THE SUPREME COURT OF APPEAL
SOUTH AFRICA

CASE NO: 483/95

In the matter between:

G A ABRAHAMSE — Appellant

and

MUNICIPALITY OF EAST LONDON
AND ANOTHER — 1st Respondent

MUNICIPALITY OP BEACON BAY — 2nd Respondent

and — Case No 513/95

In the matter between:

MUNICIPALITY OF EAST LONDON — Appellant

AND ANOTHER

and

G A ABRAHAMSE — Respondent

CORAM: MAHOMED CJ, F H GROSSKOPF, HARMS, MARAIS JJA et STREICHER AJA

HEARD: 17 MARCH 1997

DELIVERED: 12 MAY 1997

J U D G M E N T

HARMS JA/

HARMS JA:

Whilst I agree with Marais JA that the appeal of the Municipality of East London stands to be dismissed, I disagree with his judgment concerning the appeal of the plaintiff against the Municipality of Beacon Bay. It, too, should be dismissed. My point of departure is the interpretation of s 2 of the Act, particularly ss (2)(c). Interpretation concerns the meaning of the words used by the Legislature and it is therefore useful to approach the task by referring to the words used, and to leave extraneous considerations for later. No constitutional principles were invoked or are involved.

The scheme of s 2 is simple[1]. It prohibits the institution of legal proceedings against a local authority "unless" a condition has been met. The

[1] In my analysis I confine myself to those aspects of s 2 that are relevant to the present case.

condition requires of the plaintiff to give written notice to the local authority "within 90 days as from the day on which the debt became due". The "due" date has a settled meaning – it is the date on which the cause of action fully accrues[2]. The due date can be postponed by agreement (ss (2)(d)). Additionally, there are two deeming provisions concerning the due date. The first relates to the instance where the debtor intentionally prevents the creditor from coming to know of the existence of the debt. The second is to be found in ss (2)(c), the provision in contention:-

> "(2) For the purposes of subsection (1) -(a)
>
> (b) ...
>
> (c) a debt shall not be regarded as due before the first day on which the creditor has knowledge of the identity of

[2] Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd 1991 (1) SA 525 (A) 532H-I. Further references are collected in Snraga v Chalk 1994 (3) SA 145 (N) 153.

> the debtor and the facts from which the debt arose, or the first day on which the creditor can acquire such knowledge by the exercise of reasonable care, whichever is the earlier day;
>
> (d) ... "

The effect of this provision is that the 90-day period begins to run, not from the due date, but from the first day on which the creditor

- has knowledge of the identity of the debtor and the facts from which the debt arose, or
- can acquire such knowledge by the exercise of reasonable care,

("whichever is the earlier").

The meaning of the first postulate is clear and it involves a question of fact – that of actual knowledge. The second postulate is couched in the alternative and it also concerns a question of fact, albeit one more difficult to prove: on what day could

the creditor have acquired the knowledge by the exercise of reasonable care? This postulate is not dependent upon the first not being present. Of concern is the "earlier" of the two. The second must, as a matter of logic, coincide with or precede the first.

> Is the ability of a creditor to acquire knowledge by reasonable care subject to any conditions? There are none in the Act. Marais JA, as I understand his judgment, implies that there are. My problem is that the conditions (maybe exceptions) have not been clearly formulated; it has not been said what words or phrases must be read into (or out of) the provision or what "unusual" meaning has been attached to what word or phrase. Nevertheless, it seems to me that he has two situations in mind in which the creditor is entitled to some leeway. The one is where he has no reason to doubt the identity of the debtor and the other where he, by the exercise of reasonable care, identifies the wrong debtor.

For the sake of argument I am prepared to accept that there might be policy reasons why a creditor in these circumstances ought to be protected. But that is not the question; the question is whether the Legislature intended to grant him protection. The fact that the Legislature, consciously or unconsciously, did not give such protection in ss (2) (c) does not amount to an anomaly or absurdity.

The Act deals with competing interests: those of plaintiffs and those of local authorities. It limits the right of the plaintiff to institute action by requiring notice within a very limited time period after the relevant event. A plaintiff who requires more time may make an application for relief in terms of s 4. The court has then to weigh up the competing interests since it must be satisfied that the debtor is not prejudiced by the delay, and that by reason of special circumstances the creditor could not reasonably have been expected to

serve the notice in time. It is therefore reasonable to assume that the intention of the Legislature was that where special circumstances for a late notice exist, the matter should be dealt with under s 4. Whether the extraordinary instances postulated by Marais JA fall under s 4, I need not consider. My point is that, having created a special mechanism in s 4 to deal with special cases, the otherwise clear language of ss (2)(c) cannot be modified by way of judicial interpretation to also deal with some or all of them.

On the basis then that ss (2)(c) means what it says, I turn to the facts of the case.

The date on which the plaintiff became aware of the damage to his property is not referred to in the stated case. It is significant that it was omitted from par 26. As a matter of necessary inference, however, it has to follow from par 19 that his knowledge ante-dated the letter of 28 November 1991 because it was agreed that

that letter contained a statement of the plaintiff's intention to hold the Municipality of East London liable. Such intention is perforce dependent on knowledge.

The facts concerning the plaintiff's ability to have established the identity of the debtor are simple. I did not understand the plaintiff's counsel to dispute that it was very easy to determine which municipality was in control of the burst pipe. A single call to the local authority would have sufficed. So, too, a glance at the water account (see GAA4), a discussion with the tenant who reported the mishap or the agent who managed the property (par 11 and 33) and attended to the problem (par 18 and 22).

Counsel submitted that the fact that the plaintiff was at all material times resident in Bophuthatswana is not irrelevant. I agree, but there is no suggestion that, because of that circumstance, he could not quite easily have established the identity of

the debtor. Counsel also submitted that it had not been established that the insurer who wrote the letter, GAA6, to the Municipality of East London was negligent in doing so. I have some doubt about the validity of the submission, but it is in any event misconceived. The issue is not whether the insurer was negligent but whether, acting on the plaintiff's behalf, it could by the exercise of reasonable care, have established the identity of the debtor.[3] On the stated case the insurer did nothing at all. No reason is given as to why the letter was addressed to the wrong municipality and there is no allegation relating to the insurer's (or even the plaintiff s) knowledge or belief. The salient facts being within the special knowledge of the plaintiff, the absence of any information in these regards can only enure to the benefit of the debtor.

[3] For the same reason I find it unhelpful and unnecessary to consider GAA6 and 7.

Both appeals are dismissed with costs.

