

SUMMARY OF THE JUDGMENT

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>> PROPERTY LAW UPDATE

PRESCRIPTION WHERE SALE NOT ENFORCEABLE FOR LONG PERIOD AFTER ITS CONCLUSION

Kosmos v Leopont (20546/2014) [2016] ZASCA 48 (31 March 2016)

In this matter, new owners in a development sought to force the developer to finalise erection of facilities. Transfer was however effected a long time after the sale agreements were concluded and issues regarding prescription of the owners' claims arose. The court held that prescription could only commence when the sale agreements became enforceable. What does this mean in a sale?

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

FACTS

Leopont Properties 64 (Pty) Ltd (Leopont) was the developer of a property that became known as the Kosmos Extension 6 Township. During the period 31 March to 1 May 2004, it concluded agreements of sale with various purchasers in terms of which they bought a number of erven in the proposed township.

Section 67 of the Town Planning and Township Ordinance 15 of 1986 (the Ordinance) prohibits the sale of an erf in a township after an owner of land has taken steps to establish a township on his land, until such time as the township is approved. However, in terms of section 97(1) of the Ordinance, a local authority may grant consent for pre-proclamation acquisition of erven. As the Kosmos township had not yet been proclaimed when the sale agreements were concluded, consent in terms of section 97(1) was obtained from the local authority.

On 31 May 2005 the township was declared and in October 2005, the municipality authorised the subdivision of the farm into erven. On 8 December 2005 the General Plan, providing for the further subdivision of the farm, was approved by the office of the Surveyor General. The erven sold were finally transferred to the purchasers on 16 August 2006. The purchasers then ceded their rights under the agreements to the Kosmos X6 Homeowners Association (Kosmos).

On 3 May 2007 Kosmos wrote to Leopont raising a list of snags under the agreement and demanding performance of its obligations not later than 31 May 2007. These related to facilities in the development that Leopont had undertaken to construct within the township. On 4 June 2007 Leopont responded and undertook to perform its statutory obligations as set out in the service agreement concluded with the Municipality. It also listed certain facilities as outstanding and indicated that money was held in trust (presumably to attend

thereto).

On 18 August 2008 Kosmos issued a summons against Leopont, seeking:

- (i) an order of rectification of the agreements (as, so it alleged, certain obligations were erroneously omitted from the agreements, such as building a parking area, a circle road around the sewerage pump station, a security wall between the waterfront area and the waterfront erven and so forth. According to Kosmos, the failure to include these terms in the agreements was a result of an error common to all parties.);
- (ii) an order of specific performance in respect of these obligations under the agreements; and
- (iii) in the alternative, payment of the damages it had suffered as a result of the failure by Leopont to perform the obligations.

Leopont raised a special plea of prescription, contending that all Kosmos' claims became due more than three years before service of the summons on it. The argument was that prescription commenced to run from 31 March 2004 to 31 April 2004, when the agreements were concluded.

The court *a quo* found that prescription commenced on conclusion of the agreements, between 31 March and 1 May 2004, and that because the agreements stipulated that the payment of the balance of the purchase price was only due within one month of proclamation of the township (which fell on 30 June 2005), performance of the (additional) obligations listed in the summons became due on 1 July 2005. Consequently, the court held, when the summons was served on Leopont on 20 August 2008, the claims had indeed prescribed.

Kosmos appealed and argued that the date on which provision of the facilities under the agreements became due was 16 August 2006, when the properties were transferred to the purchasers.

HELD:

- Section 12(1) of the Prescription Act 68 of 1969 provides that, subject to certain exceptions, prescription shall commence to run as soon as a debt is due.
- The Act contains no definition of the term 'due'. The basic principle on the running of prescription is that the debt will be due and the prescription period commences running as soon as there is a completed cause of action, with a plaintiff who can sue and a defendant who can be sued.

- Completion of the cause of action is 'when everything has happened which would entitle the creditor to institute action to obtain judgment'. Prescription begins to run when a creditor has the minimum facts that are necessary to institute action.
- Our law thus distinguishes between the concept of a 'debt arising' and a 'debt becoming due', although the dates on which the debt arises and when it becomes due may coincide. The difference relates to the coming into existence of a debt, on the one hand, and the recoverability thereof, on the other: A debt may come into existence (arise) at the time when a debtor undertakes to pay on a certain date, but the debt will only be due once that date arrives.
- In the present matter, the sale agreements became binding on conclusion thereof. However, Leopont's principal obligation was to effect transfer of the erven once the township had been proclaimed and the erven registered in the Deeds Registry. It was therefore only after 8 December 2005 that the purchasers' cause of action in respect of the erven became complete and Leopont's obligation regarding the additional facilities arose.
- Given that the erection of facilities were secondary to the main object of the agreements, it would have made no sense for the purchasers to be entitled to delivery of the facilities even before they were entitled to the erven. By their nature, the facilities were intended to be enjoyed as accessories to the erven.
- With regard to the facilities, there was neither an express time for performance nor an express condition upon which performance was made dependent in the agreements. That did not however detract from the intrinsic nature of the agreements (being the sale and transfer of erven), and there could be no breach of collateral obligations prior to the main object of the agreements being realised.
- Therefore, at the earliest, performance of the obligations relating to the facilities could be due only from 8 December 2005 when the erven came into existence. The claim had therefore not prescribed on 16 August 2008 when the summons was served. In any event, the plea of prescription could not apply to the claim for rectification of the agreements in this case.

The appeal was consequently upheld.

CONTACT US

■ CAPE TOWN
Tel: 021 406 9100

■ SOMERSET MALL
Tel: 021 850 6400

■ TYGER VALLEY
Tel: 021 943 3800

■ FOURWAYS
Tel: 010 001 2632

■ CLAREMONT
Tel: 021 673 4700

■ STELLENBOSCH
Tel: 021 001 1170

■ MENLYN
Tel: 012 348 1682

■ CENTURION
Tel: 012 001 1546

■ FISH HOEK
Tel: 021 784 1580

■ BLOUBERG
Tel: 021 521 4000

■ ILLOVO
Tel: 011 219 6200

■ BEDFORDVIEW
Tel: 011 453 0577