REPUBLIC OF SOUTH AFRICA

REPORTABLE

Case no: 8161/92

IN THE SUPREME COURT OF APPEAL OF
SOUTH AFRICA

In the matter between:

DRENNAN MAUD & PARTNERS Appellant

and

THE TOWN BOARD OF THE TOWNSHIP
OF PENNINGTON

Respondent

Coram : Van Heerden DCJ, Harms, Olivier, Scott and Zulman JJA Date of

hearing : 20 February 1998

Date of delivery : 27 March 1998

JUDGMENT

OLIVIER JA

The Umzinto river in KwaZulu-Natal flows into the Indian Ocean within the area under the control of the Respondent, the Town Board of Pennington (hereinafter referred to as the "Town Board"). In September 1987 heavy floods occurred. The river came down in spate, breached the right-hand (southern) bank, passed over beach area, and entered the sea some 300 metres south of its former mouth. The effect was that a large portion of the original river bank area was eroded. As the floods subsided, a quantity of sand was deposited on the eroded area, but it was evident that future floods would create a real risk to properties on the south bank.

These properties can be described as follows: Along the original river course is admiralty reserve - a wide, sandy area. Adjacent to it and to the south is Lot 1166, a strip of land with a beach frontage, and used as public open space. On this property, which is owned and controlled by the Town Board, the Town Board established a car park and built an ablution block. Inland and adjacent to

are a number of privately owned properties, Lots 667,666,665 and 664, and Salmon Drive, a cul de sac owned by the Town Board giving access to the parking area on Lot 1166.

Wishing to protect Lot 1166 and Salmon Drive against future flooding, the Town Board consulted the appellant, a partnership of consulting civil engineers and engineering geologists, with the request that it present the Town Board with proposals for the reinstatement and protection of the right-hand bank of the river. The appellant recommended the construction of a reinforced concrete retaining wall, running more or less parallel to the border between the admiralty reserve and Lot 1166, from the southern embankment of a railway bridge crossing the river to the mouth of the river. The Town Board accepted the proposal and instructed the appellant to design and supervise the building of the wall. The Town Board subsequently engaged a construction firm to build the wall in accordance with the design.

According to the original design the wall was to end in the sea, a total

distance of about 350 metres from the embankment. It was to have a footing more than a metre wide, be founded on bedrock, and was to rise to a uniform level, 0.6 metres above that of the original beach.

It is unclear whether the wall as designed and built stood on the admiralty reserve or on the adjoining Lot 1166. For the purpose of this judgment the issue is not crucial, and I shall adopt the assumption most favourable to the Town Board, namely that it was built on the admiralty reserve, close to the northern border of Lot 1166.

During the course of construction two alterations to the original design were proposed by the appellant to the Town Board.

First, it was proposed to change the method of founding the wall over much of its length. While the first 60 metres of the wall from the railway embankment would continue to stand on a foundation bedded on rock, the foundation of the remainder of the wall, though beneath sand level, would be supported above bedrock on grout injected piles that would stand on bedrock. The reason for this

alteration was practical: After some 60 metres the bedrock dipped abruptly to a depth not anticipated by the appellant. To excavate the extra sand overburden would have been prohibitively expensive.

Second, construction was terminated when only 270 instead of 360 metres of wall, measured from the embankment, had been built. There were insufficient funds. The Town Board was warned by the appellant that this decision could have serious consequences because a partially completed wall could cause intensive scouring of the river bank just downstream from the end of the wall. This in turn could lead to Lots 665 and 664 being severely damaged and, further, there was the possibility of the river undercutting the backfill behind the wall which, in the event of a severe flood, could result in erosion of the public open space "south of Lot 666" (ie Lot 1166).

After May 1989, outside the scope of the contract, members of the public backfilled the area behind the wall with sea sand to the level of the top of the wall.

It is common cause that heavy rain fell in the catchment area of the river on

a few separate occasions relevant to this appeal, viz between 22 to 23 September 1989, 2 to 3 November 1989, 10 to 11 November 1989 and 29 to 30 November 1989. The first and last of these were exceptionally heavy.