L T C HARMS JUDGE
OF APPEAL

MAHOMED CJ)
F H GROSSKOPF JA) Concur
STREICHER AJA)

OF SOUTH AFRICA

Case No 483/95

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In the matter between:

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Appellant

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G A ABRAHAMSE

Respondent

Coram: MAHOMED CJ, F H GROSSKOPF, HARMS,
MARAIS JJA et STREICHER AJA

Date Heard: 17 March 1997

Delivered: 12 May 1997

J U D G M E N T

MARAISJA

Broadly stated, the issue raised in these two appeals is whether or not the plaintiff in the Court a quo had complied with sec 2 (1) (a) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970 ("the Act") prior to instituting a claim for damages against two municipalities who were the defendants. I shall refer to the parties as they were referred to in the Court a quo.

On 2 November 1991 a municipal water main burst and flooded plaintiffs property at 42 Pentlands Place, Beacon Bay, East London. On 28 October 1993 plaintiff issued summons in the East London Circuit Local Division against both the Municipality of East London (first defendant) and the Municipality of Beacon Bay (second defendant). Damages in the sum of R 93 187,21 were claimed from first defendant, alternatively second defendant. The action was

founded upon the allegedly negligent conduct of either first or second defendant. Plaintiff alleged in the particulars of claim that he had complied with the terms of sec 2 of the Act in respect of both defendants.

Sec 2 provides:

"(1) Subject to the provisions of this Act, no legal proceedings in respect of any debt shall be instituted against an administration, local authority or officer (hereinafter referred to as the debtor) -

(a) unless the creditor has within 90 days as from the day on which the debt became due, served a written notice of such proceedings, in which are set out the facts from which the debt arose and such particulars of such debt as are within the knowledge of the creditor, on the debtor by delivering it to him or by sending it to him by registered post;

(b) before the expiration of a period of ninety days as from the day on which the notice contemplated in paragraph (a) was served on the debtor, unless the debtor has in writing denied liability for the debt before the expiration of such period;

(c) after a lapse of a period of twenty-four months as from

the day on which the debt became due.

(2) For the purposes of subsection (1) -

(a) legal proceedings shall be deemed to be instituted by service on the debtor of any process (including a notice of any application to court and any other document by which legal proceedings are commenced) in which the creditor claims payment of the debt;

(b) a debt shall, if the debtor intentionally prevents the creditor from coming to know of the existence thereof, not be regarded as due before the day on which the creditor comes to know of the existence thereof;

(c) a debt shall not be regarded as due before the first day on which the creditor has knowledge of the identity of the debtor and the facts from which the debt arose, or the first day on which the creditor can acquire such knowledge by the exercise of reasonable care, whichever is the earlier day;

(d) a period prescribed in paragraph (a) or (c) of that subsection shall, in the case of a debt of which the due date is postponed by agreement between the creditor and the debtor, be calculated afresh as from the day on which the debt again becomes due."

In addition to pleading over, first defendant raised a

special plea the gravamen of which was that plaintiffs claims against it were unenforceable by reason of plaintiffs failure to comply with sec 2 (1) (a) of the Act, or to seek a waiver by first defendant of its right to rely upon such failure by way of defence, or to seek in terms of sec 4 of the Act the Court's leave to serve the relevant notice after the lapse of the prescribed period of 90 days. Second defendant contented itself with a bare denial of plaintiffs allegation that he had complied with the terms of sec 2.

The parties joined in stating a special case for the consideration of the Court a quo in terms of Rule 33. It had been admitted by plaintiff at a pre-trial conference that he had sought neither a waiver by first defendant of its right to raise the defence afforded by sec 2 (1) (a), nor the leave of the Court to serve the relevant notice later than the prescribed period. Because the facts and

contentions set forth in the special case and the questions posed for consideration in it are more than ordinarily material and significant in the consideration of plaintiffs appeal against the upholding by the Court a quo of second defendant's defence, I quote them in full.

"SPECIAL CASE IN TERMS OF RULE 33 (11 OF THE RULES OF COURT

A. PREAMBLE

1. Plaintiff is GERALD ALBERT ABRAHAMSE, an adult male and the owner of the property situated at 42 Pentlands Place, Beacon Bay, East London. The said property is hereinafter referred to as 'the property'.

2. First Defendant is THE MUNICIPALITY OF EAST LONDON, which was at the date of the institution of action herein a Municipality established in terms of the Municipal Ordinance 20 of 1974 (Cape), of the City Administrative Centre, 29 Oxford Street, East London.

3. Second Defendant is THE MUNICIPALITY OF BEACON BAY, which was at the date of the institution of action herein a Municipality established in terms of the Municipal Ordinance 20 of 1974 (Cape), of the Civic Centre, Beacon Bay.

4. Plaintiff sued Defendant for damages in the sum of R93 187,21 alleged by him to have been sustained on the 2nd November

1991 as a result of the negligence of First Defendant, alternatively of Second Defendant, in the control of certain water pipe ("the pipe"), which as a result of the said negligence, burst and flooded the property.

5. Plaintiff has averred that he had complied with the provisions of Section 2 of Act 94 of 1970 ("the Act").

6. First Defendant has pleaded raising a Special Plea and pleading over to the merits. The Special Plea avers non-compliance with the Act in that Plaintiff is alleged to have failed "to deliver or send by registered post the notice contemplated by Section 2 (1) (a) of the Act within a period of ninety days as from the day uponwhich the alleged claim arose....."'

7. Second Defendant has denied Plaintiffs averment of compliance with the Act.

8. The parties have agreed to request this Honourable Court, in terms of Rule 33 (4) of the Rules of Court, to order that the issue of whether Plaintiff has complied with the Act be decided before any evidence is led or separately from any other question.

9. The parties have further agreed upon the following written statement of facts in the form of a special case for the adjudication of this Honourable Court.

B. STATEMENTS OF FACTS

10. Plaintiff has been resident in Bophuthatswana from 1986 to date.

11. From 1986 to date the property has been administered by

Periwinkle Estates of East London, ("Periwinkle"), upon a mandate from Plaintiff to perform the following services:

11.1 to procure a tenant for the property, prepare a lease in respect thereof, and secure the tenant's signature of same;

11.2 to receive rental payments by the tenant and to pay same into Plaintiffs bond account with the South African Permanent Building Society, and later its successors;

11.3 to attend upon complaints by the tenant, and to arrange, from time to time as the need arose for the effecting of minor repairs to, or maintenance of, the property.

