IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

13/10/2015.
DATE

SIGNATURE

15/10/2015

Case Number: 16926/2001

In the matter between:

HABAKUK MAGABUTLANE SHIKOANE	Plaintiff
and	
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	First Defendant
MEC HOUSING AND LOCAL GOVERNMENT LIMPOPO PROVINCE	Second Defendant
TOWN MANAGER LEBOWAKGOWU	Third Defendant
REGISTRAR OF DEEDS PRETORIA	Fourth Defendant
HM SHIKOANE NO	Fifth Defendant
SS SHIKWANE	Sixth Defendant

JUDGMENT

POTTERILL J

[1] The first, second, fourth and sixth defendants raised a special plea of prescription against the plaintiff's claims. For ease of reference I refer to the first, second and fourth defendants as the "state defendants". Mr. Cohen appeared on behalf of the sixth defendant, the daughter-in-law of the plaintiff.

[2] The plaintiff raised a point *in limine* on the special plea which in a nutshell was that all the facts were common cause negating the necessity of leading any evidence on the special plea. I dismissed the point *in limine* and the reasons therefore will follow in what is set out below.

[3] The following chronology sets out the background to the matter:

3.1 The plaintiff and the first defendant entered into an oral agreement in terms of which the first defendant sold to the plaintiff the land known as site 2, Unit E, Lebowakgomo.

3.2 On 8 December 1976 plaintiff paid the transfer registration fee of R2 for sit 2 in Lebokwakgomo E. The purchase price was also paid.

3.3 On 29 November 1977 the plaintiff's application for a deed of grant for site 2 in Lebowakgomo E was approved.

3.4 The deed of grant for site 2 in Lebokwakgomo E was issued to the plaintiff on 18 November 1977.

3.5 Site 2 in Lebowakgomo E was registered in the name of the plaintiff in the Deeds Registration Office on 20 March 1978.

3.6 The plaintiff alleged that he also bought and paid the purchase price for sites 3 and 4 of Lebokwakgomo E during 1976 and 1977.

3.7 The plaintiff acquired the right to demand delivery of site 2 by means of transfer of this site into his name.

3.8 Plaintiff took occupation of sites 2 to 4 in Lebowakgomo E during 1976 and 1977 and developed the properties by erecting structures and buildings thereon.

3.9 On 14 September 1993 the plaintiff applied for the subdivision of site 2 and for the consolidation of portion 1 of site 2 with sites 3 and 4 in Lebowakgomo E.

3.10 On 20 September 1993 the Town Manager, Lebowakgomo approved the subdivision and consolidation.

3.11 The application for subdivision and consolidation was approved on 11 November 1993.

3.12 On 14 March 1994 the plaintiff was informed of same.

3.13 On 31 March 1994 the Surveyor-General approved the subdivision and consolidation as requested. Sit 2 was divided into Portion 1 of site 2 and Remaining Extent of Site 2. Portion 1 of site 2 was consolidated with sites 3 and 4 form site 176.

3.14 On 30 May 1994 the plaintiff applied applied for the transfer of site 2 in Lebowakgomo E to MRS Property Trust.

3.15 On 24 June 1994 this application was approved.

3.16 On 28 June 1994 the transfer of the ownership of site 2 in Lebowakgomo E to MRS Property Trust was registered in the Deeds Registry at Lebowakgomo.

3.17 The plaintiff's son and sixth defendant's husband died on 6 July 1996. It is common cause that the sixth defendant's and plaintiff's relationship soured after his death.

3.18 The sixth defendant applied for a deed of grant and concluded a sale agreement with the Government for site 176 in Lebowakgomo E on 21 February 1997.

3.19 On 8 January 1997 a meeting of the Trustees of the Magabutlane Shikoane Family Trust (of which plaintiff is a trustee) was held at Pietersburg, during which it was resolved that the Trust would let to the sixth defendant the premises situated on sites 3 and 4. According to the lease agreement it would have run for a period of five years.

3.20 On 21 February 1997 a deed of sale was entered into between the Lebowa Government and the sixth defendant whereby the sixth defendant purchased site 176. The sixth defendant applied for a deed of grant in respect of site 176.

3.21 On 27 March 1997 that the application was approved by the Lebowakgomo Town Council.

3.22 On 4 August 1997 the application is approved by the Secretary of the Department of Home Affairs of the Lebowa government.

