THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 851/2019

In the matter between:

LAMBERTUS VON WIELLIGH BESTER NO	**FIRST APPELLANT**
RYNETTE PIETERS NO	**SECOND APPELLANT**
BAREND PETERSON NO	**THIRD APPELLANT**

(In their capacities as joint trustees of the RVAF TRUST – RV IT 932/2004)

and

ANTON GOUWS	**FIRST RESPONDENT**
SCHALK W J STEENKAMP	**SECOND RESPONDENT**
JOHAN JOUBERT	**THIRD RESPONDENT**
SWARTLAND MAKELAARS CC	**FOURTH RESPONDENT**
MARK EISERMAN	**FIFTH RESPONDENT**
MARK ALEXANDER INVESTMENTS CC	**SIXTH RESPONDENT**
JANNIE AUGUSTYN	**SEVENTH RESPONDENT**
ANDREA FREDERICKA MOOLMAN	**EIGHTH RESPONDENT**
VAIDRO 172 CC	**NINTH RESPONDENT**

HENDRIK JANSE VAN VUUREN **TENTH RESPONDENT**

HENDRIK VAN VUUREN MAKELAARS CC **ELEVENTH RESPONDENT**

Neutral citation: *Bester and Others NNO v Gouws and Others* (851/2019) [2020] ZASCA 174 (17 December 2020)

Coram: PONNAN, WALLIS, ZONDI and DLODLO JJA and WEINER AJA

Heard: 4 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10:00 am on 17 December 2020.

Summary: Prescription Act 68 of 1969 – sections 12(1) and 12(3) – knowledge of identity of debtor and basis of cause of action – when knowledge acquired or deemed to have been acquired through the exercise of reasonable care.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Meer J, sitting as court of first instance):

The appeal is dismissed with costs, including the costs occasioned by the employment of two counsel, save that the costs of the preparation, perusal and copying of the record shall be limited to 60% of the costs incurred in those tasks.

JUDGMENT

Weiner AJA (Ponnan, Wallis, Zondi and Dlodlo JJA concurring)

[1] 'If something sounds too good to be true, it probably is.' This adage is particularly apt in situations where once hopeful investors are suddenly left with nothing, save for much remorse, notwithstanding the extravagant returns promised. That is the unfortunate lesson that investors in the RVAF Trust (the Trust) learned from its demise and insolvency. Investors were promised irresistible (but unsustainable) returns on their investment. The Trust paid

such returns for a period but when the predictable collapse occurred, the total amount due to investors vastly exceeded the total amount of money available.

[2] This judgment involves the more mundane question of whether claims, brought by the trustees of the insolvent Trust to recover commissions paid to brokers who solicited those investments, have prescribed. The Western Cape Division of the High Court, Cape Town (Meer J) held that they had, and refused leave to appeal. This appeal is with the leave of this court.

Background

[3] From the early 2000s, Mr Herman Pretorius began operating an investment scheme (the scheme) through which he solicited investments from the public on a large scale. As part of the operation of the scheme, he recruited a number of investment brokers (the brokers). Together with the brokers, he succeeded in enticing a considerable number of investors to invest huge amounts in his scheme on the basis that it would yield returns far exceeding those achieved by conventional established institutions. He promised returns of between 14% and 25% per annum.

[4] These promises were fulfilled during the early years of the scheme, and both old and new investors appeared to have the utmost faith in Mr Pretorius and accepted the reported returns of the scheme at face value. The funds raised by Mr Pretorius through his scheme soon escalated to approximately R200 million.

[5] In March 2004, Mr Pretorius created the Trust as part of an entity styled the Abante Group (the Group). Mr Pretorius and Mr Eduard Brand were appointed as trustees of the Trust. It is common cause that the Trust deed provided that a minimum of three trustees were required and that they had to act jointly in

all events. It is also common cause that Mr Pretorius took control of the Trust, did not consult Mr Brand on decisions, and operated the scheme on his own.