12. When, damage in the sum of approximately R 300.00 was caused to the property by a burst water pipe in November 1990 ("the 1990 claim"), the tenant of the property reported same to Periwinkle which reported it in turn to Plaintiffs insurers, Mutual and Federal Insurance Company Limited ("Mutual") which made a claim upon First Defendant under reference E53863-002 which was not met by any denial by First Defendant of responsibility for the relevant water reticulation system.

13. Mutual did not persist with the 1990 claim prior to the 28th November 1991, due to the relatively trivial extent of same.

14. Responsibility for the water reticulation system in Beacon Bay was handed over by First Defendant to Second Defendant, pursuant to agreement between the said parties, Second Defendant accepting such responsibility from the 1st of July

1991.

15. During June, July, September and October 1991, a newsletter was published by Second Defendant, copies of which were delivered by hand to all residential and commercial premises situate within Second Defendant's boundary. Copies of the said newsletters bearing the dates June 1991, July 1991, September 1991 and October 1991, are annexed hereto marked "GAA1", GAA2", GAA3" and "GAA4" respectively.

16. Second Defendant caused a notice entitled "Proposed take-over of water reticulation service" to be published in the Daily Dispatch newsletter of the 11th of May 1991. Copy of the said notice is annexed hereto marked "GAA5".

17. Plaintiff was at no time apprised personally by First or Second Defendant of such a transfer of responsibility or liability.

18. The incident pleaded in paragraph 5 of Plaintiffs Particulars of Claim ("the incident") caused the tenant of the property to report same by telephone to a servant of Second Defendant at or about 03h45 on the 2 November 1991, and to report same to Periwinkle, which in turn reported same to Mutual.

19. Mutual gave written notice of the incident and of Plaintiffs intention to hold First Defendant liable for same by letter dated the 28 November 1991 sent by ordinary post, ("the first claim"), a copy of which is annexed hereto marked "GAA6".

20. The first claim was received by First Defendant on 2 December 1991.

21. First Defendant's Insurers responded to the first claim by letter dated 27 December 1991 advising that it was First Defendant's

view that it was not negligent, as the cause of the pipe bursting was that the pipe was defective. Copy of the said response is annexed hereto marked "GAA7".

22. Periwinkle thereafter, and upon the instruction of Mutual, embarked upon securing quotations for the repair of the damage caused by the incident ("the damage").

23. That the damage had been established to be more extensive than at first concluded was reported by Periwinkle to Mutual which, on or about the 14th of May 1992, accordingly appointed Campbell and Williams, loss adjusters, to ascertain the precise extent of the damage which Arm in turn employed consulting engineers.

24. The involvement of Campbell and Williams led to the discovery that Second Defendant had, since the 1st of July 1991 become responsible for the water main, the bursting of which had caused the incident, and accordingly written notice of the damage and the Plaintiffs intention to hold Second Defendant liable for same was given to Second Defendant by Campbell and Williams on behalf of Plaintiff, by letter sent by ordinary post and dated the 3rd of June 1992 ("the second claim"). A copy of the second claim is annexed hereto marked "GAA8".

25. Second Defendant received the said claim on the 4th of June 1992.

26. Plaintiff became personally aware on the 15th of April 1992 that Second Defendant had assumed responsibility for the pipe.

27. The pipe burst on the 7th of November 1990 and also on the 14th of July 1991 in the vicinity of Houses 40 and 42, Pentlands

Place.

28. The burst in the pipe in front of House 40 Pentlands Place on the 14th of July 1991 was attended to by the Engineering Department of Second Defendant from 04h30 to 15h30 on the 14th of July 1991.

29. The incident was attended to by the Engineering Department of Second Defendant and the work was completed by 12h45 on the 2nd of November 1991.

30. A further burst or leakage in the pipe occurred on the 4th of November 1991 between Houses 40 and 42 Pentlands Place at llh00 which burst was repaired by the Engineering Department of Second Defendant by 16h30 on the same day.

31. The Engineering Department of Second Defendant re-laid a new section of the pipe between numbers 24 and 46 Pentlands Place during February 1992.

32. All vehicles used in the work executed by the Engineering Department of Second Defendant, and set out in paragraphs 28 and 31 inclusive above, had the badge and markings of Second Defendant displayed thereon.

33. One Muller of Periwinkle, who performed the mandate referred to in paragraph 11 (above), did not know, during the period 2nd November 1991 to 15th April 1992 whether it was First Defendant, or Second Defendant, that was responsible for the pipe, but during the said period the said Muller assumed, by virtue of the pipe being located within the boundaries of Second Defendant, that Second Defendant was responsible for same.

34. On the 27th of November 1991 and on the 30th of January 1992

Campbell and Williams addressed letters to the Town Clerk of the Second Defendant giving notice to Second Defendant on behalf of parties other than the Plaintiff of damage sustained allegedly by burst pipe for which Second Defendant was liable. Copies of the said letters are annexed hereto marked "GAA9" and "GAA10" respectively. 34A. It is common cause that no other notice other than the letter of 28 November 1991 from Mutual and Federal Insurance Company was given to First Defendant.

C THE PARTIES' CONTENTIONS

35. Plaintiffs contentions:

35.1 Plaintiff contends in regard to the service of Annexure "GAA6" upon First Defendant that:

35.1.1 it was timeous in that it was effected by the end of November alternatively the beginning of December 1991;

35.1.2 the Annexure "GAA6" contained a sufficient statement of the facts from which Plaintiffs debt arose, and such particulars thereof as were within the knowledge of Plaintiff;

35.1.3 it was "served" by "delivery" within the meaning of Section 2 (1) (a) of the Act.

35.2 Plaintiff contends in regard to the service of Annexure "GAA8" upon Second Defendant that:

35.2.1 such service was timeous in that it was affected within ninety days of the first day upon which Plaintiff had knowledge of Second Defendant being the debtor, and the facts from which such debt arose, alternatively within ninety days of the first day upon which Plaintiff was able to acquire such knowledge of Second Defendant being the debtor by the exercise of reasonable care, and the facts from which such debt arose, , which date was, in either event, the 3rd of June 1992;

35.2.2 the Annexure "GAA8" contained a sufficient statement of the facts from which Plaintiffs debt arose, and such, and such particulars thereof as were within the knowledge of Plaintiff;

35.2.3 the annexure was "served" by "delivery" within the meaning of Section 2 (1) (a) of the Act.