3.23 On 29 April 1997 Messrs. Pratt Luyt & De Lange addressed a letter to the sixth defendant wherein it is alleged that there was *"a conveyancing error when Erf 2 was transferred into the name of your late husband. It was our client's intention to subdivide Erf 2 and thereafter to transfer the subdivided remaining extent of Erf 2 to your late husband and then to consolidate portion 1 of Erf 2 with Erven 3 and 4. Mr Shikwane has instructed us to apply for rectification of this conveyancing error ...".*

3.24 On 14 October 1997 site 176E was registered in the name of the sixth defendant.

3.25 In November 1997 the sixth defendant informed the plaintiff that she refused to sign the lease because she was the owner of site 176.

3.26 On 4 February 1998 Truter & Wessels on behalf of the plaintiff addressed a letter to the Town Manager of Lebowakgomo informing it that a search was made at the Deeds Office and it has come to Mr. Shikwane's knowledge that stand number 2 was transferred to the MRS Property Trust. *"Should stands number 3 and 4, however, also have been transferred to either mr Shikwane jnr or the MRS Trust, this would be contrary to all instructions by mr Shikwane snr and it has not been authorised by him ... At all times it was the*

understanding that mr Shikwane would be entitled to take transfer of the properties against payment of the purchase price thereof. As mentioned, he has already paid the purchase price of the above three stands and he has also paid the purchase price of stand number 1".

3.27 On 24 August 1998 Truter & Wessels wrote on behalf of the plaintiff to attorney Philippou for the sixth defendant confirming discussions on previous occasions concerning the disputes between the plaintiff and the sixth defendant concerning the properties known as sites 3 and 4.

3.28 On 25 August 1998 Phillippou wrote on behalf of the sixth defendant to Truter & Wessels advising the sixth defendant is the owner of site 176, having procured the property from the Department of Land Affairs.

3.29 On 2 September 1998 Truter & Wessels wrote on behalf of the plaintiff to the Head of the Department, Deeds Division, Department of Local Government Pietersburg once again reiterating that he had purchased the properties in question and paid for them a very long time ago, but that the properties had never been transferred into his name despite several requests by him.

3.30 On 1 June 1999 the plaintiff wrote to the Premier, Northern Province requesting an investigation into the circumstances under which sites 2, 3 and 4 were transferred into the name of the sixth defendant.

3.31 In December 2000 the plaintiff in writing demanded delivery of the land through the transfer of the said land into his name.

3.32 On 5 January 2001 an application under case number 32038/2000 was served on the present second, third and sixth defendants in which the plaintiff (applicant) claimed a declaratory order that he is the lawful owner of site 176 alternatively the transfer of site 176 Lebowakgomo E into his name.

3.33 On 20 June 2001 the matter was heard before His Lordship Mr Justice Kirk-Cohen and an *ex tempore* judgment was delivered. Adv. Sceales SC of the Pretoria Bar argued that if the application was dismissed instead of being referred for oral evidence or referred to trial, then the plaintiff could not commence a trial action *de novo* as the claim would have prescribed. The plaintiff was present in court when the matter was heard and was privy to this argument on his behalf. On the same date the application was dismissed with costs.

3.34 On 4 July 2001 summons in the present action was issued by the Registrar of this Court. The summons was served on the second, third, fourth and sixth defendants during July 2001.

3.35 On 4 June 2002 the plaintiff applied for leave to join the government, who became the first defendant as the defendant in the original action.

3.36 This order was granted on 4 June 2002.

3.37 Notice of the court order, original summons and notice of intention to amend was served on the government on 6 June 2002.

3.38 Plaintiff amended the particulars of claim and inserted a new claim 2 against a new defendant on 16 July 2002 when the amended claim was served on the government.

The evidence

[4] On behalf of the state defendants Mr. Ngoepe, the Assisting Manager, the Cooperative Governance, Human Settlements and Traditional Affairs, testified. He was employed in this same section since 1994 and became the Assisting Manager in 1998. The purpose of his evidence was to place documentary evidence under his control before the court. His evidence is in a nutshell set out in the background and chronology *supra*. What is of importance in his evidence was that there was no official or public documentary evidence of a sale agreement or a deed of grant pertaining to sites 3 and 4. This evidence was not contradicted by the plaintiff. His evidence was also uncontested that there was no record that the plaintiff asked for the transfer of sites 2, 3 and 4 prior to 20 May 1998. It was also not in issue that the sixth defendant bought site 176 which was then registered in the name of MRS Property Trust. It was also common cause that the plaintiff had developed sites 2 to 4 and site 176 in Lebowakgomo E and it erected improvements on sites 2 and 4 and site 176 before the transfer of site 176 to the sixth defendant in 1997.