[6] The scheme was, however, a fraudulent and illegal pyramid style investment scheme and the Trust was used as part of this fraudulent Ponzi scheme. The scheme collapsed after its mastermind, Mr Pretorius, killed his former business partner, Mr Williams and committed suicide on 26 July 2012. This incident triggered action by investors against the Group, in particular the Trust. Investors began clamouring for the return of their investments. These were not forthcoming.

[7] On 30 July 2012, Mr Morné Strydom, an investor, applied to sequestrate the Trust. The provisional sequestration order was granted on 1 August 2012. The appellants were appointed as provisional trustees on 7 August 2012. On the same day, the Master provided authority in terms of s 18(2) of the Insolvency Act 24 of 1936[1] (the Act) for the provisional trustees to appoint attorneys to provide them with legal advice. The Trust appointed Mostert & Bosman Attorneys (MB). On 17 August 2012, the appellants also obtained an order granting them the necessary power to institute legal proceedings in terms of s 18(3) of the Act.[2]

[8] The Trust was finally sequestrated on 3 September 2012. The appellants were appointed final trustees on 23 October 2012. Summonses were instituted

[1] Section 18 of the Act provides:
'Appointment of provisional trustee by Master
(1) …
(2) At any time before the meeting of the creditors of an insolvent estate in terms of section 40, the Master may, subject to the provisions of subsection (3) of this section, give such directions to the provisional trustee as could be given to a trustee by the creditors at a meeting of creditors.'

[2] Section 18(3) provides:
A provisional trustee shall have the powers and the duties of a trustee, as provided in this Act, except that without the authority of the court or for the purpose of obtaining such authority he shall not bring or defend any legal proceedings and that without the authority of the court or Master he shall not sell any property belonging to the estate in question. Such sale shall furthermore be after such notices and subject to such conditions as the Master may direct.'

against the respondents on 9 November 2015, more than three years later. The respondents are all brokers who introduced investors to the scheme conducted by the Trust between October 2004 and June 2012. They received commission payments from the Trust for such referrals.

[9] The appellants, as trustees, instituted action against the respondents on two bases: under the common law (on the basis of unjust enrichment); *alternatively*, under s 26 and s 32 of the Act. The appellants claimed that the commissions that the respondents earned were repayable on the basis that:

(a) at all material times there were fewer than the minimum number of trustees as specified in the trust deed holding office. The Trust therefore lacked capacity to make any payments to the respondents;[3]

(b) Mr Pretorius acted unilaterally to the exclusion of his co-trustee, Mr Brand;

(c) The trustees failed to exercise the powers in accordance with the trust deed and the commission payments were made to the respondents pursuant to the operation of an unlawful and fraudulent pyramid or Ponzi type scheme;

(d) In the alternative, the payments were claimed on the basis that they were impeachable transactions under s 32 of the Act (i.e. dispositions without value).

[10] The respondents raised certain defences on the merits and two special pleas of prescription. These pleas were heard separately by the high court in terms of rule 33(4) of the Uniform Rules of Court. The separate actions against the brokers were consolidated for the purposes of the hearing and the case

[3] *Land and Agricultural Bank of South Africa v Parker and others* 2005 (2) SA 77 (SCA)

proceeded using the claim against the tenth and eleventh respondents as the test case applicable to all.

[11] The first prescription plea was that the appellants had, or should have had the requisite knowledge under s 12(3) of the Prescription Act 68 of 1969[4] (the Prescription Act) on either 17 August 2012 (the date on which the appellants obtained the order in terms of s 18(3) of the Act), or at the latest on 23 October 2012, the date on which the appellants were appointed as final trustees (the first prescription plea).

[12] The second prescription plea, raised in the alternative, and only in respect of the common law enrichment claims, was that all of the debts arising from payments made to the respondents within three years prior to the date of the Trust's provisional sequestration (i.e. before 1 August 2009) had prescribed. This plea relates to portions of the claims against each of the respondents (the second prescription plea). The basis for the plea was that each payment made *sine causa* gave rise to a separate claim and that the running of prescription arose when each payment was made.