36. First Defendant's contentions:

36.1 First Defendant contends in regard to Annexure "GAA6"

that the said annexure does not constitute a notice such as is envisaged in Section 2 (1) of the Act in that:

36.1.1 the said letter does not give notice to the First Defendant of legal proceedings contemplated;

36.1.2 the said letter does not contain facts from which it could be inferred that it was intended as notice of the threat of these proceedings;

36.1.3 the said letter contains no particulars of the debt or the extent thereof.

36.2 First Defendant contends in regard to the "service" of Annexure "GAA6" upon First Defendant that:

36.2.1 the said letter was not served on the Defendant by delivery to it;

36.2.2 the said letter was not sent to the Defendant by registered post;

36.2.3 the letter was therefore not served as required by Section 2 (1) of the Act.

36.3 First Defendant contends accordingly that Plaintiff had failed to deliver or to send by registered post the notice contemplated by Section 2 (1) (a) of the Act within a period of ninety days as from the date upon which the

alleged claim arose.

37. Second Defendant's contentions:

37.1 Second Defendant contends that First Defendant's contentions in regard to Annexure "GAA6" are similar to its contentions in regard to "GAA8" and prays that same be incorporated herein.

37.2 Second Defendant contends that the cause of action "the debt" occurred on 2 November 1991 and that Plaintiff was required to notify Second Defendant in writing within 90 days thereof of his intention to institute legal proceedings against Second Defendant. The letter of 3 June 1992 was received 7 months after the cause of action arose and therefore long after the time allowed in terms of Section 2 (1) (a) of Act 94 of 1970.

37.3 Second Defendant contends that Plaintiff and/or his agent/s could have reasonably ascertained on 2 November 1991 that Second Defendant was a debtor in that it assumed control and responsibility for the water reticulation in Beacon Bay on 1 July 1991:

37.3.1 Second Defendant caused notices to be sent to all owners and occupiers in Beacon Bay informing them that it had now taken over the responsibility for water reticulation and also set out the procedure to be followed when a water pipe burst and/or leaked, and

also caused an advertisement to appear in the Daily Dispatch informing the public of the proposed take-over of the reticulation system.

Vide paras Statement of Facts. 15 & 16 Annexures "GAA1" - "GAA5".

37.3.2 Second Defendant's employees attended to a burst pipe in front of Plaintiffs house on 14 July 1991.

Vide Statement of Facts No 27

Plaintiffs tenant advised Second Defendant of the burst pipe or leakage at 03h45 on the 2nd November 1991, Vide Statement of Fact No 18 Second Defendant's employees attended to the repair of the said burst pipe and/or leak on the 2 November 1991 Vide Statement of Fact No 28 At all material times the vehicles used by the Second Defendant in effecting the repairs bore the coat of arms and name of Second Defendant.

37.3.3 If Plaintiff or his agent had enquired from the tenant they would have been informed that the burst pipe and leakage had been reported to Second Defendant and that Second Defendant had attended to the repair

thereof. Their failure in this regard is unreasonable in the premises.

37.4 Second Defendant contends that Plaintiff and/or his agent could have seen the activity of Second Defendant in relaying a new stretch of water piping from house 14 to house 45 in Pentlands Place during February 1992. Vide Statement of Facts No 30

37.5 In any event, Second Defendant contends that Plaintiff or his agent/s could reasonably have ascertained the identity of Second Defendant merely by placing a telephonic call to Second Defendant's office or by making enquiries from a local Beacon Bay plumber.

37.6 Second Defendant contends that Plaintiff cannot shelter behind the unreasonable efforts of his agent/s to establish the identity of Second Defendant, Vigilantibus non dormientibus jura subveniunt.

37.7 Second Defendant contends that the fact of Plaintiff living in Bophuthatswana, does not entitle him to be placed in a better position than a house owner living in Beacon Bay.

37.8 Second Defendant contends that Plaintiff could have discovered by reasonable care and effort the identity of Second Defendant on or before 27 December 1991, the date Campbell and Williams sent a letter on behalf of UBS Insurers to Second Defendant claiming damages. Vide 31A of Statement of Facts. "GAA9"

Second Defendant also contends that Plaintiff could have, by reasonable care and effort discovered Second Defendant's identity on or before 30 January 1992, the date Campbell and Williams wrote to Second Defendant on behalf of UBS Insurers claiming damage as set out in "GAA10".

Vide 31B Statement of Fact 37.9 Second Defendant contends that at all material times hereto Mutual and Federal at East London branch were acting as agents for Plaintiff.

38. This Honourable Court is requested to find, on the basis of the above contentions, whether Plaintiff complied with Section 2 (1) (a) of Act 94 of 1970 in respect of both Defendants, alternatively in respect of First Defendant only, alternatively in respect of Second Defendant only, alternatively Plaintiff failed to comply with the said statutory requirement in respect of both Defendants, (sic)"

I refrain from quoting verbatim annexures "GAA1", "GAA2", "GAA3", "GAA4" and "GAA5". It suffices to say that anyone who saw them would have realised that as from 1 July 1991 the Beacon Bay Municipality would take over or had taken over from the East London Municipality the water reticulation system within

Beacon Bay.

"GAA6", the letter from Mutual and Federal Insurance Company Limited, read:

"28/11/91
The City Engineer
East London Municipality
EAST LONDON OUR REF: MRS J SCOTT AA
Dear Sir
OUR INSURED G A ABRAHAMSE
OUR CLAIMS E536863-002& E582776-002
CIRCUMSTANCES WATER DAMAGE TO PROPERTY AT 42 PENTLANDS PLACE, BEACON BAY We are the comprehensive insurers of Number 42 Pentlands Place, owned by G Abrahamse.
On the 07 November 1990 and 02 November 1991 respectively a municipal water mains pipe burst in front of the Insured's property, flooding the grounds and causing damage to the Insured's swimming pool on both occasions, as well as the driveway and the wall surrounding the pool.
We are therefore holding the East London Municipality liable for all damages caused by the above and our quotations and Final Repair Invoice will be forwarded to you in due course for reimbursement. As this is becoming a frequent event we would suggest that you look into the matter in order to prevent this occurrence from happening

again.

Enclosed please find a copy of quote and Final Invoice in respect of damage which occurred on the 07 November 1990. We look forward to receiving reimbursement of R316.50 in due course.

If, however, you are insured for losses of this nature we suggest that this letter be handed to your Insurance Company in order that they may deal with the matter on your behalf.