The September rains, the first since the wall had been built, caused the river to come down in spate, bursting through the sand bank which had blocked the free flow of water to the sea in September 1987. There was a strong flow in the river along the wall. During the September and again the early November floods, sinkholes formed in the backfill behind the wall, more particularly near the toe of the wall. These sinkholes developed progressively and became substantial. By January 1990, the river was flowing freely under the whole length of the piled section of the wall. Both the river and the Town Board were back to where they had been before the appellant was consulted.

The learned judge a quo correctly described the cause of the ineffectiveness of the wall when he said the following:

It would seem that what happened was that during the

> floods, the river, due to the combined effect of the velocity of its flow, the turbulence of its flow and perhaps also the gradient, scoured the river bed alongside the wall down to below the level of the footing of the wall and then eroded the sand under the wall in the piled section and the fill at the back of the wall, or else that the fill, being sand with little cohesion and not being compacted, became saturated from below with water from the river and consequently slipped under the wall into the channel of the river and was washed out to sea, thereby enabling the river to invade the area at the back of the wall and eventually to form a channel on the landward side of the wall. There was also erosion by the tides at the toe of the wall and for some distance along the wall.

The Town Board issued a summons against the appellant, claiming as damages the amounts spent on the construction of the wall, the professional fees of the appellant, and the cost of backfilling, landscaping and grassing the area behind the wall. It based its claim for damages on an alleged breach by the appellant of the contract. In essence, the Town Board alleged that the appellant had breached its obligation to exercise reasonable care and skill in making its recommendations and preparing its design. In particular, it was alleged that the

appellant should have realised that piled foundations would have aggravated the problem rather than solve it. The claim was based on the erosion which occurred roughly in the middle section of the wall, the allegation being that the design change had taken place without the consent or authority of the Town Board. The latter allegation was shown to be incorrect and the case proceeded on the basis that the Town Board had consented to the alteration. The erosion at the toe of the wall, which was foreseen, did not form part of the complaint.

However, the merits of the Town Board's claim are not at this stage of the proceedings in issue because of a special plea of prescription which, by an order of court, had to be decided separately.

The special plea alleged that the cause of action (the breach of contract) arose not later than the completion date of the wall (May 1989) and that by no later than 13 November 1989 the Town Board had knowledge of the identity of the debtor (the appellant) and the facts from which the alleged claim arose. In a rejoinder it was additionally alleged that had the Town Board exercised reasonable

care in the light of the facts known to it by 13 November, it could have had knowledge of those facts.

The averments relating to knowledge were necessary in the light of s 12 of the Prescription Act, No 68 of 1969 ("the Act") which reads as follows:

> 12 (1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.
>
> (2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shah not commence to run until the creditor becomes aware of the existence of the debt.
>
> (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity 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.

Important is sub-section (3). As the action was instituted by the issue and

service of summons on the appellant only on 20 November 1992, the Town Board's claim (which is subject to a three year extinctive prescription period) would have become prescribed if it had acquired the actual or deemed knowledge required by ss (3) before 20 November 1989. In the light of Gericke v Sack 1978(1) SA 821 (A) the onus to prove such knowledge rested on the appellant.

The special plea was adjudicated upon and dismissed by Thirion J in the Durban and Coast Local Division. He subsequently granted leave to appeal to this Court.

Originally the Town Board averred that in terms of the contract the appellant would -

(a) investigate the cause of erosion damage to the immovable property owned by or under the control of the Town Board at the mouth of the river;

(b) make recommendations about the most efficient method of

(i) reclaiming the land lost as a consequence of erosion, and (ii) protecting "the said property" against further erosion damage;

(c) design the works required to give effect to the recommendations. (This is taken from the judgment of the court below and may have been a summary of the pleading and not its actual wording. The original pleading is not in the record.) At the end of the trial, the Town Board amended its particulars of claim in some respects, but failed to make all the consequential amendments that were necessary. (In the end the failure had no effect on the outcome of the case.) The apparent reason for the amendment was that, as will appear, the Town Board had knowledge, before 20 November 1989, that the wall did not serve the purpose of reclaiming land lost as a consequence of the erosion. In the light of that fact the claim as originally formulated would have become prescribed. The Town Board, therefore, withdrew the allegation that one of the purposes would be the reclamation of the land lost as a consequence of the floods, and instead solely relied on the duty of the appellants to design a wall which would protect the property described in the pleadings.

