THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 356/2020

In the matter between:

VAN HEERDEN & BRUMMER INC **APPELLANT**

and

HARRY MARK DEON BATH **RESPONDENT**

Neutral citation: *Van Heerden & Brummer Inc v Bath* (356/2020) [2021] ZASCA 80 (11 June 2021)

Coram: PETSE DP and MBHA and ZONDI JJA and KGOELE and PHATSHOANE AJJA

Heard: 3 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h30 on 11 June 2021.

Summary: Prescription Act 68 of 1969 – firm of attorneys sued for damages arising out of drafting of an ante-nuptial contract subsequently found to be invalid – date of commencement of the running of prescription – meaning of the expression 'debt is due' – s 12(3) requires knowledge of the identity of the debtor and facts necessary to institute action – knowledge of legal conclusion not required by s 12(3).

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Van der Schyff J sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the high court is set aside and replaced with the following:

'2.1 The first defendant's special plea is upheld with costs.

2.2 The plaintiff's claim against the defendant is dismissed with costs.'

JUDGMENT

Kgoele AJA (Petse DP and Mbha and Zondi JJA and Phatshoane AJA concurring):

[1] This appeal originates from an action instituted by the respondent, Mr Harry Bath, against the appellant, Van Heerden and Brummer Incorporated, a firm of attorneys, in the North Gauteng Division of the High Court (the high court), for damages in respect of a breach of mandate and professional negligence arising out of drafting an antenuptial contract subsequently found to be invalid by the court. In the proceeding before the high court, the appellant, who was the first defendant, raised a special plea of prescription. The high court (Van der Schyff J) made an order in terms of rule 33(4) of the Uniform Rules of Court, in terms of which the special plea of prescription was decided separately from the other issues raised by the parties. After hearing evidence, the high court dismissed the

special plea. This appeal is against that order, with leave having been granted by the high court.

[2] The appeal turns primarily on the interpretation of s 12(1) of the Prescription Act 68 of 1969 (the Act) and in particular, the phrase 'debt is due'. The question to be determined is therefore, whether the high court correctly found that the respondent's claim had not become prescribed at the time the summons was served on 2 February 2017.

[3] What follows are the material facts which are necessary for the determination of the sole issue before us which are largely common cause, or not seriously disputed. On 21 October 2005, the respondent gave the appellant a mandate to draft an antenuptial contract in contemplation of his marriage to his now ex-wife, Mrs Juanita Bath. Ms Nunes, the Notary Public employed by the appellant at that time, and who does not feature in this appeal, drafted the antenuptial contract which was subsequently registered in the Deeds Office on 9 November 2005.

[4] During February 2010, the respondent instituted divorce proceedings against his ex-wife. Mr Brummer, an attorney and a director of the appellant and Ms Hartman, who served as counsel, represented the respondent in the divorce action. Mrs Bath defended the divorce action. In her amended plea and counterclaim, she alleged that the antenuptial contract was void for vagueness. The divorce action came before Louw J in the Gauteng Division of the High Court, Pretoria. Pursuant to the agreement between the parties, the validity of the antenuptial contract was determined first as a separate issue. In a judgment delivered on 3 September 2012, Louw J held that the antenuptial contract was *void ab initio* due to vagueness, and that the marriage between the parties was in community of property.

[5] Dissatisfied with the outcome, the respondent was, on 22 November 2012, granted leave to appeal to this Court. The appeal was heard on 24 February 2014, and subsequently dismissed on 24 March 2014.[1] Thereafter, a decree of divorce was granted on 13 October 2015 incorporating a deed of settlement in terms of which, the respondent and his ex-wife agreed, *inter alia*, to appoint a liquidator to distribute their joint estate, arising from the erstwhile marriage in community.

[6] On 24 January 2017, the respondent instituted the current action for damages against the appellant and Ms Nunes and on 2 February 2017, the summons was served on them. No relief was sought against Ms Nunes who was cited purely out of caution as the second defendant. Thus, the second defendant took no part in this litigation both in the high court and this Court. In this action, the respondent asserted that the appellant had negligently breached its mandate because the Notary Public employed by it failed to draft a valid antenuptial contract. According to the respondent, the net result of this was that he became liable to pay his ex-wife substantially more money than would have been payable had the antenuptial contract been valid.