Yours faithfully

(SIGNED)

for BRANCH MANAGER"

The relevant parts of "GAA7", the letter from the Standard General

Insurance Company Limited, read:

" 'Without Prejudice'

To: MUTUAL & FEDERAL Date: 27/12/91

Address P O Box 608 EL Your Ref Mrs J Scott

Our Ref: Miss Wood Your Insured: G A Abrahamse

Our Insured: ELM Your claim: E536863-002

Our claim No Tba-Ref 166/991 Your Policy No----------

Our memo of: 28/11/91 Refers/is acknowledged

REMARKS

According to our Insured and the circumstances we do not feel that our Insured was negligent as the cause of the pipe bursting, was due to the pipe being defective and not due to negligence on the part of our Insured. Our file remains closed.

(SIGNED)

Signature"

"GAA8", the letter from Campbell & Williams, read:

"3 June 1992

The Town Clerk
Beacon Bay Municipality
P O Box 2001
BEACON BAY
5205

Dear Sir

FRACTURING OF WATER MAIN : 42 PENTLANDS PLACE : House G ABRAHAMSE

We act for the Insurers of the above party. On the 7th November 1990 and again on the 2nd November 1991, the municipal water main in Pentlands Place burst in front of the above property, flooding the grounds and causing damage to the swimming pool and surrounding walls as well as to the driveway.

Extensive damages have been caused and we invite your Inspector to view the damage prior to it being repaired.

Such repairs are being supervised by Consulting Engineers and are expected to be fairly costly. The costs thereof are not yet established.

Kindly take notice of our Principal's intention to hold the Municipality liable for the damages on the basis that it is considered they have been negligent in not replacing the defective water main within a reasonable period of time following numerous fractures in the Beacon Bay area

and in particular in the area of the above property in November of 1990.

Yours faithfully

CAMPBELL & WILLIAMS (PTY) LIMITED

(SIGNED)

MA LOPPNOW"

"GAA9" and GAA10" were letters written respectively on 27 December 1991 and 30 January 1992 by Campbell & Williams to the Town Clerk of second defendant on behalf of the insurers of two other properties in Beacon Bay. Reimbursement was sought for damages caused by burst water mains on 17 November 1990 and 22 November 1991 respectively.

The Court a quo (Van Rensburg J) decided that plaintiff had complied with sec 2 vis-à-vis first defendant but had not done so vis-à-vis second defendant. With the leave of the Court a quo plaintiff appeals against the finding that he had not complied with sec 2 in so

far as second defendant is concerned, and first defendant appeals against the finding that plaintiff had so complied as far as first defendant is concerned.

The appeal of first defendant (The Municipality of East London)

Counsel for first defendant confined his submissions to a single and narrow point. He contended that the letter ("GAA6") sent to first defendant did not notify it sufficiently or at all of an intention to institute legal proceedings should liability be disputed. While conceding that an explicit statement to that effect was not essential and that it would suffice if that was implicit in the letter (Maponya v Minister of Police and Another 1983 (2) SA 616 (A) 620D; Sibeko and Another v Minister of Police and Others 1985 (1) SA 151 (W) 166H-I; Minister van Wet en Order en 'n Ander v Hendricks 1987 (3) SA 657 (A) 663D-664G), he argued that no such implication

existed in "GAA6". He contrasted the contents of that letter with the contents of letters in other cases in which such an implication had been found to exist and sought to show that "GAA6" suffered by comparison and that an intention to institute legal proceedings could not be inferred. As E M Grosskopf JA observed in the case of Hendricks, supra at 663G, this is a question of fact and previous decisions are of limited value in answering it. It is true that it is not a lawyer's letter, that it does not bear a litigious heading such as "G A Abrahamse v Municipality of East London", and that in so far as the first claim made in it is concerned, the letter was not sent within the period of 90 days for which sec 2 makes provision. On the other hand, the letter is rather more than a routine covering letter enclosing an invoice reflecting a debt due by first defendant for goods supplied to it. It refers to "claims" arising out of damage to property caused by

flooding as a consequence of a municipal water mains pipe bursting on two separate occasions and asserts that"We are therefore holding the East London Municipality liable for all damages caused by the above and our quotations and Final Repair Invoice will be forwarded to you in due course for reimbursement". I think that that terminology is redolent of potential litigation if liability is denied and I have no doubt that it would have been so understood by first defendant. First defendant's insurer and first defendant clearly understood the letter to impute negligence to first defendant for in the reply ("GAA7") there is a denial of any negligence on first defendant's part. In my opinion, it was implicit in the letter ("GAA6") that legal proceedings would result if liability was disputed and consequently the purpose which sec 2 is there to achieve was met. The letter served to put first defendant on inquiry and afforded an early opportunity to it to investigate the

matter and to avoid litigation if so advised. The learned judge in the Court a quo was therefore correct in upholding plaintiffs contention in that regard. First defendant's appeal is dismissed with costs. The appeal of plaintiff

It is necessary to preface consideration of the facts of this case with some observations about the interpretation of sec 2 of the Act. The purpose of legislation like this is plain and has been set forth in so many cases that their citation yet again seems unnecessary. In this instance it is to protect a local authority against precipitate citation of it in a lawsuit by a litigant seeking to obtain payment of a debt allegedly due by the local authority. It is aimed at providing a local authority with an opportunity of investigating the matter sooner rather than later when investigations might prove more difficult, of considering its position, and, if so advised, of paying or compromising

the debt before becoming embroiled in costly litigation. What has received somewhat less attention is the relationship between the first part of sec 2 (2) (c) which reads "before the first day on which the creditor has knowledge of the identity of the debtor and the facts from which the debt arose" and the second part which reads "or the first day on which the creditor can acquire such knowledge by the exercise of reasonable care, whichever is the earlier day". What the subsection postulates is, on the one hand, a creditor who knows these things and, on the other, one who does not. Time begins to run against a creditor who knows from the date upon which he knew. However, it is obvious that if his belief is erroneous and not in accord with the facts, time cannot begin to run against him from the date upon which he erroneously believed he knew. For time to commence running against a claimant in terms of the first part of the subsection, he must know

the true identity of the debtor and the true facts. Knowledge of anything less will not trigger the running of time against him.