The amended particulars of claim state that the terms of the contract were

that-

(a) the appellant would investigate the cause of erosion damage to "certain immovable property owned by, alternatively under the control of" the Town Board;

(b) the appellant would make recommendations concerning the most efficient and cost effective method of protecting the "said property";

(c) the defendant would design the works;

(d) in performing its obligations, the defendant would exercise reasonable care and skill.

It became clear from the evidence that by the "immovable property" was meant Lot 1166 and, perhaps, Salmon Drive.

The enquiry after the amendment can thus be defined as follows : when did the Town Board, acting through its employees and members, become aware, or is deemed to have become aware, that the appellant had committed a design fault which resulted in a failure to protect the Town Board's properties as described, ie

Lot 1166 and the end of Salmon Drive?

If such knowledge was acquired, or deemed to have been acquired, by the Town Board on or before 20 November 1989, its claim would have become prescribed.

Only one witness testified at the trial, viz Ms Mann, the Town Clerk of Pennington for some 25 years.

She testified that she had visited the area under discussion, accompanied by Mr Potgieter, the Chairman of the Town Board, during or shortly after the floods of September 1989. The purpose of the visit was to see how the wall was withstanding the flood. They observed three small depressions - about 40 centimetres in diameter and 30 centimetres deep - behind the wall and some distance upstream from the toe opposite the ablution block. They were "most concerned" when they noticed these depressions. At the toe of the wall were larger depressions but they were to be expected because the wall had not been completed. Because it was school holidays, they felt that there could be a danger

4 to school children on the beach and decided to have warning signs erected. Along

the beach - one near the toe and another opposite the three depressions.

Ms Mann did not inspect the site after the rains of 2 and 3 November it being the duty of the Town Manager to do so and report to her. Nevertheless, she was aware that sink holes were occurring or had enlarged, but, according to her, these were concentrated more towards the toe. Shown a photograph of a large and deep subsidence which had by then taken the place of the three sinkholes described above, she stated that she had become aware of its existence only towards the end of November 1989 although she could not say exactly when.

At an informal meeting of the Town Board on 18 November Mr Robinson, a local property owner and President of the SA Council of Professional Engineers, informed the Town Board that if they were dissatisfied with the work of the consulting engineers, a complaint should be lodged with his Council, that a professional engineer is liable for faulty design, and that such liability cannot become prescribed. At that stage the Town Board felt that it had been left "with

5 a wall that was incomplete and not very satisfactory," although, according to Ms

Mann, the Town Board still believed that it was the non-completion of the wall that caused the problem.

On 20 November 1989 a special committee of the Town Board decided that a letter be faxed to the appellant advising it that the wall required urgent attention and requesting that a full report be submitted at a meeting to be held on either 27 or 28 November, failing which the Town Board would have no option but to appeal to "higher authority". Ms Mann testified that what required urgent attention was the erosion of the beach at the toe end of the wall.

The envisaged meeting took place on 27 November 1989. A letter by the appellant dated 23 November was tabled. In it the appellant stated that "scour occurred under the base of the wall and at the unprotected portion at the southern end of the wall." The works were "primarily designed as protection for the right bank and for Salmon Drive." Disappointment at the collapse of "some of the backfill" was expressed, but it was ascribed to scour action. The appellant also

disclaimed responsibility for the erosion of the backfill. The letter concluded with a summary stating that the structural integrity of the works had not been impaired and that "the river bank protection function of the works is satisfactory, the reclamation work aspect is a little disappointing and measures may have to be considered to protect the bottom of the backfill, to prevent scour and associated development of sink holes."

Ms Mann testified that the meeting was the first occasion that the Town Board became aware that the problem was due to scour between the piles; prior thereto the only scour it was aware of was at the toe of the wall. However, it is clear from the minutes of the meeting that at least Mr Potgieter, the Chairman of the Town Board, clearly distinguished between the damage at the toe of the wall and the erosion of the backfill further back. He was of the view that the cause of the latter was the use of piling instead of solid uninterrupted foundations.