[13] The appellants replicated to the first prescription plea by alleging that:

(a) they had obtained authority to institute proceedings against the respondents only at the second meeting of creditors on 14 June 2013; and not in terms of the s 18(3) order on 17 August 2012; and

[4] Section 12 of the Prescription Act provides that:
(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.
(2) …
(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.

(b) they only acquired the requisite knowledge of the identities of the respondents and the facts from which the individual claims against the respondents arose, on conclusion of forensic investigations into the reconciliation of the respondents' transactions with the Trust, after August 2013.

[14] In regard to the second plea of prescription the appellants replicated that:

(a) at all relevant times the Trust lacked capacity; and

(b) the knowledge of the individual trustees could not be ascribed to the Trust because of the fraudulent role played by the controlling trustee, Mr Pretorius.

[15] The court a quo found that the appellants obtained the necessary power to institute proceedings in terms of the s 18(3) court order on 17 August 2012. The appellants have not appealed that finding. Secondly, it held that the appellants had, or could reasonably have had, the requisite knowledge to institute action against the respondents by 23 October 2012. The challenge to this finding forms the basis of this appeal. Having found as it did on the first prescription plea, the court a quo did not make any findings on the second prescription plea.

[16] The appeal raises two issues: first, whether the appellants had actual or deemed knowledge of all the facts necessary to institute action against the respondents by 23 October 2012; and second, if they did not, whether the claim based on payments made before 1 August 2009 has prescribed. If the first prescription plea is upheld, the second prescription plea becomes academic.

[17] It is common cause, or cannot reasonably be disputed, that the appellants knew prior to 23 October 2012 that:

(a) the trust deed required three trustees;
(b) only two trustees had been issued with letters of authority;
(c) Mr Pretorius was the controlling mind of the Trust and took all decisions to the exclusion of his co-trustee, Mr Brand;
(d) the trustees had not exercised their powers according to the trust deed;
(e) the investment scheme was a fraudulent Ponzi scheme;
(f) the Trust was insolvent from inception;
(g) the scheme was dependant, in part, on the participation of various brokers/intermediaries, who had introduced their clients to the scheme and had been paid commissions therefor.

[18] This knowledge to a large extent comprised the requisite facts upon which the enrichment claim was based. The payment of commissions to the brokers was also the basis of the statutory claims.

[19] The appellants, however, claimed that, by 23 October 2012, they did not have full knowledge of the following facts:

(a) the full amount paid to the respondents;
(b) that the sums were paid as commission;
(c) that the payments were made after commission statements had been issued.
(d) that the scheme was a Ponzi scheme and insolvent from the outset.

[20] This last contention was belied by the affidavits deposed to in the sequestration application and various subsequent proceedings. The founding affidavit in the sequestration proceedings was deposed to by a partner in MB and he said unequivocally that the liabilities of the Trust by far exceeded the

assets. The receipt of claims from investors wishing to withdraw their funds and the inability to satisfy their claims would have confirmed that. On no less than three occasions Ms Pieters, the second appellant deposed to affidavits in which she described the scheme as a pyramid scheme.[5]

[21] It was suggested that this did not satisfy the requirements for actual knowledge of facts as discussed in *Gore*,[6] but it clearly did. In *Gore* it was held that for the purposes of prescription, knowledge extends to a conviction or belief that is engendered by or inferred from attendant circumstances. The appellants may not have been 100 percent certain, but they believed on the basis of all the information in their possession, which was considerable, that this was a pyramid scheme and that it had always been insolvent. That was sufficient knowledge of these facts.

Chronology of events

[22] The chronology of events presented by the appellants at the trial was accepted by the respondents. This chronology was also succinctly laid out by the judge in the court a quo.

[23] The appellants had access to the Group premises from 8 August 2012. They soon became aware that the files, relating to the brokers and the commissions earned by them, were kept by Ms Monica Goodman in a cabinet behind her desk in the reception area at the Group premises. There were some documents

[5] In her affidavit of 22 August 2012, when applying for the appellants' powers to be extended in terms of Rule 18(3), Ms Pieters stated: 'By virtue of the nature of the business conducted by Pretorius it is clear that he conducted what appears to be a "pyramid scheme". Such a scheme pays interest and dividends to investors by the consumption of their own capital. This practice renders the "scheme" insolvent from the outset'. There are various other affidavits by one or more of the appellants confirming this view (dated 18 September 2012, 9 October 2012, and 10 October 2012).