What seems equally beyond doubt is that the second part of the subsection is there to avoid what would have been the unacceptable consequences of the first part, if the second part were not there. But for the inclusion of the second part, the date upon which time would commence to run against a claimant would depend solely upon when the identity of the debtor and the facts actually became known to him. As long as he did not know these things and however remiss he might have been in failing to make enquiries into them, it would not matter; time would not run against him. That would have rewarded continuing inexcusable inaction on the part of the creditor and have frustrated one of the main purposes of the legislation, namely, to afford a local authority an early opportunity of investigation

before the lapse of time had made investigations more difficult. Hence the second part of the subsection. It is noteworthy that it does not limit the potential open-endedness of the first part by laying down an outer limit consisting of an arbitrary period of time. What it does is to provide a notional day upon which time will commence to run against a claimant who does not know the identity of the debtor or the facts from which the debt arose. That notional day is not to be determined by reference to the expiry of any particular period of time since the debt actually became due; it is to be determined by the result of another notional inquiry, namely, on what day could the claimant have acquired knowledge of the identity of the debtor and the facts from which the debt arose by the exercise of reasonable care? In passing I mention that this obviously cannot mean that the day in question must be a day on which knowledge of both the identity of

the debtor and the facts giving rise to the debt could have been acquired simultaneously. It may be, for example, that the facts giving rise to the debt are known upon the happening of a particular event which causes damage, but that the identity of the debtor is not, and could not have been, known then. Manifestly, what the legislature had in mind is a day by which both these things could have been known by the exercise of reasonable care. The fact that there is an earlier day by which one of these things could have been known or was in fact known, is immaterial.

The criteria provided by the legislature for the ascertainment of the notional day take account, as one would expect, of the infinitely variable circumstances which could exist and the widely differing nature of the difficulties which might confront a claimant intent upon acquiring knowledge of the identity of his debtor

or of the facts giving rise to the debt. In one case that day might be no more than a week after the occurrence giving rise to the debt; in another it might be two years later. In the latter case, it is no doubt so that the local authority may be deprived of the benefit of early investigation which the Act is designed to provide but that is an inevitable consequence of the balance which the legislature has decided must be struck between the interests of the claimant and the interests of a local authority. It was plainly not prepared to strip of what might have been a rightful claim a claimant who neither knew, nor by the exercise of reasonable care could have known, of the facts giving rise to the claim or the identity of the debtor. As was said of a similar provision in the Prescription Act 68 of 1989, it is "obviously based on an equitable principle". Protea International (Pty) Ltd v Peat Marwick Mitchell & Co 1990 (2) SA 566 (A) 569E .

While the second part of the subsection postulates a notional date, it by no means follows that the ascertainment of that date is an inquiry in abstracto divorced from what was actually done or what actually happened in that regard in a particular case. Cf Brand v Williams 1988 (3) SA 908 (C) 915H-916B; Administrator. Cape v Olpin 1996 (1) SA 569 (C) 578A-581H. If the claimant did in fact exercise reasonable care account must surely be taken of what actually happened as a consequence of exercising reasonable care. If, despite the exercise of reasonable care by a claimant, he has on a particular day not acquired correct information as to the identity of the debtor but erroneous information which misleads him to believe that the identity of the debtor is now known to him, and that causes him to refrain from any further inquiry, I fail to see how it can be said that that or any other day is the day on which he could have acquired the

correct information by the exercise of reasonable care simply because he could have got the correct information if he had taken other additional steps which would also have amounted to taking reasonable care. It would be a contradiction in terms: if he exercised reasonable care in acquiring the information, and cannot be said to be guilty of want of care in accepting it, but it happens to be erroneous, by what process of reasoning can one arrive at the conclusion that that or any other day is the day upon which he could have acquired the correct information by exercising reasonable care? I see none.

It might be suggested that the second part of the sub-section envisages an objective review of what conceivable avenues of enquiry existed, and a consideration of whether a resort to one or other or all of them would have resulted in the true identity of the debtor becoming known, and whether a creditor exercising reasonable care

would or should have resorted to one, more, or all of them. That is no doubt the appropriate approach where the claimant is aware that he needs to ascertain the identity of the debtor because it is unknown to him. It does not follow that it is an appropriate approach when the creditor is, for good reason, oblivious of the fact that he needs to ascertain the identity of the debtor because, for equally good reason, he believes that he knows the identity of the debtor. In such a case I think an analysis of the situation shows first, that the creditor did not in truth know the identity of the debtor but that his belief that he did, is in no way culpable, and secondly, that there was therefore no reason why he should have applied his mind to what further steps he should take to identify his debtor. The point is that if reasonable care has already been exercised in identifying the debtor, but for reasons peculiar to the case and for which the creditor is not to blame, the

identification is erroneous, one cannot escape the fact that reasonable care was exercised but, unbeknown to the creditor, it did not result in the creditor acquiring knowledge of the true identity of the debtor. In such circumstances it seems to me to be idle to pose hypothetical questions going to what other possible ways of establishing the debtor's identity might have been resorted to and to assess whether they would have resulted in a correct identification.

A creditor who has exercised reasonable care in identifying his debtor and believes on good grounds that he has correctly identified him, has done all that the statute requires of him. The fact that in the particular circumstances of the case it has yielded the wrong information is unfortunate for it may mean that the true debtor will not receive timeous notice of the claimant's intention to sue, but I see no escape from the consequence that flows inexorably

from such a situation, namely, that it is not possible to postulate, far less actually determine, another day upon which the exercise of reasonable care would have resulted in a correct identification of the debtor. In short, for as long as the erroneous identification arrived at by the exercise of reasonable care continues to be believed with good reason by the creditor to be a correct identification, it will be impossible to show that by exercising reasonable care he would have been able to identify the true debtor any earlier than the day upon which he learns or should have learnt that the identification was erroneous.

Any other interpretation of the provision would produce results so absurd that they could never have been intended by the legislature. In saying this I am aware of the fact that the existence of anomalies is not sufficient justification for departing from the clear

meaning of a statute. But there is a well recognised and conceptually clear distinction between mere anomalies and palpable absurdity. It has correctly been observed that statutory provisions such as this penalise "negligent, rather than innocent, inaction". See Administrator. Cape v Olpin 1996 (1) SA 569 (C) 578A-B. To interpret this provision in such a way as to penalise "innocent inaction" which did not result from any failure to exercise reasonable care, would produce a result quite contrary to that so plainly intended by the legislature. In my opinion, the language in which the subsection is couched falls far short of "clearly" meaning that the penalty is to be paid even in such circumstances.