[7] The appellant defended the action essentially on the basis that the claim had become prescribed on 25 September 2015. As already indicated, this special plea was heard separately from the merits of the action. In support of this defence, the appellant led the evidence of Mr Brummer and Ms Hartman. Their evidence mainly comprised an exposition of an uncontested factual account of their interaction with the respondent with specific reference to a series of dates in order to demonstrate that the respondent had knowledge of all the facts necessary to institute his claim, at the latest, on 26 September 2012.

[1] *Bath v Bath* [2014] ZASCA 14.

[8] The summary of their evidence which forms the factual matrix for this appeal is that subsequent to the filing of the amended plea and before the commencement of the divorce trial, they held a consultation with the respondent on 6 August 2012 where the implications of the amended plea and the counterclaim were extensively discussed and explained. Provisional financial values were drawn up to illustrate the likely consequences of a marriage in community of property. This discussion continued during the period 13 to 17 August 2012, when the evidence regarding the validity of the antenuptial contract was heard in court. After the judgment was delivered on 3 September 2012, Mr Brummer informed the respondent telephonically that the trial court had declared the antenuptial contract void. He further explained to him that as a result, the parties' marriage was regarded as one in community of property and arranged a consultation with the respondent.

[9] The consultation took place on 21 September 2012 during which the judgment, its consequences, who was liable to be sued, the conflict likely to arise if the appellant were sued, including prescription of the respondent's claim, were thoroughly discussed with the respondent. The respondent, despite being disappointed and upset by the result, persisted with his desire to appeal against the judgment which declared the antenuptial contract void, whilst retaining the same legal team. This prompted a further consultation on 25 September 2012, to which Mr Brummer invited Ms Hartman. At this consultation, the respondent's intention to sue crystallised and the possible withdrawal of Mr Brummer was further discussed with the respondent. The time lapse pending the appeal which might affect prescription of his claim was reiterated, including the advice to the respondent to seek an independent legal practitioner to represent him for this claim. It was ultimately agreed that the appellant's firm would remain the attorneys of record for the purposes of appealing the decision of Louw J. On 26

September 2012 an email confirming the discussion of 25 September 2012 was sent to the respondent.

[10] The respondent elected not to testify at the trial. Thus, there was no countervailing evidence to controvert the version of the appellant. The upshot of the appellant's evidence was succinctly set out in the judgment of the high court. For present purposes a chronological exposition of the crucial dates and facts will suffice. More pertinently, the respondent, in his heads of argument, acknowledged that it cannot be disputed that he was advised by both Mr Brummer and Ms Hartman about the consequences of the finding made by Louw J that the antenuptial contract was void. The respondent also did not dispute, as rightly noted in paragraph 9 of the judgment of the high court, that Ms Hartman explained to him that he had a claim against the appellant and the impact that the running of prescription might have on the claim.

[11] The submission of the appellant before the high court, which was persisted with before us, is that on one of these dates, prescription began to run. They are: (a) 6 August 2012 – a consultation where the consequences of the amended plea raised in the divorce action was explained to the respondent in detail using provisional financial values; (b) 13 to 17 August 2012 – the period during which the validity of the antenuptial contract was heard and evidence thereof continuously raised with respondent; (c) 3 September 2012 – when Mr Brummer informed the respondent telephonically that the high court declared the antenuptial contract void and that their marriage was regarded as one in community of property including the fact that the Notary Public was to be blamed for the finding; (d) 21 September 2012 – a consultation with Mr Brummer wherein the judgment, its consequences, who to sue, the apparent conflict, including prescription of his claim, were thoroughly discussed with the respondent; (e) 25 September 2012 – a consultation with Mr Brummer and Ms

Hartman wherein the intention to sue, the onset of prescription and possible withdrawal of Mr Brummer were explained to the respondent; or (f) 26 September 2012 – when an email confirming the discussion of 25 September was sent to the respondent.

[12] As already indicated, before the high court the appellant, relying on these dates, argued that the respondent's claim arose and became due on any one of the dates mentioned in the preceding paragraph but not later than 26 September 2012, when the appellant addressed an email to the respondent in which it recorded the issues dealt with during the consultation on the previous day, 25 September 2012. The respondent, in his defence, contended that the prescription commenced to run from the date on which judgment in his appeal was handed down by this Court on 24 March 2014. In elaboration, the respondent's counsel placed much emphasis on what he perceived as the need to distinguish between the 'coming into existence' of a debt and 'the recoverability' thereof, to bolster the argument that the judgment of the SCA constituted an essential fact in support of the respondent's cause of action (ie the so-called last fact) as opposed to 'obtaining legal certainty' as argued by the appellant. According to him, the respondent's damages manifested or materialised on 24 March 2014, because his patrimonial loss would not have eventuated had his appeal been upheld. Thus, so the argument continued, instituting his damages claim against the appellant before the final determination of his appeal to this Court would have been premature.