[6] See *Minister of Finance and Others v Gore NO* [2006] ZASCA 98; 2007 (1) SA 111 (SCA).

relating to the brokers which had been archived in boxes which were kept in a room behind the reception area.

[24] When the appellants began their investigations on 8 August 2012, they were assisted by employees of the Trust and/or the Group. Mr Brand, as a co-trustee, (although apparently not involved in the fraudulent conduct of the scheme) was aware of the scheme and the parties who were involved in it, including the brokers. On 12 August 2012, the services of majority of the staff of the Trust were terminated save for Mr Brand, Ms Swart (who was Mr Pretorius's personal assistant), Ms Swanepoel, and Ms Goodman. Ms Goodman remained at the Group's premises until 17 August 2012.

[25] The appellants appointed MB as lawyers[7] and BGR de Jager Accountants (the auditors) to assist in the investigation of the affairs of the Trust and other related entities. In mid-August 2012, they requested an analysis of payments made from the Trust to other entities within the Abante group, and to other accounts held by Mr Pretorius and/or his family members. Mr Bezuidenhout, who was working with the auditors, was charged with a forensic investigation on the financial affairs of the Trust with initial focus on the SECA trust (SECA), the Trading Alpha trust (TAT), the Abante trust, Mr Pretorius, and the companies related to him.

[26] The auditors were mandated to conduct investigations on the substantial amounts paid out from the Trust and to determine the routes of the payments via the financial institutions. Nedbank and Standard Bank were requested to confirm and verify account details of approximately 39 entities/trusts and

[7] The appellants also appointed two other firms of attorneys to assist them in winding-up the estate.

personal accounts of Mr Pretorius and his family, and to furnish the appellants with such documents for the purposes of the investigation.

[27] From 8 August 2012 to December 2012, the appellants' requested the auditors to prioritise the myriad of inter-group transactions between the entities within the Group. Over this period, several of these entities were sequestrated or liquidated. An Anton Piller order was obtained on 27 September 2012 to obtain documents. An anti-dissipation interdict was obtained against several of these entities on 9 October 2012.

[28] In claiming that they could not reasonably have acquired knowledge of the identity of the brokers and the facts from which their claims against the brokers arose, the appellants relied on the complexity of the insolvent estate of the Trust. They stated that they were required to investigate more than fifty entities, in which Mr Pretorius was involved, and the inter-group transfers of monies both locally and internationally between these entities. Over R2 billion had been paid into the Standard Bank and Nedbank accounts, which they were obliged to reconcile through forensic investigations. To deal with the complexity, the appellants obtained two forensic reports detailing the fraudulent nature of the scheme, the state of solvency of the Trust, and the date that each payment was made by the Trust for the purposes of claims under the Act.

[29] The investors' claims and the inter-group transfers were prioritised by the appellants. There was no investigation into the claims against the brokers during 2012. On 28 January 2013, the auditors requested a meeting with the appellants to discuss the investigations of the brokers.

[30] On 25 February 2013, the appellants requested the auditors to prepare schedules to reflect the commission payments that the brokers received from the Trust and also the contracts concluded with the brokers in terms of which the commissions were paid. The auditors confirmed on the following day that they had perused the broker files. They could not find any contracts in the files. However, the files contained statements and proof of payment of commissions to each of the brokers. According to the auditors, the files relating to the brokers were, in some instances, incomplete and they were not in chronological order. They also stated that they only received the missing bank statements from Nedbank on 18 March 2013.

[31] In December 2013, MB followed up on the previous correspondence of February 2013 in relation to the schedules of the brokers' commission, to enable them to address letters of demand to the brokers for the repayment of the commissions and to issue subpoenas for the insolvency enquiry. By 11 February 2014, the broker files were returned to MB with the requisite details relating to the claim against each broker. From the contents of the brokers' files, schedules were prepared by the auditors which contained a summary of each claim against each broker. These were attached to subpoenas issued to brokers to attend the insolvency enquiry in April 2014. Those schedules were utilised by the appellants to compile the annexures to the particulars of claim in the present action.