One has merely to pose the following example to demonstrate the absurdity inherent in such an interpretation. A resident of Beacon Bay who suffers similar damage is aware that there

has been public debate about the possibility of the East London Municipality handing over responsibility for water reticulation to the Beacon Bay Municipality and he is unsure whether that has happened. He telephones the relevant department at the East London Municipality to enquire what the position is and is told that the taking over of responsibility has occurred but that it was on a date subsequent to the occurrence of the damage. The information as to the date happens to be wrong. It was a date before the occurrence of the damage. The person giving the erroneous information is a senior official in the department. On the strength of the information so given, the resident gives notice in terms of sec 2 to the East London Municipality. He receives a reply when more than 90 days have elapsed since the occurrence of the event. He is told that the Beacon Bay Municipality had taken over responsibility by the relevant date and that the East

London Municipality denies liability. He immediately gives notice in terms of sec 2 to the Beacon Bay Municipality. Can the latter be heard to say that although in fact he only acquired knowledge of its identity as his debtor on the day he received the East London Municipality's reply, he could have ascertained the true identity of his debtor earlier by the exercise of reasonable care? I think not. Reasonable care was precisely what he exercised yet it did not result in his acquiring knowledge of the true identity of his debtor.

It is no answer to say that the doctrine of estoppel may enable him to proceed with his claim against the Beacon Bay Municipality. It was not its conduct which misled him and no estoppel can arise against it. Nor is it an answer to say that the East London Municipality may be liable to him. It is trite that estoppel cannot found a cause of action where none exists and in so far as an

action for damages for negligent statements causing economic loss may be a possible remedy, that begs the question of whether or not he has indeed been barred by sec 2 from proceeding against the Beacon Bay Municipality. It is only if he is barred that a remedy against the East London Municipality might exist.

The example I have posed is but one illustration of how it can come to pass that a claimant, without any want of care on his part, may acquire erroneous information which results in his not acquiring correct information until 90 days have passed since the occurrence of the event which gives rise to the debt. Many other illustrations can be given and they cannot be dismissed as far-fetched or so unlikely to happen that the legislature was content not to cater for them.

In reaching this conclusion as to the interpretation of the

Act, I have not overlooked the provisions of subsection (2) (b) or sec 4 of the Act. Neither, so it seems to me, derogates from the interpretation I have placed upon subsection (2) (c). Subsection 2 (b) deals with another situation altogether, namely, one in which the debtor intentionally prevents the creditor from coming to know of the very existence of the debt. In such a case, whether the creditor would or could by the exercise of reasonable care have learnt of the existence of the debt is irrelevant. It is not regarded as due until "the day upon which the creditor comes to know of the existence thereof". Sec 4 is only of application where the creditor has "failed to comply with the provisions of paragraph (a) of subsection (1) of section 2". There can only be a failure to comply if there has been a failure to give the requisite notice within 90 days of "the day upon which the debt became due". By virtue of the provisions of subsection (2) the due

date may have to be regarded as having dawned more than 90 days after the debt in fact became due. In that event, there will have been no failure to comply with sec 2 (1) (a) if a notice is served within 90 days of the day upon which the debt is regarded as having fallen due and therefore sec 4 can have no application.

With that prelude I turn to the facts of this case. The parties' election to place them before the court by way of a special case has resulted in a situation which is somewhat unsatisfactory in that not all the information which is relevant to the questions which were posed was provided. Thus, one does not know when plaintiff personally learnt of the flooding which occurred on 2 November 1991, nor whether he was privy to the report to second defendant made by the tenant of the property, or to the report made by Periwinkle to Mutual, nor what, if anything, Mutual was told by Periwinkle about

which municipality was the responsible municipality. However, the lack of information in those respects cannot enure to the disadvantage of plaintiff. It was not disputed that the onus of proving that plaintiff knew, or by the exercise of reasonable care could have known, earlier than 15 April 1992 that second defendant had taken over responsibility for the water mains, rested upon second defendant. Administrateur. Kaap v Burger 1993 (3) SA 414 (A) 422D-E. Where parties have confined the court to a consideration of an agreed set of facts in circumstances in which one of them is burdened with an onus of proof, it is not open to the court to infer the existence of other facts unfavourable to the party unburdened by the onus of proof unless of course the inference is the only inference that can be drawn or the most probable of the possible inferences which can be drawn.

In my view, second defendant has not shown that plaintiff

knew, or by exercising reasonable care could have known, earlier than 15 April 1992 that second defendant had taken over responsibility for the water mains in Beacon Bay. The taking over by one municipality of responsibility for water reticulation which had previously been borne by another is, in my opinion, not something which should reasonably be anticipated or foreseen by an absentee property owner. The earlier flooding incident in November 1990 had resulted in the intimation of a claim to first defendant which was in fact the responsible party at that time. While the claim was not paid, it was not met by any denial by first defendant of responsibility for the water reticulation system, nor could it have been, for it was indeed responsible.

The publicity given to the takeover of responsibility, the newsletters delivered to residential premises, and the activities of

second defendant's servants when water pipes burst within second defendant's boundaries, no doubt resulted in those of the owners of property in Beacon Bay who actually resided there becoming aware of the takeover but it is an agreed fact that they did not result in plaintiff personally becoming aware of it until 15 April 1992. Nor, as I see it, was there any reason for plaintiff to have entertained any doubt as to who was responsible for the water reticulation. He was certainly not shown to have been personally guilty of any want of care in failing to learn until 15 April 1992 that second defendant and not first defendant was the true debtor.

As for Periwinkle, its mandate was limited to performing the functions listed in para 11 of the Statement of Facts. While its representative Muller was uncertain where responsibility for water reticulation lay at the relevant time, there is nothing to show that he

communicated his uncertainty to Mutual when reporting the incident to it. If he did not, his failure to do so is not something for which plaintiff is vicariously responsible and for which plaintiff must suffer. His uncertainty can no more be imputed to plaintiff than any knowledge he might have had of second defendant's newsletters, press notice, and physical activities when water pipes burst, could have been imputed to plaintiff.

The Court a quo was required to deal with the case on the footing that Mutual's letter of 28 November 1991 to first defendant was notice "of plaintiffs intention to hold first defendant liable" (para 19 of the Statement of Facts) and second defendant contended before the Court a quo that Mutual was "at all material times. . .acting as agent(s) for plaintiff". Even if it be assumed that a want of care by Mutual in concluding that first defendant was the debtor would have

to be imputed to plaintiff, I do not think that any want of care existed or was shown to have existed. It was for second defendant to show that by exercising reasonable care Mutual could have learnt earlier than plaintiff did that second defendant, and not first defendant, was the debtor.