The heavy rains of 29 and 30 November caused further erosion of the backfill. By January 1990 the river was freely flowing only on the landward side

7 of the wall, a sand bank having built up on the other side.

From the cross-examination of Ms Mann the following became apparent: (i) Prior to 20 November 1989 she was aware of a large subsidence beside the wall, originating at the toe end and extending some distance away from it. (ii) The row of sink holes observed in September 1989 led her to the conclusion that there was a serious problem with the wall or the back-fill. (iii) The water in the subsidence described in (i) - and which is clearly visible in the relevant photographs - indicated that water was seeping from the river under the wall into the subsidence. (iv) Before 16 November 1989 the Town Board was aware that the river could pass under the wall near the toe of the wall. (v) It was apparent that a substantial deterioration and erosion of the backfill had occurred between 2 and 16 November 1989. It had no connection with the problem at the toe. (vi) The formation of this subsidence was there to be observed by the Town

Board's employees working on site under the supervision of the Town Manager.

(vii) Anybody looking at the situation prior to 16 November 1989 would at least have thought that it was possible that water was coming under the wall at that point. The wall was 3.6 metres high from its footing, and the hole was about 4 metres deep. Consequently, she conceded that, as a reasonable person looking at the site, it should have occurred to her that there might be something wrong with the wall and that the large subsidence had been formed by the river coming through underneath the wall and removing the sand.

Although Ms Mann denied that the Town Board was aware that the problems were caused by faulty design before 27 November 1989, there was never any reason to believe that the wall itself was not properly built or constructed in accordance with the design. Furthermore, at the meeting of 27 November 1989, Potgieter accused Dr Maud of being responsible for a faulty design. And if

Potgieter, as chairman of the Town Board, realised this to be the position on 27 November 1989, the Town Board ought to have realised it by 18 November 1989, because nothing had changed in the meantime.

The learned judge dismissed the special plea on the strength of the following conclusions:

(i) The damage to the backfill on the landward side of the wall was visible before 20 November 1989.

(ii) By 18 November 1989 a visual inspection of the wall by even a layman would have revealed that the integrity or structure of the wall had not been impaired. That left as the only cause of the subsidence the fact that the wall was not founded on bedrock but rested on end bearing piles which went down through sand, thus making scour below and behind the wall possible. At least one inference could be drawn in these circumstances: that the appellant had not taken sufficient precaution in designing the wall to ensure that the wall

would permit the reclamation of the land previously eroded by the river.

(iii) The Town Board, by the exercise of reasonable care, could have acquired knowledge by not later than 20 November 1989 that the design of the wall was defective in that, though the wall was built in accordance with the design, it did not serve the purpose of permitting the reclamation of previously eroded land, because the river, whenever it flooded would, through scour action, remove the sand from under and behind the wall.

(iv) In spite of the aforegoing, the Town Board could not, by the exercise of reasonable care, have acquired knowledge on or before 20 November 1989 that the wall, though it allowed scouring away of the backfill, would not serve the purpose of protecting the eroded south bank of the river and certain endangered immovable property, which the learned judge assumed was Lot 666. He found that the

wall had not been built along the new bank but some 25 metres to the north. The depressions formed behind the wall were close to the wall and remained fairly narrow despite the floods. There was no indication that the erosion would, in time, reach the river bank. In the result, the appellant failed to prove that the Town Board had knowledge or could, by the exercise of reasonable care, have acquired knowledge, on or before 20 November 1989, "that the wall, due to its being designed to rest on piles instead of being founded on bedrock, would not serve the purpose of protecting the right bank of the river and the adjacent properties." Conclusions (i), (ii) and (iii) were not attacked by either counsel and correctly so.

The consequence of these conclusions is that the damage to the backfill south of the wall was visible before 20 November 1989 and that by then it would have been clear to even a layman that the only cause of the large subsidence was

the fact that part of the wall was built on piles thus making it possible for scour and erosion to take place below and behind the wall. A probable inference would be that the designer was at fault. Even if it is accepted that the respondent was not as a fact aware of the existence of the large substantial subsidence near the middle of the wall, it could, by the exercise of reasonable care, have acquired knowledge by not later than 20 November 1989 of the existence of such subsidence and that the design of the wall by the appellant was defective.