[32] The appellants contended that the findings by the court a quo failed to recognise that the appellants' actions fell to be examined against the duties and obligations required of provisional trustees in the context of the sequestration of an extensive and potentially fraudulent investment scheme. They submitted that the court a quo's conclusion implied that the appellants

should have isolated and prioritised the 37 broker files amongst the many thousands of files, and targeted them first in the course of the administration of the estate. This, according to the appellants, ignored the scale of the investigations required in the affairs of an insolvent estate of this complexity and nature. In order to evaluate these submissions, an analysis of the evidence presented at the trial is necessary.

Evidence

[33] Mr Janse van Vuuren (the tenth respondent) and Ms Goodman testified for the respondents. Mr van Vuuren's evidence was that he would get commission statements every month from the Trust. Ms Goodman dealt with all broker related enquiries and Mr Brand dealt with the situation when claw-back payments were deducted.[8] From Mr van Vuuren's evidence, it is clear that his file contained a commission statement, a cheque and deposit slip for every entry on Annexure "E" to the particulars of claim, save for one.

[34] Ms Goodman took over the responsibility of maintaining the brokers' files from November 2008. She testified that if anyone needed to know how much commission any broker received, they only needed to look at the broker files or the archive files containing historic information. The documents contained in the files relating to each broker included one or more of the following: a deposit slip, a cheque, and/or a commission statement to evidence each payment made to the particular broker. She and/or Mr Brand and/or the other employees of the Trust, could have assisted the appellants to find any documentation required. The appellants did not seek Ms Goodman's

[8] If an investor withdrew their investment before it was repayable, the broker's commission was adjusted.

assistance in this regard – either whilst she was at the Group's premises in August 2012, or when she returned to work for them in February 2013.

[35] Mr Bester (the first appellant), Mr Bezuidenhout (the auditor), Mr Brand, and Mr du Toit (the attorney of MB, dealing with the estate) testified for the appellants. Mr Bester stated that, as provisional trustees (as opposed to finally appointed trustees) the immediate work required was to safeguard assets and prevent the dissipation of funds. It was not possible to deal with the claims against the brokers until early 2013, because they were concentrating on and prioritising other claims. He confirmed that the investigation into the 37 brokers' files was not an insurmountable task, and when undertaken, it took a relatively short time to be completed. Mr Bester knew from the outset that the Trust had used brokers to procure the investments. He conceded that whilst examining the bank statements for inter-group transactions in August 2012, the auditors could simultaneously have accessed the payments made to the brokers.

[36] Mr Bezuidenhout, the auditor appointed by the appellants, consulted with Mr Brand, Ms Swanepoel, Ms Swart and Ms Pieters at the Group's premises. Ms Goodman was also there. He did not enquire from any of them as to the brokers' files, which he conceded he could have done. He received bank statements from Standard Bank and an incomplete set from Nedbank. They showed all monies paid out by the Trust, including amounts paid to the brokers. Mr Bezuidenhout was working with five clerks. They prioritised the inter-group transfers. He conceded that, even without the full set of bank statements, there were commission statements, cheques, and deposit slips in the broker files, which could have been reconciled and utilised to make the claims against the brokers. Mr Bezuidenhout conceded further that he could

have complied a schedule, similar to that attached to the particulars of claim as Annexure "E", from the documents in the broker files without a forensic investigation. In the case of Mr van Vuuren, it would have taken him approximately two hours to do his.

[37] Mr Brand was fully aware of where the brokers' files were kept and that they contained the details of the brokers and the commissions paid to them. He knew many of the brokers personally and had their email addresses. If asked, he could have pointed out the brokers' files and the archived files. He stated that he would have been able to trace all the brokers quite easily – if he would have been asked.

