**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

Case no**:** 872/10

In the matter between:

**EVERT BAKKES CLAASEN** **Appellant**

and

**MICHIEL DANIëL BESTER** **Respondent**

**Neutral citation:** ***Claasen v Bester*** **(872/10) [2011] 197 ZASCA (23November 2011)**

**Coram:** Harms DP, Lewis, Shongwe, Majiedt JJA and Plasket AJA

**Heard:** **14 November 2011**

**Delivered** **23 November 2011**

**Summary:** Extinctive prescription – knowledge of legal conclusion not a fact for purpose of s 12(3) of the Prescription Act 68 of 1969.

ORDER

**On appeal from:** Free State High Court, Bloemfontein (Van Zyl J sitting as court of first instance):

The appeal is upheld with the costs of two counsel. The order of the high court is replaced with:

'The defendant's special plea of prescription is upheld, and the plaintiff's claim dismissed, with costs.'

JUDGMENT

LEWIS JA (HARMS AP, SHONGWE and MAJIEDT JJA and PLASKET AJA concurring )

[1] The parties in this matter are farmers in the Heilbron district of the Free State. They were also once friends. When the respondent, Mr M D Bester, ran into financial difficulty, the appellant, Mr E B Claasen, a younger man, offered to prevent foreclosure of Bester's farm by the Land Bank, and bought the farm from Bester at a price that approximated the debt to the Land Bank, and in the deed of sale afforded Bester the rights of lifelong use and occupation. He also agreed that Bester could buy the farm back, but no price for this 'right' was reflected in the deed of sale. It is this 'right' that was central to the dispute between the parties, because when Bester wished to buy back the farm, Claasen refused to sell, and was indeed not obliged to do so, the term being unenforceable. I shall deal with this shortly.

[2] When Bester brought an action for a declaration that the sale by him was void, or voidable, and against tender of the repayment of the purchase price, claimed restitution (retransfer of the property into his name), Claasen pleaded that the claim had prescribed. His special plea of prescription was adjudicated separately, by agreement, and Van Zyl J in the Free State High Court held that the claim had not prescribed. The appeal to this court is with her leave.

[3] The detailed background to the sale of the farm by Bester to Claasen is not of significance to the very simple issue on which this court is called to decide: whether failure to appreciate that a contract is void or voidable is a 'fact' for the purposes of s 12(3) of the Prescription Act 68 of 1969. But some facts are germane and I shall deal with them shortly. First, however, it is useful to set out the relevant terms of s12(3) of the Act.

Section 12(1) provides that prescription shall begin to run as soon as the debt is due. Section 12(3) provides:

'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] The facts, in summary, are these. A sale in execution of Bester's farm, to be held on 26 September 2001, was advertised on 14 September. A few days before the proposed auction, Claasen and his son and son-in-law visited Bester on the farm and discussed the possibility of buying it before the auction. Bester and his wife subsequently visited Claasen and proposed that should he sell the farm to Claasen, he should have the right to buy back the property, to be reflected in the deed of sale. On the same day, 25 September 2001, the parties went to see an attorney, also a Mr Claasen, to discuss a sale on these terms. Bester testified that at that meeting he had insisted that the price at which he would buy back the farm must be market-related. The following day the parties signed the deed of sale. And on 29 September 2001 they amended it to reflect Claasen as the sole purchaser. Transfer of the farm was effected on 24 July the following year, 2002.

[5] Bester did not read the deed of sale in detail when he signed it. He relied on attorney Claasen whom he thought had included in the deed what he and Claasen had agreed. But it is common cause that the right Bester thought he had acquired to purchase the farm at a market-related price was not contained in the deed. The contract provided that Bester sold the farm, fully described in the document, to Claasen for R175 000 which would be payable in a prescribed

fashion to the Land Bank.

[6] The deed contained several 'spesiale voorwaardes', which in fact conferred rights on Bester. These included a lifelong right to live in the house which he occupied, for no consideration. He was obliged, however, to maintain the house, and precluded from transferring the right of occupation. Bester was also afforded the rights to have weekend visitors and to allow them to fish, provided that they did so in an orderly fashion; and to keep a few head of cattle, the number determinable at Claasen's discretion.

[7] The clause as to the repurchase by Bester provided that:

'Die koper verleen hiermee 'n terugkoop reg aan die verkopers om die hiermee verkoopte eiendomme binne 'n tydperk van 5 jaar vanaf datum hiervan te kan terugkoop. Die koopprys, terme en of voorwaardes van so 'n koop om tussen die partye wanneer die reg uitgeoefen sou word, bepaal te word. . . .'

Bester claimed not to have read this provision: he had relied on attorney Claasen to reflect the price as being market related. It was only when he obtained a copy of the deed of sale on 3 March 2004, from attorney Claasen, that he realized that such a provision had been omitted. He was advised by another attorney, Mr B G Smit, that the provision actually included was vague.