What remains to be evaluated is the conclusion reached by Thirion J that the respondent could not, by the exercise of reasonable care, have acquired knowledge on or before 20 November 1989 that the wall, built as it was on piles and allowing scouring away of the backfill, would not serve the purpose of protecting the right bank of the river and the endangered immovable property, which he described as Lot 666.

In reaching the said conclusion, Thirion J discussed the meaning of the words "the facts from which the debt arises" in s 12(3) of the Act. He equated

this phrase with "all the facts from which the cause of action arises." The interpretation given by the learned judge was debated at length by counsel in this Court I shall assume in favour of the Town Board that the interpretation given by the learned judge is correct. In my view, such interpretation did not influence the learned judges's final conclusion, which was essentially one of fact.

The learned judge was also criticised for holding that in order to decide the special plea, the "facts which are material to the plaintiffs cause of action have to be ascertained from plaintiffs particulars of claim." I doubt whether that formulation is correct. That approach would have been in order had the appellant excepted to the particulars of claim. But here a trial had taken place. At the end of the trial there was no doubt as to the Town Board's cause of complaint. However, I say this in passing, because the final conclusion reached by the learned judge was based on his view of what a reasonable person in the position of the Town Board should have known or be deemed to know on or before 20 November 1989.

The discussion by the learned judge of this final matter took as its point of departure that the only object of building the wall was to protect Lot 666. This is not so. Lot 666 is a private property, belonging to Mr Bowden. The protection of this property, along with other beachfront properties, was at best only of secondary concern to the respondent and never part of the appellant's contractual obligations. The appellant's contractual obligation was to design a wall which would protect Lot 1166 and the end of Salmon Drive i.e. the respondent's properties. If the wall failed in any of these respects, and only then, would it not have served its purpose in terms of the contract. The evidence, therefore, refutes the conception that what was to be protected was only Lot 666, which is further away from the wall than Lot 1166. This misconception probably had a direct effect on the conclusion reached by the learned judge.

In any event, even if one were to accept that the sole object of the wall was to protect Lot 666, it is clear that a reasonable person, cognisant of the history of the matter and the previous damage to Lot 1166 and the imminent danger to Lots

654,655 and 666, should have realised that the defective design would eventually result in what happened in January 1990, viz that the river would freely flow underneath the wall and that progressive erosion of the whole of the right bank would occur during a future serious flood. Sec 12(3) of the Act provides that a creditor shall be deemed to have the required knowledge "if he could have acquired it by exercising reasonable care." In my view the requirement "exercising reasonable care" requires diligence not only in the ascertainment of the facts underlying the debt, but also in relation to the evaluation and significance of those facts. This means that the creditor is deemed to have the requisite knowledge if a reasonable person in his position would have deduced the identity of the debtor and the facts from which the debt arises.

In the present case, the application of this test to the actual knowledge in possession of the respondent, convinces me that by 18 November 1989 at the latest it would have led the reasonable person to realise that the faulty design of the wall would, during a future flood, result in damage to the whole of the right river bank

6 of the Umzinto River, including Lots 1166 and 666.

In reaching the conclusion that it was, by 20 November 1989, not reasonably foreseeable that the abovementioned design fault would result in damage to the Town Boards properties, Thirion J stated:

> The wall was a very substantial structure. It was 3,6 metre in height (or depth). It had a broad footing where it rested on piles. The floods occurred at a time when the backfill had not yet become compacted. The floods were of unusual intensity. The defendant itself was, as at 23 November 1989, still of the view that the wall was fulfilling its function of protecting the river bank and the defendant was, after all, the expert to whom the plaintiff was entitled to look for an explanation of what was happening at the wall. They did try to get in touch with defendant but no one of the partners was available before 21 November 1989 to advise the plaintiff as to what was happening. The subsidences which had occurred up to 20 November 1989 had been in a narrow band behind the wall. There was no indication that the erosion would, in time, spread to the river bank.
>
> In all the circumstances I find that the defendant has not proved that the plaintiff had knowledge or could, by the exercise of reasonable care, have acquired knowledge on or before 20 November 1989 that the wall, due to its

> being designed to rest on piles instead of being founded on bedrock, would not serve the purpose of protecting the right bank of the river and the adjacent properties.

