IN THE KWAZULU NATAL HIGH COURT, DURBAN **REPORTABLE**

REPUBLIC OF SOUTH AFRICA CASE NO. 6082/2002

In the matter between:

BEBINCHAND SEEVNARAYAN **PLAINTIFF**

and

YUSUF ESSACK **DEFENDANT**

J U D G M E N T

MSIMANG JP

[1] This is an action for damages which is based on the allegations of breach of contract by the defendant or, alternatively, on the allegations of breach of duty of care which the defendant owed to the plaintiff.

[2] At all times material hereto the defendant was a practising attorney and acted as such for the plaintiff.

[3] In his particulars of claim the plaintiff avers that, during or about the early to mid-part of the 1990s, but prior to 1996, he, acting personally, concluded an oral agreement with the defendant, the material terms of which were that the plaintiff would deposit monies with the defendant and that the latter would, acting as an agent for the plaintiff, (the latter being an undisclosed principal) lend those monies to third parties on the terms approved by the plaintiff and after having first obtained adequate security, including sureties where necessary.

[4] Plaintiff further avers that, pursuant to the said agreement and during

the early to mid 1990s (the plaintiff is unable to specify the precise date) but prior to November 1996, the plaintiff paid to the defendant amounts totalling not less than R1 000 000,00 of which the defendant repaid to the plaintiff, prior to November 1996, amounts totalling not more than R200 000,00, leaving a balance of not less than R800 000,00 being the property belonging to the plaintiff.

[5] Save for averring that the plaintiff and one **Pattundeen** had concluded the said oral agreement with the defendant and that, in terms thereof, the latter would act as attorney and agent for both the plaintiff and the said **Pattundeen**, and save for denying that the said monies deposited with him was the sole property of the plaintiff and averring that one half of the same belonged to the said **Pattundeen**, in his plea the defendant seems to admit the rest of the aforesaid allegations made in plaintiff's particulars of claim.

[6] The gravamen of plaintiff's complaint is that the defendant lent and advanced the said amount, to wit, a sum of R600 000,00 to **Bale Investments (Pty) Ltd (Bale)** and an amount of R200 000,00 to **Aslam Cassim Peer (Peer)**, without first obtaining plaintiff's approval and without first obtaining adequate security in the form of mortgage bonds over immovable properties or any other form of security over any valuable assets or without first obtaining a surety or sureties of substance and therefore that, by so doing, he committed breach of the said oral agreement, or alternatively, that he breached a duty of care owed to him by the defendant.

[7] Though it was initially denied, it has now become common cause between the parties that **Bale** and **Peer** failed to repay the said monies advanced to them.

[8] It is on the basis of these allegations that the plaintiff contends that he has suffered damages in the sum of R800 000,00 plus interest for which amount the defendant is liable to compensate him by reason of aforesaid breach of contract or, alternatively, by reason of his failure to act pursuant to a duty of care owed by him to the plaintiff.

[9] In response to these allegations, the defendant denies that the loans to **Bale** and **Peer** were granted without the knowledge or consent of the plaintiff and contends that the plaintiff had personally prescribed the terms on which the loans had to be granted to **Bale** and **Peer**. Furthermore, the defendant admits that, in granting the said loans, he had not registered a mortgage bond on any property but avers that he had not, at any time, been instructed by the plaintiff to lend money on his behalf as against the security of a mortgage bond.

[10] The defendant accordingly denies that he is liable to compensate the plaintiff for the amount of damages claimed in the summons and urges this Court to dismiss plaintiff's action with costs.

[11] Before pleading to the merits, the defendant had filed a special plea to plaintiff's particulars of claim in terms of which he pleaded, *inter alia*, that the plaintiff was aware, or alternatively, that he ought reasonably to have been aware of the facts constituting the basis of his main and alternative claims and of the identity of the defendant by no later than April 1999, that the main and alternative claims became due and that the prescription in respect thereof commenced to run by no later than 30 April 1999, that, in terms of section 11 of the Prescription Act[1], the main and alternative claims accordingly became prescribed by no later than 24 April 2002 and that, as the summons herein was served upon the defendant on 2 October 2002, which was more than a period of three (3) years after the plaintiff became or ought to have been aware of the facts forming the basis of those claims as well as of the identity of the defendant, those claims are accordingly unforceable.

