudiation of the agreements by the respondents on 4 July 2012. Consequently, it concluded that the debts had not prescribed. As to repudiation, it suffices merely to record that at the hearing of the appeal, counsel for the appellants expressly disavowed any reliance on the respondents' purported repudiation of the agreements, which the appellant had in any event not accepted. Thus, nothing more need be said in relation to this aspect. With respect to the appellants' alternative claim for damages, we were informed by counsel at the hearing of the appeal that it too would not be persisted in.

[27] As will be demonstrated below, the obligation of the respondents to pay transfer costs and other related costs in terms of the sale agreements, constitutes a debt as contemplated in s 10(1) of the Prescription Act. There is no dispute that, as a general principle, prescription commences to run as soon as the debt is due as contemplated in s 12(1).

[28] The argument advanced on behalf of the appellants was three-pronged. First, it was contended that the obligation to pay transfer costs undertaken by the respondents does not constitute a debt as contemplated in s 10(1) of the Prescription Act. Second, it was contended that to the extent that such an obligation is held to constitute a debt, the wording of clause 7.1 of the sale agreements does not contemplate immediate performance by the respondents. And, consequently, the running of prescription did not commence upon the conclusion of the agreements in question that only once the costs of transfer have been paid by the seller to its conveyancer. Third, that taking cognisance of the fact that the dates on which a debt arises and when it becomes claimable do not always coincide; the debt in this instance would therefore have become due from the date on which the transfer costs were paid. And as the respondents had still not paid such costs by the time the appellants' summons was served on them, the running of prescription had not yet commenced when the appellants' action was instituted.

[29] Before I deal with these contentions, it is necessary to make one further observation. In large measure, the fate of this appeal hinges on the interpretation of the Prescription Act and clause 7.1, in accordance with the well-established canons of interpretation of documents. The interpretation process entails that the document in issue must be interpreted in the light of the language used. The context in which the relevant provisions appear, their apparent purpose and the material known to those responsible for their production are also relevant considerations. (See in this regard *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.)

[30] Accordingly, as endorsed in a long line of cases, the logical point of departure is the language of the relevant provisions themselves read in the context of the overall scheme of the Act, having regard to the purpose of the provision and against the background to the production of the document. (See in this regard: *South African Airways (Pty) Ltd v Aviation Union of South Africa & others* [2011] ZASCA 1; 2011 (3) SA 148 (SCA) paras 25-30; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) paras 10-12; *Novartis SA v Maphil Trading* [2015] ZASCA 111; 2016 (1) SA 518 (SA) paras 24-31.)

[31] An obligation to do something undertaken in terms of a contract, when the contract is silent as to the time of performance, is a debt which becomes immediately claimable or exigible at the instance of the creditor. Thus prescription commences to run from the date on which the contract was concluded. In *Munnikhuis v Melamed NO* 1998 (3) SA 873 (W) the court said the following (at 887E-F):

‘. . . A right to claim performance under a contract ordinarily becomes due according to its terms or, if nothing is said, within a reasonable time, which in appropriate circumstances, can be immediately . . .’

[32] In *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) 510 (C) the following was stated at 546I-547B:

‘The next question which must be addressed is when separate debts in an overdrawn current account are due and payable. An overdraft is a series of loans. A loan without agreement as to

time for repayment is at common law repayable on demand. Although by no means linguistically clear, the phrase “payable on demand” is used in this context in our law to mean that no specific demand for repayment is necessary and the debt is repayable as soon as it is incurred. When suing for repayment there is no need to allege a demand and such a demand is not part of the plaintiff’s cause of action.’ [Citations omitted.]

[33] The passage in *Standard Bank Ltd* quoted in the preceding paragraph was cited with approval by the Constitutional Court in *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* [2017] ZACC 32 para 42. The Constitutional Court stated in para 105, that prescription in respect of loans payable on demand begins to run when the debt arises unless there is clear indication to the contrary.

[34] Professor M M Loubser in his book titled *Extinctive Prescription* (1996) at 53, inter alia, points out that where a contract is silent as to the time of performance, the debt is generally due immediately upon conclusion of the contract. Similarly, J Saner SC in *Prescription in South African Law*, Issue 23 (2016) says the following (at 3.65):

‘It is arguable that a contract allowing a creditor to determine, of his own accord, when performance is to be made is in effect silent as to the time of performance. Performance is therefore due immediately on conclusion of the contract, when prescription begins to run. Taking the argument further, the stipulation that performance is due on demand merely reinforces the implicit term of the contract that performance is due from the conclusion of the contract.’