The very crux of the appeal is whether these conclusions are supportable. In my view they are not.

It is true that the wall was a substantial structure, as described by the learned judge. But the essence of the Town Boards knowledge on or before 18 November 1989 was that the nature of the design fault was clearly visible at the toe end of the wall. Anyone observing what was taking place there could see the scouring action of the river and sea, and how sand behind the wall was being sucked out into the river. Near the middle of the wall another large subsidence had formed. At its bottom, a large pool of water was clearly visible. A reasonable person, observing the washing away of the backfill near the toe end of the wall and the subsidence it has formed there, could not fail to see the similarity between that subsidence and the one near the middle of the wall. The reasonable person would have realised

that the cause of this subsidence was scouring away of the backfill because of the piling used as foundation and the exposure of the sand between the piles to the fast flowing river water on the other side of the wall and the piles.

Any reasonable person should have seen that there was nothing to stop further erosion and the growth of the subsidence until it linked up with the subsidence at the toe end of the wall. Any reasonable person would have realised that the subsidence would also spread southwards, ie towards Lot 1166 and the end of Salmon Drive, eventually causing extensive erosion of these properties.

As indicated earlier, the wall was built either on or very close to Lot 1166. Even on the assumption that it was built close to Lot 1166, it should have been observable that the subsidence, as it was on or before 20 November 1989, had already reached the said Lot, or was very close to it and would eventually spread much further.

Had the learned judge directed his attention to the correct properties to be protected, ie Lot 1166 and Salmon Drive, and not Lot 666, which was further

inland, he would, in my respectful opinion, have reached the correct conclusion.

It should also be noted that the subsidence near the middle of the wall was not exactly a " . . . narrow band behind the wall." No viva voce evidence was offered as to the exact measurements of this subsidence, but it is manifest from the photographic exhibits, that, even before 20 November 1989, it was more than 3,6 metres deep, of considerable length and quite a few metres wide. Having regard to the history of the matter and the observable facts, a reasonable person in the position of the Town Board should have foreseen that the erosion would spread to Lot 1166 and even further.

Thirion J also relied on a report dated 23 November 1989 by the appellant to the respondent. In it the appellant averred that the wall was fulfilling its function of protecting the river bank. From this the learned judge deduced that the respondent, relying on the expert advice of its consultants, could also not have known of the danger of the subsidence spreading towards its properties.

Little, if any, weight can, however, be given to this report. It appears from

the report itself that the appellant had last visited the site on 14 September 1989, ie some five weeks before the report was given. There was no evidence that the appellant had based its report on the position as it was just prior to 20 November 1989. Furthermore, the appellant sought to justify itself. It was not a case of a debtor wilfully preventing the creditor from coming to know of the existence of the debt (s 12(2)). The Town Board disagreed with its contents and was not misled by it.

On the assumption, in respondent's favour, that the damage, which occurred and was observable before 20 November 1989, did not as a fact occur on the respondent's property, ie Lot 1166, but further north on the admiralty reserve land, the consequence of the interpretation which I have placed on s 12(3) of the Act is that the prescriptive period nevertheless began to run before there was physical damage to the respondent's property.

This conclusion is, in my view, consistent with the principle that a debt to pay damages becomes due when loss occurs as a result of a delict (Oslo Land Co

Ltd v Union Government 1938 AD 584 at 590; Evins v Shield Insurance Co Ltd 1980(2) SA SA 814 (A) at 838 H to 839 G) or a breach of contract (Swart v Van der Vyver 1970(1) SA 633 (A) at 643 C-D). In the present case, the respondent did not claim prospective damage in the sense of damage to its property. It claimed, as damages, the wasted costs of building the wall. That loss or damage had already occurred when the Town Board should have been aware (ie acquired deemed knowledge) that the wall did not serve the purpose for which it was built and that the costs of building it was wasted.

In the result, the appeal is well-founded. The employment of two counsel by the appellant for the appeal was, in my view, justified.

The effect of the outcome of the appeal is that the special plea raised by the appellant is upheld, resulting in the dismissal of the action. In the result, the appellant is entitled to the costs of the trial before Thirion J, such costs to include the costs attendant upon the employment of two counsel.