[12] In terms of the minutes of the pre-trial conference held on 23 November 2007 a discussion was conducted regarding the possible separation of the special plea of prescription from other issues so that the special plea would be heard first and the remaining matters would stand over for later determination. A view expressed by the plaintiff during that

1 68 of 1969;

conference, which apparently carried the day, was that it would be necessary to hear the evidence in order to determine the said special plea and therefore that it would not be convenient to separate the two issues.

[13] In retrospect, it would appear that plaintiff's view has proved to be a prudent one for, after having listened to the evidence, Counsel were agreed that the plaintiff must have been aware of the facts forming the basis of his claims as well as of the identity of the defendant during July 1999, that is, the month during which his attorney, **Mr Colin Cowan**, and the plaintiff had confronted the defendant about the loans that had been granted to **Bale** and **Peer**.

[14] **Mr Smithers**, who appeared for the defendant, however, submitted that, despite such an awareness, the period of prescription in respect of both claims had not begun to run during July of 1999. He referred to the provisions of section 12 of the Prescription Act, the relevant portions of which read as follows:-

> "12(1) Subject to the provisions of subsection …… (3) ……, prescription shall commence to run as soon as the debt is due ……
> 12(3) A debt shall not be deemed to be due until the creditor has knowledge 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 ……."

and submitted that, before a debt can be said to be due, the cause of action upon which it is based must be complete. Regarding the main claim he contended that the requisites for such a completed cause of action are the contract, the breach and that the plaintiff must have suffered damages in the form of patrimonial loss. According to him the requisites for a cause of action upon which the alternative claim is based are a wrongful act, fault on the part of the defendant in the form of *dolus* or *culpa* and damages in the form of patrimonial loss.

[15] He then pointed out that, in the present matter, it is common cause between the parties that, before issuing summons, the defendant had first proceeded by way of a provisional sentence summons against **Bale** and **Peer** in an attempt to recoup the amounts of the loans granted to them, that provisional sentence was granted in defendant's favour and against **Bale** and **Peer** and that it was only during or about June 2000 that the defendant advised the plaintiff that the loans were not recoverable from **Bale** and **Peer** and that attempts to excuss them had been unsuccessful.

[16] It was only then that the cause of action upon which both claims were based became complete, and it was only thereafter that the prescription in respect of both claims began to run. Prior to that, so the argument went, the plaintiff had not suffered any loss and the third of the requisites for both claims had not been satisfied. Had the plaintiff sued the defendant then, such an action would have been premature and would have met with a complete defence from the defendant.

[17] The response to **Mr Smithers'** submission would depend on the interpretation of the words "shall commence to run as soon as the debt is due" appearing in Section 12(1) of the Prescription Act.

[18] In *Delloite Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* [2] the case relied upon by **Mr Smithers** for his submissions, **Van Heerden JA** pronounced himself as follows regarding the provisions of Section 12(1) of the Prescription Act:-

> "Section 12(1) of the Prescription Act, 68 of 1969 provides that 'prescription shall commence to run as soon as the debt is due'. This means that there has to be a debt immediately claimable by the debtor or, stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately. See *The Master v IL Back and Company Ltd and Others* 1983 (1) SA 986 (A) at 1004, read with *Benson and Others v Walters and Others* 1984 (1) SA 73 (A) at 82. It follows that prescription cannot begin to run against a creditor before his cause of action is fully accrued, i.e. before he is able to pursue his claim (cf. *Van Vuuren v Boshoff* 1964 (1) SA

2 1991 (1) SA 525 (A);

395 (T) at 401)."

[19] The facts in *Deloitte* were the following. On 30 July 1980 the parties had concluded a written agreement in terms of which the appellant undertook to design and implement certain computer application modules for the respondent at an agreed remuneration of R50 000,00, one of the terms of the agreement being that the complete system be supplied by 30 June 1981 and that, should the appellant fail to supply those systems by that date:-

> "…. The customer (respondent) may, at his discretion, employ the service of a third party for the completion of the same; the costs of which will be met by the consultants"[3]

[20] It would appear that the appellant failed to supply the complete system by 30 June 1981 and during December of 1982 the respondent employed the services of third parties for the purpose of such completion and the costs attendant to such employment amounted to R92 436,10. An action brought by the respondent against the appellant during August of 1985 for the recovery of the said amount was met with a special plea to the effect that the said action had become prescribed by reason of the fact that the debt had become due more than three years before the service of the summons upon the appellant. Respondent's conclusion that the action had become prescribed was premised on a view that the period of prescription in respect of the same had commenced running when he had failed to perform by the *mora* date, namely, 30 June 1981.