[38] Mr du Toit, a partner of MB, who was the attorney charged with the investigation into the Trust, testified that shortly after being appointed as the appellants' attorneys, he consulted with them and Mr Pieters from Duvenhage and Cilliers attorneys, who were also assisting with the estate. The initial focus was on the recovery of assets belonging to the Trust and not the brokers. Mr du Toit conceded that all the questions which Mr Brand was asked at the insolvency enquiry in February 2013, relating to the broker files could have been asked of Mr Brand in August 2012. Had he enquired from Mr Brand or Ms Goodman about the commission claims of the brokers, when first appointed in August 2012, that information would have been forthcoming. Mr du Toit stated quite frankly that the information was all there in the files and had he, the trustees or the auditors opened the files and looked at their contents, the information would have been available to them.

[39] As will appear from what had been stated above, the respondents did not rely upon actual knowledge. They contended that, through the exercise of

reasonable care, the appellants could have established the requisite facts in order to institute action.

The Law

[40] In terms of s 12(1) of the Prescription Act, prescription begins to run as soon as the debt is due. A debt is due when it is immediately claimable or recoverable. If the debtor has knowledge of the identity of the debtor and of the facts from which the debt arises, the debt is deemed to be due, as by that stage, the creditor acquires a complete cause of action for the recovery of the debt. In terms of s 12(3) of the Prescription Act, the creditor is deemed to have knowledge of the identity of the debtor and of the facts from which the debt arises if it could have been acquired by the exercise of reasonable care.[9]

[41] The knowledge required relates to the factual ingredients giving rise to the debt and not knowledge of the legal conclusions.[10] The requisites of such knowledge were described in *Gore*.[11] Whilst mere 'opinion and supposition' is not sufficient,[12] a belief that is inferred from the circumstances of the case, as well as from information received from employees and/or agents, or those assisting the trustees, can be imputed to the trustees.

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[9] *Road Accident Fund and Another v Mdeyide* (CCT 10/10) [2010] ZACC 18; 2011 (1) BCLR 1 (CC) ; 2011 (2) SA 26 (CC) (30 September 2010) para 13 (citations omitted); *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd and Another* [2016] ZASCA 91; 2017 (1) SA 185 (SCA) para 24, citing *Truter and Another v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) para 16.
[10] *Truter v Deysel* (note 9 above). *Van Staden v Fourie* 1989 (3) SA 200 (A) at 216B-F.
[11] *Gore NO* (note 6 above).
[12] *Gore NO* (note 6 above) para 18.

[42] Prescription starts to run when the creditor has knowledge of the requisite facts (whether actual or imputed) or when the creditor is deemed to have the requisite knowledge of the facts underlying the action. As stated in *Gore*:

'The running of prescription is not postponed until the creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove the case comfortably.'[13]

The creditor is also not permitted to postpone prescription through his own inaction. As stated by Van den Heever J in *Benson and Another v Walters and Others*[14]:

'Our Courts have consistently held that a creditor is not able by his own conduct to postpone the commencement of prescription.' This approach was confirmed in *The Master v I L, Back & Co Ltd* where Galgut AJA stated:

'A creditor's right of action is not postponed until such time as he may, either in his wisdom or when he thinks he ought to, bestir himself.'[15]

[43] In regard to the requirement of reasonable care, this court stated in *Drennan Maud & Partners v Pennington Town Board*[16]:

'…[T]he 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.'

[44] The principles relating to prescription are applicable to trustees and liquidators. The respondents contended that the appellants should not be

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[13] See *Gore NO (note 6 above)* with reference to Van Staden v Fourie 1989 (3) SA 200 (A) at 216B-F and *Nedcor Bank Bpk v Regering van die Republiek van Suid-Afrika* 2001 (1) SA 987 (SCA) paras 11 and 13.
[14] *Benson and Another v Walters and Others* 1981 (4) SA 42 (C) at 49G-H, as quoted in *Uitenhage Municipality v Molloy* 1998 (2) SA 735 (SCA) at 742A–C.
[15] *The Master v I L, Back & Co Ltd* 1983 (1) SA 986 (A) at 1005G-H.
[16] *Drennan Maud & Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) at 209F–G.

treated any differently to any other creditor which, in terms of Prescription Act, needs to institute the action within three years of the debt being due.[17] The appellants did not suggest otherwise.