[5] On behalf of the sixth defendant the attorney Mervin Dendy testified. He was instructed in May 2000 by the sixth defendant and was her attorney ever since. He

acted for the sixth defendant in case number 32038/2000 wherein the plaintiff was the applicant and the sixth defendant was the first respondent. In this application the plaintiff requested:

> *"1. Declaring the applicant to be the lawful owner of stands 4, 3 and portion 1 of stand 2 in the industrial township of Lebowakgomo-E, district Thabamoopo, alternatively to be the lawful owner of the consolidated property described as stand 176E in the same industrial township.*
>
> *2. Directing the second and third respondents transfer the properties (on the alternative basis) described in prayer 1 above into the name of the applicant, and to give effect thereto by signing or executing any documents which may be required in order to facilitate such transfer of property.*
>
> *3. Directing the second and third respondents to cancel the deed of grant issued to the applicant in respect of stand no. 2 in the industrial township of Lebowakgomo-E and to effect the transfer of such property into the name of the applicant by taking whatever steps may be necessary in order to facilitate the registration of such transfer."*

[6] He drafted the founding affidavit as well as the replying affidavit of the first respondent (sixth defendant) on instruction and pursuant to consultation. Adv.

Cohen also appeared for the sixth defendant in that application. This matter was heard on the 20th of June 2001. The plaintiff (applicant) was present as well as Mr. Daya as the instructed attorney as well as Adv. Sceales who acted on behalf of Mr. Shikwane. The *ex tempore* judgment was before court and Mr. Dendy read the relevant part of the judgment into the record as he was also present in court:

> *"Counsel for the applicant has said that one of the considerations I should take into account is that the question of prescription may arise and that, were the application to be dismissed, it might prejudice the applicant. When one has regard thereto the respondent says the following. I read from 132:*
>
> > *'The applicant acquired knowledge in January 1997 of the alleged cause of action, and yet instituted proceedings on 14 December 2000 ...'*
>
> *I pause there to say that the date 14 December 2000 is wrong; the application was only served on 5 January 2001. However, I continue:*
>
> > *"... being three years and 11 months after the acquisition of knowledge. In addition, in paragraph 24 of the Founding Affidavit the Applicant makes reference to the conclusion of leases and the fact that I would not sign a lease. It is correct that I would not sign a*

lease as I refuse to do so because I informed the Applicant that I was the owner of the property. The Applicant has failed to advise this Honourable Court when such refusal on my part was conveyed, but such refusal was conveyed in approximately November 1997 after a Deed of Grant in respect of Site 176 was registered in my name.'"

On page 14 of the judgment commencing at line 5 the court quoted as follows:

"It is a complete lie on the part of the first respondent that she informed me of the reason why she refused to sign a lease agreement which I had prepared in respect of the property on which the motor dealership was situated. In fact there were two lease agreements prepared by my attorney and presented to her. This was to the best of my recollection, around about January or February 1997. This was also after the first respondent had indicated to me that she did not want to be part of my family trust."

Mr. Dendy testified that thus already in 20 June 2001 the plaintiff herein was aware that he faced a prescription problem. Mr. Dendy also testified to the deed of lease which was a document before the court from which it could be gleaned that the Magabutlane Shikwane Family Trust leased to the sixth defendant certain commercial premises situated on plot 3 and 4, Lebowakgomo consisting of a motor vehicle showroom, spare parts shop and workshop known as Winners Toyota

Garage. Mr. Dendy testified that this proved that the plaintiff was aware of the debt in January 1997 and prescription had started to run. No cross-examination was put to this witness by the plaintiff.