[35] According to clause 7.1 of the relevant agreements, the seller, ie Adlu Projects CC, is, amongst other things, liable for the payment of transfer and related costs to conveyancers appointed by it. And that only upon payment of such costs, would transfer of ownership of the properties in question be effected by its conveyancers. Clause 7.1 nowhere stipulates the time as to when such payment should be made. All it does is to impose an obligation on the respondents as the seller to pay these costs. When prompted by a question posed to him by a member of the Bench, counsel for the appellants sought to argue that the language of clause 7.1 manifests an intention on the part of the contracting parties to the effect that the transfer of the properties into the

name of the Trust would only occur after the seller had paid the transfer costs. Put differently, the transfer of the properties was subject to a suspensive condition, namely the payment of transfer costs. Thus for as long as the transfer costs remained unpaid the running of prescription in relation to the transfer of the properties did not commence to run. However, counsel had difficulty in articulating this proposition. Ultimately he was constrained to disavow any reliance on the notion that the transfer of the relevant properties was subject to a suspensive condition. Accordingly, nothing more need be said on this score.

[36] Accordingly, the question arises as to whether this obligation constitutes a debt as contemplated in s 10(1) of the Prescription Act. To escape the consequences of extinctive prescription, counsel for the appellants argued that this obligation does not constitute a debt. He further contended that even if it were to be regarded as a debt, it was a debt owed not to the Trust but to the conveyancers who were to transfer the properties to the Trust. This argument cannot be sustained. First, in *Makate* the Constitutional Court, in the course of reviewing decisions of our courts as to what constitutes a debt, adopted the dictionary meaning ascribed to the word 'debt' in the *Shorter Oxford English Dictionary* 5ed (1993) and concluded in paras 85-86 that a debt is:

'1 something owed or due: something (as money, goods or services) which one person is under an obligation to pay or render to another.

2 A liability or obligation to pay or render something; the condition of being obligated.'

Second, it cannot be an answer to say that the obligation to pay transfer costs is owed to the conveyancers simply because payment must, in terms of clause 7.1, be effected to them as the appellants sought to argue. The obvious answer is that all of the obligations undertaken by the respondents in terms of the agreements in question were owed to the Trust as the contracting party and only the Trust was entitled to enforce those obligations.

[37] It therefore follows that the Trust had every right, had it elected to do so, to demand that the respondents do what was required of them in terms of clause 7.1

immediately upon the conclusion of the agreements of sale. When he was confronted with a question from a member of the bench as to what precluded the Trust from demanding payment immediately upon conclusion of the agreements, the only answer – which is far from convincing – that counsel for the appellants could proffer was that the Trust would have been met with a defence that the respondents could do nothing until the transfer costs were determined by conveyancers. This is hardly surprising for it was certainly open to the Trust to do so once its rights flowing from the agreements came into existence on 25 February 2010. Indeed that is the very step that the appellants took, albeit outside the three year prescriptive period, when they ultimately instituted legal proceedings against the respondents in March 2013.

[38] As to the alternative contention advanced by the appellants, counsel, relying solely on the wording of clause 7.1 of the agreements, argued that as between the parties there was no expectation that the respondents would render performance, ie pay the transfer costs immediately. Rather, the parties contemplated that payment of these costs would be effected within a reasonable time. As to what constituted a reasonable period, counsel submitted, without any factual basis, that it was a period of three months.

[39] I fail to see how this argument can avail the appellants for essentially two reasons. First, a period of more than three years elapsed before the appellants enforced their contractual rights. Second, it does not follow that because the Trust believed that the respondents supposedly had three months from the conclusion of the agreement within which to pay the transfer costs, prescription did not commence to run from the date of the conclusion of the agreement. In *Baker v Probert* 1985 (3) SA 429 (A), a case where the agreement of sale was cancelled after the purchaser had already paid the purchase price, this court said at 438J-439C and 446C, that the purchaser was entitled to claim repayment of the purchase price from the seller immediately upon the valid cancellation of the sale agreement. It further stated that prescription commenced to run from the date of cancellation. By parity of reasoning, where the seller was obliged to cause transfer to be effected in terms of the agreement, as is the position here, but

failed to do so within a reasonable time, the Trust became entitled to enforce the agreement immediately. Put differently, the Trust acquired a right of action against the respondents who were, in turn, obliged to perform immediately upon the conclusion of the relevant agreements.

[40] The appellants' final argument was that the law draws a distinction between the date on which a debt arises and the date on which it falls due. And that prescription commences to run not from the date on which a debt arose but from the date on which it became due. Relying upon this distinction, the appellants further contended that in the present case the due date would have been when the transfer costs were paid by the respondent. In elaboration, counsel put some store on the concluding words 'the conveyancing process shall only commence after [transfer] costs have been paid by the seller' in clause 7.1 of the agreements. In my view, this argument is untenable. It flies in the face of the settled principle endorsed by the Constitutional Court and this court in the decisions referred to in paras 16-18 above. What it means is that for as long as the transfer costs remained unpaid – regardless of how long that might take – transfer of the properties would be held in abeyance. And that the appellants could remain supine indefinitely without running any risk of prescription intervening.

[41] To my mind, upholding the appellants' argument would have the effect that the running of prescription would only commence from the time of the Trust's choosing. In *The Master v I L Back & Co Ltd & others* 1983 (1) SA 986 (A) at 1004A-1005H, this court held that a creditor cannot by its own conduct – namely action or inaction – postpone the commencement of prescription. Professor Loubser in *Extinctive Prescription* above explains the rationale for this principle as follows at 63:

'On account of the policy consideration that a creditor should not be able to rely on his own failure to demand performance from the debtor in order to delay the running of prescription the courts will require a clear indication that the parties intended demand to be a condition precedent for the debt to become due, in which case prescription will only begin to run from the date of demand.'