[13] The high court was somewhat persuaded by these contentions and, as a result, it found in favour of the respondent and concluded that the respondent's claim had not prescribed. This, despite the fact that it made the following remarks in its judgment:

'The plaintiff's damages consist of the *diminution of his estate* caused by the breach and *this constituted a debt that was immediately payable when the antenuptial contract was declared void, irrespective of whether the damages were already quantified*.' (My emphasis.)

In coming to this conclusion, it reasoned that the respondent's damages manifested or materialised only on 24 March 2014, when the appeal was dismissed by this Court, although the full extent thereof was not determinable at that stage. Furthermore, the high court held that '[b]efore 24 March 2014 there was no basis for any claim based on the invalidity of the antenuptial contract that was either claimable by the [respondent] or payable by the [appellant]'.

[14] Accordingly, the issue in this appeal is crisp and in essence, relates to a question of law. It pertinently concerns the determination of the date on which the three-year period of prescription commenced to run in respect of the respondent's claim, which is the fundamental point of difference between the parties.

[15] Directly relevant to this enquiry is s 12 of the Act which provides that:

'(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 shall 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.'

[16] The words 'debt' including 'debt is due' are not defined in the Act. There are numerous judgments which have dealt with the meaning of these words and

the law is settled in this regard. One such seminal judgment which is relevant on the facts of this matter is *Mtokonya v Minister of Police*.[2]

[17] To my mind, the following remarks by Moseneke J in *Eskom*,[3] which were quoted with approval in *Mtokonya* bear emphasis as they neatly set out a sound foundation for several decisions that followed thereafter. There, the court said the following:

"In my view, there is no merit in the contention advanced on behalf of the plaintiff that prescription began to run only on the date the judgment of the SCA was delivered. The essence of this submission is that a claim or debt does not become due when the facts from which it arose are known to the claimant, but only when such claimant has acquired certainty in regard to the law and attendant rights and obligations that might be applicable to such a debt. If such a construction were to be placed on the provisions of section 12(3) grave absurdity would arise. These provisions regulating prescription of claims would be rendered nugatory and ineffectual. Prescription periods would be rendered elastic, open ended and contingent upon the claimant's subjective sense of legal certainty. On this contention, every claimant would be entitled to have legal certainty before the debt it seeks to enforce becomes or is deemed to be due. In my view, legal certainty does not constitute a fact from which a debt arises under s 12(3). A claimant cannot blissfully await authoritative, final and binding judicial pronouncements before its debt becomes due, or before it is deemed to have knowledge of the facts from which the debt arises."'

[18] Consistent with the principles propounded in the various judgments, most recently this Court rejected similar arguments as raised by the respondent in this matter in *McMillan v Bate Chubb*[4] and held:

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[2] *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC); [2017] ZACC 33; 2017 (11) BCLR 1443 (CC); 2018 (5) SA 22 (CC) (*Mtokonya*). See also: *Truter and Another v Deysel* 2006 (4) SA 168 (SCA); *Minister of Finance and Others v Gore* N O 2007 (1) SA 111 (SCA) para 17; *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng* 2009 (3) SA 577 (SCA); *Claasen v Bester* 2012 (2) SA 404 (SCA); *Fluxmans Incorporated v Levenson* 2017 (2) SA 520 (SCA).

[3] *Eskom v Bojanala Platinum District Municipality and Another* 2003 JDR 0498 para 16.

[4] *McMillan v Bate Chubb and Dickson Incorporated* [2021] ZASCA 45 para 38.