[7] The sixth defendant testified that she had signed under oath the first respondent's answering affidavit in the application referred to. In paragraph 9.5 thereof she attested to the following:

> *"In support of my contention that the claim has prescribed, it appears from the Applicant's own admission in para. 4.1 of the Founding Affidavit where he states on oath that 'it came to my attention during January 1997 that the stand had somehow not been registered in my name, but in that of my late son'. As such, the Applicant acquired knowledge in January 1997 of the alleged cause of action and yet instituted proceedings on 14 December 2000, being three years and elevent months after acquisition of knowledge."*

She confirmed that she refused to sign the lease because she was the owner of the property. In 1997 there was a building for the service centre and a Toyota dealership, a spares and an office which were all joined together. These improvements were done in 1997 but she couldn't recall the exact period. She however built a showroom between the service centre and shop. It was put to her by the plaintiff's counsel that this application only referred to portion 1, however it

was clear that from the attached documents HS22 and HS23 the application referred to erven 3 and 4 of Lebowakgomo E. It was further put to her that the plaintiff will testify that he had an oral agreement whereby he purchased sites 2, 3 and 4. The sixth respondent however confirmed that she is the owner of the consolidated site 176.

[8] In re-examination she was also referred to the extract from the minutes of the meeting of the trustees of the Magabutlane Shikwane Family Trust which was held at Pietersburg on the 8th day of January 1997. It was resolved therein that the trust shall lease to the sixth respondent certain commercial premises situated on plot 3 and 4 Lebowakgomo.

[9] The plaintiff testified that he was 87 years old and that he purchased sites 2, 3 and 4 almost 39 years ago and therefore that he could not recall everything. His evidence was that he was entitled to delivery after he made payment of the purchase price. He confirmed that he had developed the sites and had erected the buildings. He also requested subdivision and consolidation. In view of the fact that this was the only relevant evidence that the plaintiff tendered the state defendants and the sixth defendant did not find it necessary to cross-examine the plaintiff.

Prescription

[10] The Prescription Act 68 of 1969 ("the Act") regulates prescription. In terms of section 11(d) the period of prescription is three years save where an Act of Parliament provides otherwise. The relevant period of prescription in this matter is therefore three years.

[11] In terms of section 12(1) prescription commences to run as soon as the debt is due. This is subject to section 12(3) which provides that a debt shall not be deemed to be due until the creditor has knowledge of the identity and of the facts from which the debt arises, provided that the creditor shall be deemed to have such knowledge if he could have had acquired it by exercising reasonable care. In terms of section 15(1) the running of prescription is interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt. The running of prescription will not be deemed to have been interrupted if the creditor does not successfully prosecute his claim under the process in question to final judgment.

[12] A defendant bears the evidentiary burden to prove a plea of prescription including the date on which a plaintiff obtained actual or constructive knowledge of the debt. This burden shifts to the plaintiff only if the defendant has established a *prima facie* case.[1]

[1] ***Macleod v Kweyiya* 2013 (6) SA 1 (SCA)**

[13] In ***Truter and Another v Deysel*** **2006 (4) SA 168 (SCA)** defined *"knowledge of the fact from which the debt arises"* as follows:

> *"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."*

[14] In ***McKenzie v Farmers' Co-operative Meat Industries Ltd*** **1922 AD 16** at 23 cause of action for the purposes of prescription thus means *"... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the 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."*

[15] In ***Gunase v Anirudh*** **2012 (2) SA 398 (SCA)** at paragraphs 14 and 18-21 the court found that a debtor's conduct must be tested by reference to the steps which a reasonable person in his or her position would have taken to acquire knowledge of the facts.

[16] It was never disputed that the claims of the plaintiff constitute a *"debt"* for the purposes of the Act.

[17] In ***Uitenhage Municipality v Molloy*** **1998 (2) SA 735 (SCA)** at 742 the following was found:

> *"The rationale in the cases which held that a creditor cannot 'by his own conduct postpone the commencement of prescription' by refraining from satisfying the condition which would render a debt due and payable, apply equally where the creditor has failed to take or initiate the steps which fall within his or her power to make it possible for such a condition to be satisfied ... One of the main purposes of the Prescription Act is to protect the debtor from old claims against which it cannot effectively defend itself because of loss of records or witnesses caused by the lapse of time. If creditors are allowed by their deliberate or negligent acts to delay the pursuit of their claims without incurring the consequences of prescription, that purpose would be subverted."*

Is there prescription of plaintiff's claim 1?