Discussion

[45] The appellants' approach was not that the facts on which these claims were based were inaccessible or hard to ascertain. It was that, given the size and complexity of the insolvency process in regard to the Trust, their failure to investigate the claims did not amount to a failure to exercise reasonable care to acquire knowledge of the identity of the brokers and the facts giving rise to the claims against them.

[46] The judge did not make any adverse credibility findings against Mr Bester or Messrs Bezuidenhout and Du Toit concerning their actual state of knowledge. All conceded that they focussed on other matters and did not come to deal with the brokers and the payment of commissions until 2013. As a result, it was only in 2013 that they acquired actual knowledge of the details of these claims and the identity of the brokers. The question is whether by the exercise of reasonable care this would have been ascertained at an earlier stage prior to 23 October 2012.

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[17] *Duet and Magnum Financial Services CC (in liquidation) v Koster* (168/09) [2010] ZASCA 34 (29 March 2010); 2010 (4) SA 499 (SCA); *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and Others* 2017 (5) SA 9 (CC) para 10; *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC) para 196.

[47] In regard to knowledge which might have been obtained from Mr Brand, Ms Goodman, Ms Swanepoel or Ms Swart, the appellants contended that, in order for that knowledge to be imputed to them, the knowledge would have to have been acquired by the agent in the course of their employment with the principal, and a duty must rest upon the agent to communicate the information to his principal.[18] These persons undoubtedly had actual knowledge of the existence and identity of the brokers and the whereabouts of detailed information concerning the commissions paid to them. The question is whether the appellants should, in the exercise of reasonable care have asked them to provide that information in order to consider whether a claim for recovery should be made. The question must be answered in the affirmative. The fact is that they did not do so for the simple reason that they prioritised other issues.

[48] The prioritisation of other issues cannot be a reason for not exercising reasonable care to ascertain the facts giving rise to a debt. Trustees and liquidators cannot select the issues on which to concentrate in their administration, secure in the knowledge that a plea of prescription could be defeated by a claim of ignorance accompanied by the excuse that they were prioritising other more important matters. That would be contrary to the principle that a creditor cannot by their own actions postpone the commencement of the running of prescription.

[49] The appellants were well aware that the funds invested in the Trust had been secured largely through the efforts of brokers who were paid commissions. Given the amount of money involved those commissions would on any basis be substantial. The claim chosen as the test case was for over

[18] *Wilkins v Potgieter NO and Another* 1996 (4) SA 936 (T) at 939F-H.

R5 million. They were aware for the reasons already given that these funds had been invested in a pyramid scheme and that the entire edifice had collapsed when Mr Pretorius committed suicide and the Trust was almost immediately sequestrated. They knew, because they had the trust deed, that there were only two trustees, whereas three were required, and Mr Brand had told them that effectively Mr Pretorius was the sole decision-maker. Ms Pieters confirmed in an affidavit that the appellants were aware of the provisions of the Act dealing with the dispositions and the potential to set these aside. The commissions were manifestly dispositions by the Trust.

[50] These facts were all known to the appellants and constituted the facts from which the debts arose, whether the legal basis was a *condictio sine causa* or the dispositions under the Act. The appellants and those assisting them had not opened the brokers' files; thus they did not know the names of the brokers or how much had been paid to each of them. The moment the files were opened and examined, this information was available.

[51] The appellants' explanation that they prioritised other matters demonstrates that they could not show that they exercised reasonable care in ascertaining the information giving rise to the claims and the identity of the debtors. It, in fact, shows a deliberate decision not to investigate and ascertain the existence of relatively obvious claims. They chose to run a risk of not being able to commence proceedings timeously. As it happens in two cases to which we were referred they did sue timeously and succeeded. They simply did not do that in relation to these claims.