‘The period of prescription begins to run against a creditor when the creditor has the minimum facts which are necessary to institute action. As this Court recently held in *Fluxmans Incorporated v Levenson*:

“Knowledge that the relevant agreement did not comply with the provisions of the Act is not a fact which the respondent needed to acquire to complete a cause of action and was therefore not relevant to the running of prescription. This Court stated in *Gore NO* para 17 that the period of prescription begins to run against the creditor when it has minimum facts that are necessary to institute action. The running of prescription is not postponed until it becomes aware of the full extent of its rights nor until it has evidence that would prove a case “comfortably”. The “fact” on which the respondent relies for the contention that the period of prescription began to run in February 2014, is knowledge about the legal status of the agreement, which is irrelevant to the commencement of prescription. It may be that before February 2014 the respondent did not appreciate the legal consequences which flowed from the facts, but his failure to do so did not delay the date on which the prescription began to run. Knowledge of invalidity of the contingency fee agreement or knowledge of its non-compliance with the provision of the Act is one and the same thing otherwise stated or expressed differently. That the contingency fees agreements such as the present one, which do not comply with the Act, are invalid is a legal position that obtained since the decision of this court in *Price Waterhouse Coopers Inc* and is therefore not a fact which the respondent had to establish in order to complete his cause of action. *Section 12(3) of the Prescription Act requires knowledge only of the material facts from which the prescriptive period begins to run – it does not require knowledge of the legal conclusion (that the known facts constitute invalidity).* (*Claasen v Bester* [2011] ZASCA 197; 2012 (2) SA 404 (SCA).”

Section 12 requires knowledge only of the material facts from which the prescriptive period begins to run – it does not require knowledge of the legal consequences. Accordingly, the appellant’s cause of action was complete as soon as he was informed on 9 May 2014 of the potential conflict of interest arising from the fact the respondent’s directors may have drafted the antenuptial contract incorrectly. There is no reason in logic or in law, why he could not successfully have joined the respondent as a third party in the divorce proceedings at that stage, claiming payment from it of any sum which he may be ordered to pay to his former wife as a result of the respondent’s negligence.’ (Emphasis added.)

[19] It is important to highlight at the onset that *McMillan*[5] is on all fours with the present appeal as it dealt with almost similar facts and exactly the same legal point raised in this matter. Despite the fact that both counsels were aware of this decision, the submissions of the parties remained diametrically opposed. Counsel representing the appellant, relying on *McMillan*, argued that the respondent's claim became prescribed, at the very latest on 26 September 2012. The respondent's counsel on the other hand, relying on *Trinity v Grindstone*,[6] submitted that the *McMillan* decision did not affect the soundness of his contention because *McMillan* is clearly wrong.

[20] In elaboration, counsel argued that in *McMillan* this Court failed to appreciate that although the date on which a debt arises usually coincides with the date on which it becomes due, this is not always the case. The difference, argued counsel, relates to the coming into existence of the debt on the one hand and its recoverability on the other.[7] Therefore, whilst the legal principles dealt with by the court in *McMillan* are correct, it erred in its application of these legal principles to the facts, as the dates on which the debt arose and when it became due did not coincide both in *McMillan* and in this matter.

[21] Furthermore, respondent's counsel relied on *Umgeni Wats v Mshengu*[8] wherein it was said:

'[5] . . . Stated another way, the debt must be one in respect of which the debtor is under an obligation to pay immediately.

[6] . . . In order to be able to institute an action for the recovery of a debt a creditor must have a complete cause of action in respect of it. The expression "cause of action" has been held to mean:

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[5] Ibid.
[6] *Trinity Asset Management (Pty) Ltd v Grindstone Inv 132 (Pty) Ltd* [2017] ZACC 32; 2018 (1) SA 94 (CC); 2017 (12) BCLR 1562 (CC) para 38.
[7] *List v Jurgens* 1979 (3) SA 106 (A) at 121C-D.
[8] *Umgeni Wats v Mshengu* [2009] ZASCA 148; [2010] 2 All SA 505 (SCA) para 5-6.

"[E]very fact which it would be necessary for the plaintiff to prove . . . in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

Or slightly differently stated:

". . . [T]he entire set of facts which give rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not 'arise' or 'accrue' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action."'

[22] Counsel for the respondent also submitted that the 'last set of facts' necessary to complete the respondent's cause of action was the appeal judgment of this Court delivered on 24 March 2014. Therefore, if the judgment of Louw J was overturned on appeal, any action instituted before the appeal judgment, would have been premature. In relation to the second leg of his argument, counsel relied on *African Products v Venter*,[9] in which it was held that not only must there be an obligation to pay immediately, but there must also be no valid or bona fide defence open to the debtor.