[18] In terms of the particulars of claim the plaintiff in terms of an oral agreement bought sites 2, 3 and 4 Lebowakgomo. It is alleged that he paid the purchase price for these sites. This entitled him to immediately occupy and develop the land and to subdivide and to consolidate it. Plaintiff avers that the parties gave effect to the agreement by granting the plaintiff permission to subdivide site 2 in portion 1 of the site and the remaining extent of site 2. Consolidation of sites 3 and 4, together with

portion 1 of site 2 to form site 176 was also granted. Despite demand during 2000 for delivery of the land through transfer of the land into his name and a lapse of a reasonable period the first defendant has failed to adhere to the demand. Plaintiff accordingly prays for delivery of site 176 through the registration thereof. It is further alleged that the third defendant had erroneously or without proper and lawful cause transferred site 176 into the name of the sixth defendant.

[19] The plaintiff's argument was that in view of the long time delays that was par for the course in this transaction the demand made only in December 2000 for the debt was reasonable, but that the defendant's refusal to effect a transfer of the properties was unreasonable. This is so because by way of example the properties were bought in 1976 and 1977 and subdivision and consolidation only took place on 31 March 1994; a period of 17 years later. Although in the plaintiff's further particulars for trial it is set out that the plaintiff repeatedly orally since 1976 made demand for the delivery, he did not testify thereto. The period is reasonable because the consolidation only took place in 1994 and the demand was in 2000; a six year period in this matter is thus unassailable. It was also argued that site 176 only came into existence in March 1994 and therefore there could be no demand for transfer before 1994.

[20] On behalf of the state defendants it was argued that in order to prove prescription they must prove when the plaintiff was entitled to claim transfer. It could either be after conclusion of the sale or after payment of the purchase price. Furthermore, that the plaintiff did not make the demand for transfer within a reasonable time thereafter. In the alternative the defendants must prove that the plaintiff demanded transfer, but did not institute legal action for transfer within three years after his demand for transfer.

[21] On behalf of the state defendants it was argued that the debt will only be due after the plaintiff had demanded transfer. There is no public record that the plaintiff requested transfer of sites 3 and 4 in Lebowakgomo E in his name. The plaintiff set out that in terms of the oral agreement the plaintiff was entitled to transfer within a reasonable time after his demand for transfer.

[22] The state defendants and the sixth defendant argued that the debt was at the latest due after the purchase price was paid which was in 1977. Relying on a demand for the debt in 2000, ± 23 years later, cannot negate the application of the Act. Furthermore if the plaintiff demanded transfer repeatedly since 1976 then the issuing of the summons in 2001, ± 23 years later, is in fact preposterous and it simply cannot be submitted that prescription did not take place.

[23] In the alternative plea to claim 1 the defendants pleaded that the new site, site 176, only came into existence in 1994 and therefore could only claim transfer thereof after 1994 is bad in law. It was argued that the *"debt"* for purposes of the Act is the same; the transfer of the same land. Albeit a different name it was bought in terms of the same contract for the same purchase price. Even if for argument's sake the court would rule that demand could only take place after 1994 then at the latest the plaintiff in November 1997 knew that site 176 was registered in the name of the sixth defendant. From the letter of his attorney it was clear that they had done a deed search in terms of the other sites and it was an easy and reasonable step to have taken to determine the ownership of site 176. The three year period from November 1997 to September 2000 is longer than three years prescribed in the Act. The letters from the plaintiff's attorneys clearly set out that before 1998 the plaintiff had demanded transfer, once again a three year period before July 2001 when the summons was issued.

[24] On the common cause facts as supplemented by the oral evidence of the defendants claim 1 has prescribed. At best for the plaintiff the claim for transfer of the property that he bought became due after he paid the purchase price in 1977. The fact that the plaintiff could immediately occupy and develop the sites are factors just confirming that the plaintiff could take delivery and transfer; i.e. the debt was due and demand could be made. He could also apply for subdivision and consolidation of the properties. On his own further particulars he had made

repeated oral demand for transfer already in 1977. The period from 1977 to July 2001 when this summons was issued a lengthy 23 years and prescription speaks for itself. The period from 1977 to December 2000 when the demand was made again render the claim prescribed.