[21] Not so, concluded **Van Heerden JA** the reason being, so held the Honourable Judge of Appeal, that the provisions of clause 15 had altered the position:-

> "It is therefore clear that the remedy provided by clause 15 differs markedly from an ordinary claim for complementary damages. In essence the clause limited the appellant's liability which would have

3 Clause 15 of the Agreement;

> arisen *ex lege* had the clause merely provided that the system was to be completed by 30 June 1981. It follows that the clause was intended to provide a remedy in substitution of, and not in addition to, a common law claim for complementary damages.[4]"

[22] It was therefore against the background of this finding that the learned Judge of Appeal pronounced himself in the passage quoted by **Mr Smithers.**

[23] The comments of the learned Judge of Appeal were discussed and further explained in *Kotzé v Ongeskiktheidsfonds, Universiteit Stellenbosch* [5]. This case involved a claim by the plaintiff for the payment of a disability pension. Rule 6 of the rules of the relevant disability Pension Fund provided that, if a member of the fund had become disabled by bodily injury or illness so that he was thereby totally prevented from following his own occupation for wages or profit, and such disability had continued for an unbroken period of at least four months and still continued thereafter, the board of trustees would, upon the request of such a member, grant him a disability pension.

[24] During 1982 the plaintiff, a member of the Fund, had sustained certain bodily injuries as a result of which he had, during 1985, become totally disabled from following his occupation for wages or profit. His disability had lasted for more than four months but it was only on 8 June 1993 that he had made a request contemplated in Rule 6 and, when the board refused to accede to it. He, in 1994, instituted action for payment to him of the disability pension. In a subsequent special plea, filed on behalf of the defendant, it was contended that the disability pension became claimable by the plaintiff after his disability had continued after having lasted for an unbroken period of four months. The claimability of the same was dependant only upon the lasting of the disability for four months and its continuance thereafter which was when, in terms of Section 12 of the Prescription Act, the period of prescription commenced to run. As the aforesaid unbroken period of four months and continuance thereafter had occurred during 1985, it followed that the defendant's obligation had been extinguished by prescription during about

---

4 *Deloitte (supra)* at 532C-D;
5 1996(3) SA 252 (C)

1988.

[25] Upholding the special plea and after having referred to the comments made by **Van Heerden JA** in *Deloitte (supra),* **Duminy AJ** had the following to say:-

> "'Claimable' beteken dieselfde as 'opeisbaar'. Die Engelse agtervoegsel '-able' vervul dieselfde funksie en het dieselfde betekenis as '-baar' in Afrikaans (sien *The Shorter Oxford English Dictionary on Historical Principles* 3de uitg op 5 *sv* '-able'). Dit beteken nie dieselfde as 'claimed' nie. By wyse van vergelyking, sou die Englse teks van art 12(1) die woorde 'as soon as the debt is claimed', of iets dergeliks bevat het indien dit die bedoeling was om verjaring eers te laat begin loop wanneer 'n skuld inderdaad opgeëis is.
>
> Ek kom dus tot die gevolgtrekking dat volgens die bewoording van art 12(1) van die Verjaringswet 68 van 1969, verjaring begin loop sodra 'n skuld, synde enige verpligting wat een persoon teenoor 'n ander moet nakom, opgeëis kan word, en dat die dadwerklike opeising daarvan nie daarvoor relevant is nie." [6]

[26] Returning to the facts of the present case, plaintiff's action is based on defendant's breach of contract or, alternatively, on his breach of a duty of care which he owed to the plaintiff in that it is alleged that, contrary to an earlier agreement, the defendant had lent plaintiff's monies to third parties. *Strictu sensu* therefore plaintiff's cause of action arose and the debt became due as at the date of the said breach. It, however, became common cause between the parties that the plaintiff only became aware of the facts forming the basis of his claim as well as the identity of the debtor during July of 1999. It accordingly follows that, in terms of Section 12(3) of the Prescription Act, as from the said month and year plaintiff's right of action, in respect of both claims, accrued and the debt owing by the defendant became immediately claimable.