The court a quo, in dismissing the appellant's special plea, made no order

2 as to costs. The respondent cross-appealed against this order, arguing that in the

light of its success, it was entitled to its costs. In view of the outcome of this

appeal, the cross-appeal must also be dismissed.

The following order is made:

1. The appeal is allowed with costs and the cross-appeal dismissed with costs, such costs to include the costs attendant upon the employment of two counsel.

2. The order of the court a quo is set aside and replaced by the following order:

> "The special plea is upheld and the plaintiffs claim is dismissed with costs, such costs to include the costs of two counsel."

I concur

Van Heerden DCJ
Zulman JA

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DRENNAN MAUD & PARTNERS Appellant

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Respondent

Coram : Van Heerden DCJ, Harms, Olivier, Scott and Zulman JJA Date

of hearing: 20 February 1998 Date of delivery : 27 March

1998

JUDGMENT

HARMS JA

The only issue in this appeal is whether the Town Board, by the relevant date, had knowledge- or deemed knowledge - "of the facts from which the debt arises" (s 12(3) of the Prescription Act 68 of 1969). In this regard the learned trial judge made two pertinent findings of fact. The first was that the Town Board had deemed knowledge that the design of the wall was defective: It did not permit the reclamation of previously eroded land, because the river, whenever it flooded would, through scour action, remove the sand from under and behind the wall. The second finding was that the appellant had failed to prove that the Town Board had knowledge or deemed knowledge "that the wall, due to its being designed to rest on piles instead of being founded on bedrock, would not serve the purpose of protecting the right bank of the river and the adjacent properties."

In relation to the phrase in s 12(3) of the Prescription Act, namely "the facts from which the debt arises", Thirion J held that it means knowledge of all the

facts which are material to complete the plaintiffs cause of action, and that in this context the term "facts" is an elliptical form of "alleged facts". It is apparent that the learned judge's attention was not drawn to the body of authority that dealt with the meaning of the word "debt" in s 15(1) of the Act (collected and discussed in two later cases of this Court, namely Sentrachem Ltd v Prinsloo 1997(2) SA 1 (A) at 15B-16D and Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation) 1998 1 SA 811 (SCA) at 825B-827F). In short, the word "debt" does not refer to the "cause of action", but more generally to the "claim". There is in my view no reason to give the word another meaning in s 12(3). The effect of this finding of Thirion J on his reasoning was that he sought to determine whether the appellant had established that the Town Board had knowledge of all the facts underlying its cause of action as pleaded. Such an onus was not cast upon the appellant by s 12(3).

In addition, Thirion J held that in order to decide the special plea, the "facts

which are material to the plaintiffs cause of action have to be ascertained from plaintiff's particulars of claim." I cannot agree. That approach would have been in order had the appellant excepted to the particulars of claim.

In deciding whether a "debt" has become prescribed, one has to identify the "debt", or, put differently, what the "claim" was in the broad sense of the meaning of that word. The contract, it was clear from the evidence, required the appellant to recommend, design and supervise the building of a wall for the "reinstatement and protection of the right bank" of the river. It was common cause that reasonable care and skill had to be employed. The breach relied upon was the failure to exercise such reasonable care and skill in recommending and designing a wall that would reinstate and protect the right bank of the river. The breach was committed when the design was made - before May 1989. The Town Board had knowledge or deemed knowledge of the breach when it realised that the design was defective in a relevant regard. The breach was not a breach of a divisible but of a

single obligation. Therefore, once the Town Board had realised, as found by the trial judge, that the design of the wall was defective in the one respect, it does not matter that the Town Board had not appreciated that the design was defective in another respect (the second finding referred to). Cf Oslo Land Co Ltd v Union Government 1938 AD 584 at 590. Reference should also be made to Van Staden v Fourie 1989 3 SA 200 (A) at 216B-F where it was held that the subsection "stel ... nie die aanvang van verjaring uit totdat die skuldeiser die voile omvang van sy regte uitgevind het nie."

It follows from this that the learned Judge's first factual finding was decisive of the case and that I concur with the order proposed by Olivier JA.

LTC HARMS

Judge of
Appeal

Scott JA - Agrees