[23] Counsel's contentions are without merit for at least two reasons. First, it is not correct that in *McMillan* this Court was not alive to the distinction as espoused by the respondent's counsel. The fact that the distinction was not mentioned does not necessarily mean that the Court was oblivious to it. It is trite that no judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.[10] But to lay this matter to rest, I can do no better than quote the following paragraph in *McMillan,* which in my view is more telling:

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[9] *African Products (Pty) Ltd v Venter NO and Others* [2007] 3 All SA 605 (C); [2006] ZAWCHC 32 para 24.
[10] *R v Dhlumayo* and Another 1948 (2) SA 677 (A).

'[34] The appellant challenged the findings of the court a quo on two main grounds. It was submitted by the appellant firstly, that the court a quo erred in holding that the appellant had a complete cause of action for professional negligence against the respondent on 12 May 2014 in circumstances where the antenuptial contract was only declared invalid by Plasket J in the divorce proceedings in October 2016. Before then, so ran the argument, nobody could have anticipated a problem. Both the appellant and his former wife had considered the antenuptial contract to be valid. It was accordingly submitted by the appellant that prescription could not have commenced running before the judgment of Plasket J in October 2016. The appellant, it was argued, could not have sued the respondent. Secondly, it was submitted by the appellant that, as the respondent's directors disputed that there was a claim against the respondent for professional negligence, he could not have known that the antenuptial contract was invalid. Thus, prescription only began to run once Plasket J delivered his judgment on 18 October 2016 regarding the validity of the antenuptial contract. Before then, he did not have the necessary facts upon which to formulate a claim against the respondent.

[35] I reject the appellant's contention that, prior to the declaration of invalidity of the antenuptial contract by Plasket J in October 2016, he could not have had *knowledge of all the material facts* he needed before he could institute legal proceedings against the respondent. In order to succeed in *an action for damages against an attorney for professional negligence,* a plaintiff is required to allege and prove: (a) *a mandate given to and accepted by the attorney; (b) a breach of the mandate; (c) negligence in the sense that the attorney did not exercise the degree of skill, knowledge and diligence expected of an average practising attorney; (d) that he had suffered damages; and (e) that damages were within the contemplation of the parties when the mandate was extended.* In this case there can be little dispute about (a), (b), (c) and (e). *As to (d), the appellant had been sued by his wife for half of his estate. He had approached the respondent to defend the claim when they advised him that there was a problem with the drafting of the antenuptial contract. It was manifest at that stage that he had suffered damages as a result of the error.*

[36] . . .

[37] As I have said, the appellant had acquired knowledge *of all necessary facts on which to sue* the respondent on 9 May 2014, when he attended a consultation at the respondent's offices.' (Emphasis added.)

[24] Second, the facts of this case go far beyond what happened in *McMillan.* The appellant was and is, in my view, too generous in its contention that 26 September 2012 is the date, at the very latest, when the claim prescribed. In my view, each one of the respective dates relied upon by the appellant which predates 26 September 2012, enumerated in paragraphs 8, 9 and 11 of this judgment, is in fact dispositive of this appeal. The undisputed facts reveal that by 6 August 2012 (when a discussion about the amended plea took place), the respondent fully understood from tentative calculations provided that he would be worse off financially if the antenuptial contract turned out to be invalid. It is therefore clear that the appellant had knowledge of the fact that there was a problem with the validity of the antenuptial contract (and at all material times thereafter), and that patrimonial loss would result from a finding that the antenuptial contract is void. The effect of this is that the date on which the debt arose, namely 3 September 2012 when Louw J declared the antenuptial contract void, coincided with the date when it became due.

[25] It is manifest from the uncontested evidence before the high that the respondent already had knowledge of all the facts from which the debt arose on 6 August 2012 and at all relevant times thereafter but, in adopting a conservative approach, at the latest, on 26 September 2012. Accordingly, it goes without saying that on 26 September 2012, the respondent already possessed adequate facts as required by the Act. This conclusion therefore means that when summons was served on the appellant on 2 February 2017 a period of over three years had elapsed since the debt became due.

[26] In the result, the following order is made:

1 The appeal is upheld with costs.

2 The order of the high court is set aside and replaced with the following:

‘2.1 The first defendant’s special plea is upheld with costs.

2.2 The plaintiff's claim against the defendant is dismissed with costs.'

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A M KGOELE

ACTING JUDGE OF APPEAL

APPEARANCES:

For the appellant:	G F Heyns SC Instructed by: Ditsela Incorporated, Pretoria Honey Attorneys, Bloemfontein
For the respondent:	A M Heystek SC Instructed by: Kraljevich & Janse van Vuuren Inc, Centurion Phatshoane Henney Attorneys, Bloemfontein.