[52] The appeal involves, in the main, a challenge to the factual findings made by the court a quo, namely that the court erred in its assessment of the facts in

concluding that the appellants could reasonably have established, by 23 October 2012, that which was required in order to institute action against the respondents. It has been held by this Court that:

> 'The approach to be adopted by a court of appeal when it deals with the factual findings of a trial court is trite. A court of appeal will not disturb the factual findings of a trial court unless the latter had committed a material misdirection. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct. The appeal court will only reverse it where it is convinced that it is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion, then it will uphold it. This court in *S v Naidoo* & *others* reiterated this principle as follows:
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> "In the final analysis, a court of appeal does not overturn a trial Court's findings of fact unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong."'[19] (Footnotes omitted).

[53] The appellants did not point to any factual error in the judge's reasoning. Instead they said that by not placing sufficient weight on their evidence concerning the complexity of the process of winding up the Trust, the judge imposed an unreasonable burden on them in relation to the ascertainment of the facts giving rise to the claims against the brokers. The conclusion reached by the court a quo and the findings of fact relied upon cannot be faulted. The appeal must accordingly fail.

Costs relating to the record

[54] It is unfortunately necessary to make certain comments about the record in this matter. The record ran to some 1870 pages, a fair portion of which, as counsel conceded at the hearing of the matter, was irrelevant to the issues in the appeal. In the appellant's practice note, the Court was advised that it was necessary to read the entire record. The respondents, in their practice note

[19] *Mkhize v S* [2014] ZASCA 52 para 14 (Citations omitted).

stated that the parties had attempted to restrict the record to that which was relevant to the appeal. Both these statements were inaccurate. This practice is not confined to the present appeal. The rules of this Court, relating to the preparation of records by attorneys and the practice directive relating to the filing of a practice note by counsel, specifying the portions of the record that counsel regards as necessary to be read, continue to be ignored.

[55] In *Van Aardt v Galway*[20] this Court dealt with the persistent problem of legal representatives failure to comply with the rules of this Court. Wallis JA held:

'[34] Turning to the practice note, rule 10A(ix) enjoins counsel to provide a list reflecting those parts of the record that *in the opinion of counsel* are *necessary* for the determination of the appeal. The purpose of this provision was spelled out by Harms JA in *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another*[21]:

"The object of the note is essentially twofold. First, it enables the Chief Justice in settling the roll to estimate how much reading matter is to be allocated to a particular Judge. Second, it assists Judges in preparing the appeal without wasting time and energy in reading irrelevant matter. Unless practitioners comply with the spirit of this requirement, the objects are frustrated and this in turn leads to a longer waiting time for other matters." …

[35] …

[36] The practice note requires a statement of counsel's view, in the form of a list, of those parts of the record that need to be considered in order to decide the case. The fact that his or her opponent may disagree is neither here nor there. That will emerge from the opponent's practice note. In addition, the list is to be confined to those parts of the record that are 'necessary' for that purpose. ... The list should include only those parts of the record

[20] *Van Aardt v Galway* 2012 (2) SA 312 (SCA) paras 31-39.
[21] *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd & another* 1998 (3) SA 938 (SCA) para 36.

that counsel is likely to refer to either in support for the argument, or for rebuttal, or to highlight flaws in the judgment appealed against…'

[56] In the present matter, it appears that it was unnecessary for this Court to read approximately 40% of the record. In my view, 40% of the costs incurred in the preparation, perusal and copying of the record should be disallowed. Despite previous admonitions by this court, the rules continue to be ignored. It is hoped that these remarks, may serve as a warning to practitioners in future proceedings.

[57] The following order is made:

The appeal is dismissed with costs, including the costs occasioned by the employment of two counsel, save that the costs of the preparation, perusal and copying of the record shall be limited to 60% of the costs incurred in those tasks.

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WEINER AJA

ACTING JUDGE OF APPEAL

APPEARANCES

For appellant:	JA Van Der Merwe SC (with him BC Wharton)
Instructed by:	Mostert & Bosman Attorneys, Bellville Phatshoane Henney Attorneys, Bloemfontein.
For Respondents:	RGL Stelzner SC (with him M Daling)
Instructed by:	Laas & Scholtz Incorporated, Durbanville Webbers Attorneys, Bloemfontein.