[27] Also, I do not see any merit in **Mr Smithers'** submission that, prior to June 2000 (when the defendant had informed the plaintiff that all attempts to

---

6 *Ibid* at 258F-H;

excuss the debtors had been unsuccessful), the plaintiff had not suffered any loss or damage. In my judgment, once the plaintiff became aware that his monies had been lent to third parties by the defendant, contrary to the terms of the agreement, he had a complete right of action in respect of both claims. The right of action which accrued to him at the time included the loss in the sum of R800 000,00 which, prior to defendant's alleged breach, stood to his credit in the defendant's trust account.

[28] Even if I am wrong in the finding that, as at the date of breach, the plaintiff had suffered loss or damage, **Mr Smithers'** submissions on the issue would still lack merit. In terms of the "once and for all" or "single cause of action" approach which has, over the years, been propounded by our Courts:-

> "……. the cause of action is an unlawful act plus damage, and so soon as damage has occurred all the damage flowing from the unlawful act can be recovered, including prospective damage and depreciation in market value."[7]

[29] The approach was applied in the recent decision in *Harker and Fussell and Another*[8]. The defendants, as members of the brokers' profession, had held themselves out to the plaintiff to be experts in the field of investment advice and financial planning and, as such, had a duty to take care towards the plaintiff which duty had involved, *inter alia*, not to give advice where they did not possess the required skill or qualifications to give such advice. In the alternative, the plaintiff had relied upon a contractual cause of action based on the same facts and circumstances and the allegations in respect of both claims being that during or about July or August 1991 the defendants, acting under aforesaid duty of care, alternatively, acting in terms of those contractual obligations, advised the plaintiff to invest an amount of R290 000,00 in a company known as **Masterbond** that, acting on the strength of the said advice, the plaintiff had, on 12 August 1991, invested the said amount in **Masterbond** which, on 2 October 1991, was provisionally liquidated and placed under provisional curatorship. By advising the plaintiff to invest in

7 *Oslo Land Co Ltd v The Union Government* 1938 AD 584;
8 2002 (1) SA 170 (T);

Masterbond, the plaintiff continued to contend, the defendants had breached both the terms of the contract as well as the duty to take care in a wrongful and negligent manner.

[30] In response to plaintiff's action based on the said allegations instituted on 2 December 1998, the defendants raised a special plea of prescription, contending that the action had been instituted long after the expiry of a period of three years from the date when the debt had become due.

[31] The Court took note of the fact that in that case, the date of breach (the wrongful conduct) did not coincide with the date of the loss, which had taken place much later. As to the determination of the date when the debt in that case became due the Court, per **Basson J**, held that:-

> "The authorities are clear that, even if the breach *in casu* had not resulted in loss up until today, the special plea of prescription must still succeed. In other words, even if the loss occurs only at a later date, prescription starts to run as from the date of the breach (the wrongful act). The reasoning being that the occurrence of the loss (resulting from the breach) does not create a new debt with a new prescriptive period."[9]

[32] I have accordingly been driven to the conclusion that, at the time when the defendant committed breach herein, but for the fact that at the time the plaintiff had not been aware of the facts upon which his claims would be based as well as of the identity of the debtor, the plaintiff had a complete cause of action and a debt which was immediately claimable from the defendant. When, during 1999, the plaintiff became aware of the said facts and of the said identity, the debt became due and the prescription in respect thereof commenced to run. *Deloitte (supra)* can therefore not provide authority for the submissions made by **Mr Smithers** herein.

[33] The decision of the Zimbabwe Supreme Court in *Syfin Holdings*

---

9 *Ibid* at 173I-174A;

Limited v Pickering[10] provides authority for the proposition that:-

> "Any given transaction may therefore give rise to a number of claims the "debts" in respect of which may become due at different stages. Periods of prescription can therefore begin to run at different times."[11]

which proposition contradicts the findings in cases like *Oslo (supra)* and *Harker (supra)*. The latter cases have been followed in subsequent cases like *Primavera Construction SA v Government North West Province and Another*[12] and the unreported decision in *Avante Fishing Enterprises v Rafael Ondernemings CC*[13]. Having considered all these decisions, I have found those in cases like *Oslo (supra)* and *Harker (supra)* to accord with the general principles of our law and therefore to be preferred.