[25] The fact that site 176 came into existence in March 1994 has no role to play. The plaintiff put no facts before the court as to why he did not know of the debt (no transfer) before the site was consolidated and known as site 176 and why he could not have acquired knowledge thereof by exercising reasonable care. In fact his further particulars express that he knew since 1977 and repeatedly asked for transfer. Site 176 was consolidated from the very sites he bought in 1976 or 1977 and paid for in terms of the oral agreement. This is the plaintiff's own version. The plaintiff requested the consolidation. There was no bar to him requesting transfer before or after the consolidation. Even if, at best for the plaintiff, he could only demand transfer after March 1994, then the plaintiff in January 1997 knew of the ownership of site 176 and demand in December 2000 is after expiry of three years after it came to his knowledge. Evidence by the plaintiff as to when he acquired the knowledge or reasonably could have acquired the knowledge of the debt was crucial. No evidence was also presented as to why after 1977 he did not claim transfer and on his own contradictory evidence only in 2000. Evidence was accordingly necessary and that is why the point *in limine* was dismissed.

[26] In November 1997 he is informed by the sixth defendant that she is the owner of the land after the Trust of which the plaintiff is a trustee drafted a lease agreement with the sixth defendant. Despite this he only once again demands transfer in December 2000; again more than three years later.

[27] According to the letter dated 2 September 1998 the plaintiff's attorney informs the state defendants that prior to the date of this letter the plaintiff had made several demands for the transfer. Once again on the plaintiff's own facts a period of three years had run before demand was made.

[28] The problem with only demanding transfer in December 2000 is that the plaintiff is not by law entitled to prevent the debt from becoming due by failing or refusing to request transfer within a reasonable period after the conclusion of the agreement[2]. Mr. De Kock on behalf of the plaintiff could not present case law or argument to the contrary. The mere fact that *de facto* there were long delays can never oust the application of the Act.

Has plaintiff's claim 2 prescribed?

[29] This claim is a damages claim against a new joined defendant (the first defendant). The basis of this claim is that the plaintiff developed the land in the reasonable and *bona fide* belief that he was the *bona fide* possessor of the land. The plaintiff was

[2] ***Uitenhage Municipality*** matter ***supra***

entitled to obtain ownership thereof on demand by the registration thereof in his name. Despite demand no transfer was effected. The first defendant transferred site 176 erroneously and without proper and lawful cause into the name of the sixth defendant. As a result of the breach of the government's obligations in terms of the agreement the plaintiff suffered damages in the amount of R4 million.

[30] Prescription is only interrupted in respect of a new debt introduced by an amendment from the date when the amendment is granted or from the date of service of the application to amend. *In casu* the amendment was effected on the 16th of July 2002.

[31] The state defendants' special plea to claim 2 sets out that this claim was due on the 14th of October 1997, alternatively on or before February 1998. All the facts from which the debt in the alternative claim 2 arises flow from the verbal agreement and the development of sites 2-4 by the plaintiff. It further has its factual basis in the transfer of site 176 to the sixth defendant.

[32] The state defendants accordingly argued that all these facts had taken place and were complete when erf 176 was transferred to the sixth defendant during October 1997. It was common cause that the plaintiff had developed erf 176 before it was transferred to the sixth defendant on the 14th of October 1997. Mr. Ngoepe testified to two letters wherein the plaintiff stressed that pending the registration of the

transfers of the properties into his name he was allowed to erect buildings on the properties which buildings had in fact been standing for many years. The buildings all relate to buildings that were erected on sites 2, 3 and 4 before 4 February 1998. This evidence of Mr. Ngoepe was not contradicted by the plaintiff.

[33] The sixth defendant testified that the plaintiff erected the buildings on sites 2, 3 and 4 in Lebowakgomo 3 before her husband and plaintiff's son died in 1996. Plaintiff did not testify that the buildings and improvements on site 176 were erected by the plaintiff after the transfer of site 176 to the sixth defendant.

[34] It was accordingly the state defendants' argument that plaintiff's claim 2 against the government became prescribed three years after November 1997 when plaintiff became aware of the transfer of site 176 to the sixth defendant and accordingly the date of prescription was the 30th November 2000.

[35] The plaintiff's claim 2 against the state defendants has prescribed. On the facts the plaintiff was aware of the transfer of site 176 to the sixth defendant in November 1997. Prescription accordingly would be on 30 November 2000. The plaintiff only demanded transfer in December 2000. The plaintiff could also with the exercise of reasonable care, i.e. a deeds search, already in 1997 have acquired this knowledge that he had not obtained transfer. Mr. Ngoepe testified that a deeds search was a reasonable step to take. Correspondence by the plaintiff's attorney noted that a

deeds search was done for the other sites, and it was accordingly a known and reasonable step to take to acquire knowledge of the debt.