The learned judge in the Court a quo dealt with the question in this way. Starting from the premise that Mutual erred culpably in writing to first defendant when "it must obviously have been aware of the fact that the plaintiffs property was situate in Beacon Bay", he rejected the contention that Mutual was fortified in its belief that it was addressing the correct party by first defendant's reply ("GAA7"). It will be recalled that in that reply liability was denied for the reason that first defendant had not been negligent but no mention whatsoever was made of second defendant having taken

over responsibility for the water mains. He rejected that contention because there were two claims referred to in Mutual's letter each of which was separately numbered E536863-002 and E582776-002. The claims related to two separate incidents: the flooding of 7 November 1990 and the flooding of 2 November 1991. The learned judge thought it "significant" that in the reply only one of the claim numbers (E536863-002) was referred to when liability was denied. That claim number related to the flooding of 7 November 1990. He regarded it as "obvious" that the denial of negligence was confined to that claim only "because it arose out of events which occurred while the first defendant was still responsible for the water main in question and that Standard General "ignored the other claim because it arose out of events which occurred at a time when responsibility for the relevant water main rested in the second defendant". He proceeded to say that

whatever the position was between plaintiff and first defendant, it was of no concern to second defendant who was not a party to any of those communications. He regarded Mutual's addressing of its letter to first defendant as a "mistake they should not have made". He continued: "They should have realised that a water main situated in the Beacon Bay area was the responsibility of the second defendant. If they were in any doubt about this, such doubt could have been removed by simple enquiry".

Observing that there had been no fault on the part of second defendant which had done all that could reasonably have been expected of it to notify property owners that it had taken over responsibility for water reticulation, he said that plaintiffs absence in Bophuthatswana "at all material times" could not "place him in any better position than had he been residing in East London". His

conclusion was that Mutual was "handling the matter on his behalf and (its) acts or omissions must be imputed to him", and that second defendant had discharged the onus of establishing that by the exercise of reasonable care plaintiff could have established the correct identity of his debtor within the 90 day period envisaged by the Act or at best for him, by before 6 March 1992.

I am unable to agree. I do not consider that it should have been obvious to Mutual that because the property was in Beacon Bay it was to second defendant that it should write. The fact of the matter was that despite the location of the property in the Beacon Bay area, the first defendant had been responsible for the water mains until 1 July 1991. Moreover, Mutual had on a previous occasion written to first defendant in connection with a similar claim and no disavowal of responsibility on the ground of an agreed transfer of responsibility was

received. Just as there was no reason for plaintiff to doubt that first defendant was still responsible for the water mains in November 1991, so there was no reason for Mutual to do so when it wrote to first defendant on 28 November 1991 ("GAA6").

As for the learned judge's interpretation of Standard General's reply ("GAA7"), it was not open to him to construe it in the manner in which he did. Apart from the fact that, for reasons which I shall give in due course, it was not the interpretation which should have been given to it, the parties had pre-empted any argument about its interpretation by agreeing in para 21 read with paras 18, 19 and 20 of the Statement of Facts that "First Defendant's insurers responded to the first claim (defined in para 19 as meaning the flooding incident which occurred on 2 November 1991) by letter dated 27 December 1991 advising that it was First Defendant's view that it was not

negligent, as the cause of the pipe bursting was that the pipe was defective". Para 21 continued: "Copy of the said response is annexed hereto marked "G". This quite plainly means that there was no issue between the parties as to what was meant to be and was conveyed by Standard General's reply and it was certainly not that only the claim arising out of the flooding which occurred on 7 November 1990 was being specifically answered and that the claim arising out of the flooding which occurred on 2 November 1991 was being ignored because of the takeover of responsibility by second defendant. On the contrary, the parties joined in regarding it as an answer to the latter claim and, as has been emphasised, the answer was confined to a denial of any negligence.

In any event, in my view, it is not so that the reply should reasonably have been read as impliedly informing Mutual that the

other claim was not first defendant's responsibility but second defendant's by reason of an agreed transfer of responsibility. If that is what it was supposed to convey, why was it not said? It was a simple enough explanation to give. And if it was not given, and the reply really was confined deliberately only to the claim arising from the flooding on 7 November 1990, it would surely have been appreciated by the writer that the recipient would not know what first defendant's response was to the claim arising from the flooding of 2 November 1991. To attribute to the writer of "GAA8" a deliberate intention to mystify the recipient in that manner strikes me as casting a quite unjustified reflection of deviousness upon her. It seems far more probable than not that the denial of negligence was put forward as the defence to both claims. I am not overly impressed with the reference in the reply to only one claim number. This was not a

communication the whole of which had to be drafted by the sender. It was a printed form which required completion. It is cryptic in formulation and the manner in which it was completed shows that no great care was taken in completing it. Thus, in that part of it which refers to the "memo of 28/11/91" the words "your" and "letter" which appear as alternatives to the words "our" and "memo" respectively in the printed form, have been deleted and the words "our" and "memo" allowed to remain, thus creating the impression that it is a memorandum of Standard General's which is being referred to whereas it is quite apparent that what is being referred to is Mutual's letter of 28 November 1991. I say this because, if it were not, there would be no reference to what particular communication it is to which Standard General is replying other than the undated reference to claim no E536863-002. I consider it to be quite unrealistic to suppose that this

reply was intended to be read as a response to only that claim and that the other claim was intended to be met by only a studied silence. It is, in my view, a far more natural reading of the reply to read it as a reply to both claims and the reference to the number of only one of them as being simply due to the writer of the reply thinking that it would suffice for reference purposes to cite the first claim number only because she would also be referring in reply to Mutual's letter of 28 November 1991, and that those references would suffice.

The learned judge's dismissal of what passed between Mutual and Standard General as being of no concern to second defendant was also misplaced. It was highly relevant to the question of whether reasonable care had been taken to identify the debtor. His reference to an absence of fault on the part of second respondent, while factually correct, was of little, if any, relevance in the

circumstances of the case. In my view, the learned judge's acceptance of the proposition that plaintiffs absence in Bophuthatswana "could not place him in any better position than if he had been residing in East London" was not justified. There is no duty cast upon a property owner to reside in his property and if he lives elsewhere and it is damaged, the question is not when a person living in or near where his property is situated could have learnt of the facts giving rise to the debt and the identity of the debtor by exercising reasonable care, but when a person in the position of the plaintiff could have done so.

As for the imputation to plaintiff of the acts and omissions of Mutual, I have already explained why, even if such imputation is assumed to be permissible, Mutual did not fail to exercise reasonable care.

In my opinion, second defendant failed to prove that by

exercising reasonable care plaintiff could have learnt of the true identity of his debtor any earlier than he did. I would uphold plaintiffs appeal with costs and substitute for order 2 of the Court a quo the following order:

> "2 That in so far as the Plaintiffs claim against the Second Defendant is concerned, the issue raised in the Stated Case is decided in favour of the Plaintiff with costs."

R M MARIAS
JUDGE OF APPEAL