[34] A stage has now been set for the consideration of the contents of a letter addressed by **Mr Colin Cowan**, plaintiff's attorney, to the defendant and dated 21 July 1999. This letter was written following a meeting at which the said attorney, the plaintiff and the defendant were present. The purpose of the meeting has been alluded to in paragraph 13 of this judgment.

[35] As I understood **Mr Smithers,** he also relied on the contents of the said letter for his submission that the period of prescription in respect of the claims herein only commenced to run during or about 2000. It is therefore essential that the contents of the letter be quoted in full to facilitate the understanding of the basis upon which **Mr Smithers** placed reliance thereon. The contents are as follows:-

> "Dear Mr Essack
>
> **ASLAM CASSIM PEER/BALE INVESTMENT (PTY) LIMITED**
> **OUR CLIENT : E SEEVNARAYAN**
>
> I refer to the recent meeting in our offices with my client, Mr E

10 1982 (2) SA 225 (250)
11 *Ibid* 233C'
12 2003 (3) SA 570 (B)
13 A judgment of the South Eastern Cape Local Division : Case No. 4108/05 delivered on 29 May 2008;

> Seevnarayan, and yourself when I expressed the view that on the facts before me at this stage you will be obliged to compensate him for any loss or damage which he may sustain on the grounds of negligence on your part in the matter.
>
> You have undertaken to furnish my client with a detailed explanation in writing of your conduct in the matter from inception to date as well as copies of all relevant documents and correspondence in your file.
>
> However, before any claim can be made by our client, all efforts to recover the claims from the above Defendants must first be exhausted and the claims demonstrated to be irrecoverable. Accordingly, you are requested to proceed to the final end with the provisional sentence action instituted by you against the defendants and to attempt to execute against them pursuant to provisional sentence being obtained to recover whatever amount you can from them. Please keep me informed of progress in this regard and in the interim, as requested, furnish me with a copy of the relevant professional indemnity or other policy in terms of which you are covered for any claims which may arise against you from professional negligence on your part."

[36] Needless to say, **Mr Smithers** relied heavily on the third paragraph of the letter for his submission. It is clear from the contents of the said paragraph that the plaintiff is imposing a condition subject to which he would claim damages from the defendant, the contents of the first paragraph having made clear plaintiff's understanding in the matter, namely, that the defendant was:-

> "….. obliged to compensate him for any loss or damage which he may sustain on the grounds of negligence ….."

[37] Were **Mr Smithers'** submissions to be upheld, it would mean that, by his own conduct, the plaintiff would have succeeded to postpone the commencement of the running of the prescription herein.

[38] It is trite law that a creditor cannot, by his own conduct, postpone the commencement of the running of the prescription.[14] **Mr Smithers'** submission

14 *Lamprecht v Lyttleton Township (Pty) Ltd* 1948 (4) SA 526 (T) esp. at 529-530; *Lydenburg*

must accordingly fail.

[39] In conclusion it would be appropriate to quote the following passage from the decision of this Division in *Mahomed v Yssel and Others*[15]:-

> "The fact is, however, that prescription may often operate hardly against a creditor; it is of the very nature of prescription laws to do so. A non-vigilant creditor may lose his right to enforce his claim in circumstances which evoke great sympathy for him. Prescription laws are absolute and permit no benevolent exceptions of the clear terms of the Statute."[16]

I accordingly made the following order:-

1. **The special plea of prescription is upheld.**
2. **The plaintiff's action is dismissed with costs.**

_____

Voorspoek Ko-operasie v Els 1966 (3) SA 34 (T) esp at 37D;
15 1963 (1) SA 866 (D);
16 *Ibid* 870-871A;

Trial heard on :	6 September 2010
Counsel for the plaintiff :	Mr MDC Smithers
Instructed by :	Garlicke & Bousfield
Counsel for the defendant :	Mr RG Mossop
Instructed by :	Yusuf Essack Attorneys
Judgment handed down on :	21 September 2010