[42] In conclude, therefore, that for all the aforegoing reasons this appeal cannot succeed. In the result the following order is made:

The appeal is dismissed with costs.

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X M Petse

Judge of Appeal

Ponnan JA (concurrence):

[43] I have had the benefit of reading the judgment of Petse JA. Whilst I agree with my learned colleague's conclusion, I believe that it may conduce to clarity for me to state separately my reasons for concurring with him that the appeal must fail with costs.

[44] Stripped of unnecessary surplusage, the facts, which fall within a narrow compass, are: On 4 March 2013 the appellants caused summons to be issued seeking, in effect, an order compelling the respondents to cause transfer of certain properties to be effected into the names of the first two appellants. The appellants relied on three identically worded written agreements concluded between the parties on 25 February 2010. The summons was served on the respondents, three days after its issue, on 7 March 2013. The summons was met with a special plea in these terms:

'2. The Plaintiffs action is based upon sale agreements which were concluded on 25 February 2010. On the said date the Plaintiffs alleged claim fell due.

2.2 The Plaintiffs Summons in this action was served on the Defendants more than three years after the date upon which the claims arose.

2.3 In the premises the Plaintiffs claim has prescribed in terms of the provisions of Act 68 of 1969.'

[45] As it was put in *Umgeni Water & Others v Mshengu*:[1]

'Section 10 of the Prescription Act, No 68 of 1969 (the Act), provides for the extinction of a debt after the lapse of periods determined in s 11. The period of prescription applicable to the plaintiff's claim is that provided for in s 11(d) of the Act, namely 3 years. According to s 12(1) of the Act, *prescription* shall commence to run "as soon as the debt is due". The words "debt is due" must be given their ordinary meaning. In its ordinary meaning a debt is due when it is immediately claimable by the creditor and, as its correlative, it is immediately payable by the debtor. Stated another way, the debt must be one in respect of which the debtor is under an obligation to pay immediately.

A debt can only be said to be claimable immediately if a creditor has the right to institute an action for its recovery. In order to be able to institute an action for the recovery of a debt a creditor must have a complete cause of action in respect of it. The expression "cause of action" has been held to mean: "every fact which it would be necessary for the plaintiff to prove . . . in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved"; or slightly differently stated "the entire set of facts which give rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not 'arise' or 'accrue' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action." A plaintiff must thus have a complete cause of action at the stage when summons is issued or at any rate when the summons is served.'

[46] For the reasons that follow, I am of the view that the appellants' right to claim transfer was indeed extinguished by prescription. The right to claim registration of transfer is a debt as envisaged in s 10(1) of the Act.[2] The obligation of the respondents, in terms of each agreement, was to pass transfer. The right to claim performance in terms of an agreement ordinarily becomes due according to its terms or, if nothing is said, within a reasonable time.[3] As it was put in *Munnikhuis v Melamed* at 888A-B:[4]

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[1] *Umgeni Water & Others v Mshengu* [2009] ZASCA 148; [2010] 2 All SA 505 (SCA) paras 5 and 6.
[2] *Desai No v Desai NNO & Others* [1995] ZASCA 113*;* 1996 (1) SA 141 (A) at 146J-147A.
[3] *Hanuscke Beleggings CC v Kungwini Local Municipality* [2012] ZASCA 112 para 13.
[4] *Munnikhuis v Melamed* 1998 (3) SA 873 (W) at 888A-B.

'If a debtor fails or refuses to perform some time after the debt becomes due, the failure or refusal does not give rise to a fresh or different debt unless the creditor then cancels the agreement. If the creditor does not, it remains entitled to sue for performance. The breach of contract does not, however, create a new cause of action for specific performance. It may well create a new cause of action for cancellation, and even for damages (see the discussion in *Van der Merwe et al (op cit* at 240--2)). The authors make a related point in a different context in regard to a claim for performance against a party which has committed a breach of contract . . .:

"A claim for specific performance in terms of a contract, though instituted upon breach, is based on the contents of the contract and not on the breach as such." (At 238.)'

[47] The breach in this case took the form of a failure on the part of the respondents to transfer the properties. The appellants have here claimed performance of the very obligation due under each agreement. The breach by the respondents on account of their failure to timeously perform their obligation to pass transfer did not create a new debt. The original obligation remained intact. On the conclusion of the agreements on 25 February 2010, there was a debt in respect of which the respondents were under a duty to perform immediately.[5] The appellants could thus immediately claim transfer.

[48] It follows that when the appellants eventually caused summons to be served on the respondents on 7 March 2013 the debt had already been extinguished by prescription.

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V M Ponnan

Judge of Appeal

[5] *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* [1990] ZASCA 136; 1991 (1) SA 525 (A) at 532H.

APPEARANCES

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