[36] In the plaintiff's third claim the plaintiff claims that in the event that the Honourable Court found that the plaintiff was not entitled to delivery of the land through the registration thereof in his name then the plaintiff repeats the material facts upon which the first two claims are based and pleads that as a result of the development of the land in question the sixth defendant was unjustifiably enriched in the amount of R4 million being the value of the developed land that she received without having expended any money in the development thereof.

[37] On behalf of the sixth defendant it was also argued that the buildings and other improvements to the land in question were effected before transfer of site 176 to the sixth defendant on the 14th of October 1997. On the sixth defendant's unchallenged version the plaintiff's claim in respect of compensation for improvements must therefore have arisen by November 1997. On the plaintiff's own version he knew by 4 February 1998 that stands 3 and 4 were transferred into the name of the MRS Trust. Both of these dates were more than three years prior to the service of summons on the sixth defendant. Accordingly the third claim had also prescribed prior to the service of the summons on the sixth defendant during July 2001.

[38] This claim against the sixth defendant has also prescribed. The plaintiff knew by November 1997 of the debt and therefore the service of the summons was three years after the plaintiff acquired the knowledge of the debt and prescription is a bar to this claim.

[39] The state defendants as well as the sixth defendant submitted that the plaintiff should carry the costs on a punitive scale. The reason for this was that the claim for transfer of site 176 prescribed 22 years or more before it was instituted. The claim had patently prescribed before summons was issued and there was no argument put up which could evade the defence of prescription. The plaintiff was aware already on 20 June 2001 when the application was heard that it would be impossible for the plaintiff to commence *de novo* with a new action on account of prescription. Despite this the plaintiff persisted with this matter for 14 years. At court no evidence whatsoever was led by counsel for the plaintiff to rebut or displace the evidence led on behalf of the defendants in support of the defence of prescription. Particularly the sixth defendant has had the threat of her land being taken away for a period of 14 years without any attempt at all being made to advance a basis upon which the claims against her could be said to be alive.

[40] This conduct is accordingly vexatious and an abuse of the process of court which may form the basis for a costs order to be paid on an attorney and client scale. There was a reserved costs order made on the 13th of June 2006 and the

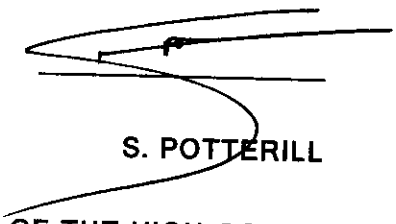
defendants submitted that these costs should also be awarded to the plaintiff on an attorney and client scale. In reply there was no argument advanced on behalf of the plaintiff pertaining to this request for punitive costs.

[41] A court has to exercise its discretion judicially in awarding costs. A court orders attorney and client costs in order to mark its disapproval of the conduct of the losing party. This matter dragged on for 14 years and a Judge had to be allocated to case manage this matter. This after the properties were bought (sites 3 and 4) on the plaintiff's version in 1977, 23 years before summons was issued. In court no relevant evidence was presented by the plaintiff and little to no relevant cross-examination could put up any triable version for the plaintiff. The *de facto* situation was accepted by the plaintiff until his son died and the relationship with his daughter-in-law soured. I am satisfied that on these facts the plaintiff acted unreasonably in his conduct of persisting with these claims for 14 years when in 2000 he already knew that his claims had prescribed.

[42] I accordingly make the following order:

42.1 The plaintiff's claims 1, 2 and 3 are dismissed.

42.2 The plaintiff is to pay the costs of the first, second, fourth and sixth defendants on an attorney and client scale including the costs reserved on 13 June 2006.



S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 16926/2001

HEARD ON: 16-22 September 2015

FOR THE PLAINTIFF: ADV. H.M. DE KOCK

INSTRUCTED BY: Ramushu Mashile Twala Inc Attorneys

FOR THE 1ST TO 4TH DEFENDANTS: ADV. L.B. VAN WYK SC

INSTRUCTED BY: State Attorney, Pretoria

FOR THE 6TH DEFENDANT: ADV. R.G. COHEN

INSTRUCTED BY: Mervin Dendy Attorney

DATE OF JUDGMENT: 15 October 2015