[8] From that date onwards, Smit attempted to have the 'special conditions', including the 'right' to buy the farm registered against the title deed of the property. Numerous letters were exchanged, including from attorney Claasen now acting on behalf of Claasen only, stating that the latter had no intention of selling the farm, and from Smit on behalf of Bester purporting to exercise his right. Eventually, on 11 January 2006, attorney Claasen advised Bester through Smit that, having obtained the opinions of two advocates, the provision purporting to give Bester the right to buy back the farm was a nullity.

[9] On 14 December 2007 Bester served summons, claiming a declaration that the entire sale was void or voidable and that he was entitled to return of the farm, and tendered return of the purchase price. Claasen raised a special plea of

prescription, which, if upheld, obviated the need to consider other issues such as the severability of the void provision from the balance of the agreement.

[10] The high court, in a lengthy disquisition on the facts, and on the law of prescription, held that the claim had not prescribed. It found that until 11 January 2006, when Bester was advised that the buy back provision was not enforceable, he had been ignorant of its unenforceability. He thus did not have knowledge of the facts from which the debt arose until that date.

[11] The argument of Claasen on appeal is that a conclusion of law is not a fact. There was but one fact of which Bester was ignorant: that a price or a determinable price had not been put in writing in the deed of sale. And that Bester learned on 3 March 2004 when he obtained a copy of the deed of sale. It was unquestionable that the provision as to the buy back was unenforceable because of the requirement of s 2(1) of the Alienation of Land Act 68 of 1981(that all material terms of a contract for the sale of land be reduced to writing): the provision in the deed did not determine the price (a material term), or set out a means for determining the price. The invalidity of the provision was a conclusion of law, and not a fact. Prescription thus began to run on 3 March 2004 when Bester knew that no price had been determined in the provision. Claasen argued that this was the only fact that Bester needed to know in order to have a cause of action. Bester knew that fact on 3 March 2004 when he saw the deed of sale. That is when prescription began to run.

[12] I do not propose to discuss the many cases that have dealt with the question when prescription begins to run for the purposes of ss 12(1) and (3) of the Prescription Act. The most pertinent suffice. In *Drennan Maud & Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) at 212F-J Harms JA, in a separate concurring judgment, said

'In 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.'

[13] In *Truter v Deysel* 2006 (4) SA 168 (SCA) para 16 this court said that:

'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.'

*Truter* dealt with a claim in delict. Bester argued that claims in contract may be different, and relied on *Van Staden v Fourie* 1989 (3) SA 200 (A) at 216F-G where the court left open the question whether the nullity of a contract (a legal conclusion) was a fact for the purpose of s 12 of the Prescription Act. But in *Truter* (para 20) Van Heerden JA said also:

'Section 12(3) of the Act requires knowledge only of the material facts from which the debt arises for the prescriptive period to begin running – it does not require knowledge of the relevant legal conclusions (ie that the known facts constitute negligence) or of the existence of an expert opinion which supports the conclusion.'

[14] And in *Minister of Finance v Gore* 2007 (1) SA 111 (SCA) para 17 Cameron and Brand JJA 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,* nor until the creditor has evidence that would enable it to prove a case comfortably.' (My emphasis).

[15] These cases clearly do not leave open the question posed and not answered in *Van Staden*. They make it abundantly clear that knowledge of legal conclusions is not required before prescription begins to run. There is no reason to distinguish delictual claims from others. The principles laid down have been applied in several cases in this court, including most recently *Yellow Star Properties v MEC, Department of Planning and Local Government* [2009] 3 All SA 475 (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. See also *ATB Chartered Accountants (SA) v Bonfiglio* [2011] 2 All SA 132 (SCA) paras 14 and 18.

[16] It is thus clear that prescription began to run on 3 March 2004, when Bester knew that no provision as to the price at which he could buy back the farm from Claasen had been included in the deed of sale. That he believed nonetheless that the provision was enforceable is not relevant. And attempts to register the 'special conditions' in the deed of sale against the title deeds by the legal representatives of both parties are also of no consequence.

[17] Bester, in his replication, asserted that the running of prescription was interrupted by Claasen's willingness to have the conditions registered, and contended, albeit faintly, before us that Claasen had indicated that he knew that Bester had a right to buy back the farm. But that too is irrelevant. Section 14 of the Prescription Act provides that the running of prescription may be interrupted by the debtor's acknowledgment of his indebtedness. Since there was no debt to acknowledge, Claasen could hardly have indicated liability in any way.

[18] Accordingly prescription began to run by 3 March 2004, and any claim that Bester may have had prescribed by the date when summons was issued and served – 14 December 2007. The appeal must thus succeed.

[19] The appeal is upheld with the costs of two counsel. The order of the high court is replaced with:
'The defendant's special plea of prescription is upheld, and the plaintiff's claim is dismissed, with costs.'

C H Lewis
Judge of Appeal

APPEARANCES:

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| FOR APPELLANT: | J S Saner (with him N J Louw)<br>Instructed by<br>Claasen Prokureurs, Frankfort<br>Schoeman Maree, Bloemfontein. |
| RESPONDENT: | J Daffue SC<br>Instructed by<br>Smit & Oertel Inc, Frankfort<br>Symington & De Kok, Bloemfontein. |