

COURTS WILL HOLD YOU TO A PROMISE TO PAY

Jones v Jones (2472/2020) [2021] ZAECPHC 42 (16 August 2021)

The parties in this judgment used to be married. After their divorce in 2002, they kept close ties, Mrs J allowing her husband to use money owing to her in terms of the divorce (upon the sale of their joint properties), to purchase a new property. In 2014 he undertook to share the balance of the proceeds from the sale of the new property with her. Fast forward to 2020 when the property was sold. At this stage Mr Jones was no longer inclined to share the proceeds of the sale and argued that the 2002 divorce order debt had prescribed. Mrs J, however, premised her claim on the later undertaking which constituted a new debt and which became claimable, she argued, on transfer of the property in 2020.

The Judgment can be viewed [here](#).

FACTS

Mrs and Mr Jones were married to each, but divorced in November 2002. In term of the consent paper which was made an order of court, (i) their property in Krugersdorp would remain jointly owned by them; (ii) if the property was to be sold, the profit would be shared between them equally; and (iii) in respect of their joint ownership of a flower shop business, Mr Jones would transfer his 50% interest therein to Mrs Jones.

Despite the divorce order, Mr and Mrs Jones continued cohabiting for many years thereafter. The Krugersdorp property and the flower shop were both sold, but the proceeds of the flower shop and the 50% of Mrs Jones' net proceeds on the sale of the Krugersdorp property were both paid to Mr Jones instead of Mrs Jones. In 2003, Mr Jones purchased the Balmoral farm ("the farm") for R445,000.00. Mr Jones admitted that he used some of the proceeds of the sale of the flower shop and the Krugersdorp property which belonged to Mrs Jones, to fund the purchase of the farm. Mr Jones contended that this was done with Mrs Jones' full knowledge and blessing.

During 2014/2015, Mr Jones made an oral undertaking to pay Mrs Jones 50% of the net proceeds of the sale of the farm, whenever that farm is sold. Mrs Jones argued that the intention of Mr Jones and her was that both of them would be registered as joint owners of the farm. However, she only became aware later that she was not registered as the joint owner in the farm and that her name was deleted from the sale agreement, an aspect denied by Mr Jones.

The farm was sold for an amount of R2,050,000.00 during 2020.

In this application to court, Mrs Jones relied on Mr Jones' verbal undertaking for an order that he pays to her 50% of the proceeds.

Mr Jones opposed the relief sought. He argued that Mrs Jones, through her attorney, misrepresented to him that she still had an enforceable claim in terms of the divorce order of 2002 and that he was thus misled into making the oral undertaking to pay 50% of the net proceeds of the sale of the farm. On Mr Jones' version, he acted under the mistaken belief that the amounts claimed on Mrs Jones' behalf were due and payable and had he been aware of the true state of affairs, that such amounts had prescribed and were no longer enforceable, he would not have made the undertaking. Mr Jones' defence was predicated on his contention that Mrs Jones' claim was founded on the divorce order granted in November 2002 and that her claim in respect of both the proceeds of the sale of the flower shop and the property sale had prescribed.

HELD

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Prescription

- The Prescription Act 68 of 1969 (“the Act”) deals with the periods of prescription of debts. A debt prescribes after 30 years in respect of a judgment debt and three years in respect of any other debt. Prescription begins to run as soon as the debt is due. The term “due” is not defined in the Act but, in the normal cause of events, a debt is due when it is claimable by the creditor, and as the corollary thereof, is payable by the debtor. On the present facts it was clear that the debt to claim the proceeds of the sale of the properties – in terms of the divorce order – had prescribed, as the properties were sold in 2005 and the debt accordingly prescribed three years later.
- This was not the end of the matter because here Mrs Jones’s claim was clearly articulated to be founded on the oral undertaking by Mr Jones to pay 50% of the net proceeds of the sale of the farm and not on the old debt (existing in terms of the divorce order).
- Mrs Jones only became aware during 2020 that the farm was sold for an amount of R2,050,000. Until the farm was sold during 2020, her debt was not claimable and there was no debt in respect of which Mr Jones was under the obligation to perform. The debt became due when the farm was sold. Therefore, Mrs Jones’s claim had not prescribed.

Misrepresentation: *iustus error*

- In our law, “... if his mistake is *due to a misrepresentation*, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is *not bound*.” [our emphasis]. In this regard, Mr Jones argued that it was misrepresented to him that the debt (in terms of the divorce order and consent paper) was still owing and that he had made the undertaking *in error*, and such *error* was *justus*.
- For Mr Jones to succeed in his defence of misrepresentation, he had to prove that Mrs Jones and/or her attorney were to blame. The evidence presented herein, i.e. emails and whatsapp messages, however all originated from Mr Jones. Mr Jones himself expressly repeated his undertaking in different wording but, the content remaining the same that Mrs Jones would receive her 50% of the net proceeds of the sale of the farm.
- In addition, Mr Jones’s argument was in any event not sustainable. He was aware of the content of the settlement agreement in the divorce order. The question was whether he was misled into making the undertaking in respect of a debt which was not (legally) enforceable and if so, whether he should be allowed to resile from such undertaking. On Mr Jones’s own version, he admitted that he used some of the proceeds of the sale of the flower shop and the Krugersdorp property to purchase the farm. Flowing from this admission, Mr Jones took money which belonged to Mrs Jones and utilized it towards the purchase of the farm. It is comprehensible why Mr Jones made the undertaking to Mrs Jones that she will receive 50% of the net proceeds of the farm when it was sold. Mr Jones was not misled by Mrs Jones through her attorney to make such undertaking.

CONCLUSION

In the circumstances, Mr Jones was ordered to pay to Mrs Jones 50% of the proceeds of the sale of the farm.