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REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 197/97

In the matter between:

SANTAM LIMITED **Appellant**

and

SONRAJ ETHWAR **Respondent**

CORAM:	VAN HEERDEN DCJ, HARMS, PLEWMAN JJA, FARLAM and NGOEPE AJJA
HEARD:	21 September 1998
DELIVERED:	26 November 1998

J U D G M E N T

HARMS JA/

HARMS JA:

During 1990 the respondent instituted action against the appellant in the Durban and Coast Local Division for compensation in terms of the Motor Vehicle Accidents Act 84 of 1986. The appellant defended the action. Before the commencement of the trial, the appellant delivered a notice dated 14 September 1992 in terms of Rule 34, which read as follows:

> "KINDLY TAKE NOTICE that the defendant in this matter offers to settle the Plaintiff's claim in the following manner:-
>
> (a) By way of payment to the Plaintiff of the sum of R292 000,00;
>
> (b) by provision to the Plaintiff of a certificate in terms of Act 84 of 1986 entitling the Plaintiff to treatment in the future at a provincial hospital. Such certificate shall however be restricted to attendance by the Plaintiff of a pain management program at Addington Hospital;
>
> (c) by payment of the Plaintiff's costs to date hereof as taxed or agreed between the parties such costs to include those qualifying expenses which the Taxing Master may allow and to include the reasonable costs incurred in considering this

offer."

This offer was accepted by the respondent on 17 September 1992. During that same month the appellant met its obligations as contained in paragraph (a) of the offer, while the certificate referred to in paragraph (b) was sent to the respondent on 6 October 1992. After that date there was no further contact between the parties until 29 September 1995 when the respondent's attorneys served the appellant's attorneys with a bill of costs and a notice of taxation. The notice indicated that the bill would be taxed on 22 November 1995.

The appellant's attorneys responded by informing both the respondent's attorneys and the taxing master that the respondent's "right to tax" the bill had become prescribed in terms of section 10(1), read with section 11(d), of the Prescription Act 68 of 1969 ("the Act"), since a period of more than three years had expired since the date of the

acceptance of the offer. In spite of this protest the bill was taxed and the taxing master's *allocatur* is dated 24 November 1995. The appellant's attorneys persisted in their attitude and informed the respondent's attorneys that the appellant did not intend to effect payment of the taxed costs.

Thereafter the respondent applied for and was granted default judgment in terms of Rule 31(5) and caused a writ of execution to be issued. The appellant responded by bringing an application to set aside the default judgment and the writ on the ground that the appellant had not been given the notice prescribed by Rule 34 (7) prior to the default judgment being applied for. This particular application was brought to finality when, by consent between the parties, the court restrained the respondent from executing the writ pending the determination of a new application to be brought by the appellant within a specific period. The

appeal flows from this second application.

Not only did the appellant again ask for an order rescinding both the default judgment and the writ of execution, but also for one in the following terms:

> "Declaring that the Respondent's claim for costs arising out of the agreement concluded between the parties on 17 September 1992 became prescribed on 17 September 1995."

McLaren J, by consent, set aside the default judgment and interdicted the respondent from executing the writ. He, however, held that the respondent's right had not become prescribed, and accordingly dismissed the prayer for the declarator. Subsequently, he granted the necessary leave to appeal to this Court.

The learned judge, quite rightly, held that the "right to tax" a bill of costs does not relate to a "debt" within the meaning of the Act. In spite of the attorneys' initial letters, that is really beside the point

because, as the appellant's prayer as quoted shows, the issue is whether the respondent's "claim for costs" has become prescribed. This depends on whether the debt became "due" - within the meaning of that word in s 12(1) of the Act - on the day of the settlement when the appellant's debt to pay the respondent's costs arose. If the answer is in the affirmative, as contended for by the appellant, prescription would have commenced running from that date, and the respondent's right become prescribed before the notice of taxation was served. If not, prescription could, of course, not have started running then. It is common cause that nothing delayed completion of prescription in terms of s 13, or that anything interrupted its running under ss 14 or 15 of the Act. It is further common cause that if prescription did not begin to run on the day of the settlement the appeal has to fail.

Section 12(1) provides that "prescription shall commence

running as soon as the debt is due." Dealing with the interpretation of the phrase "debt due", the learned judge *a quo* referred with approval to a statement by Galgut AJA in *The Master v I L Back & Co Ltd and Others* 1983 (1) SA 986 (A) at 1004G where the following was said in this connection:

> "It seems clear that this means that there must be a *liquidated money obligation* presently claimable by the creditor for which an action could presently be brought against the debtor. Stated another way, the debt must be one in respect of which the debtor is under an obligation to pay immediately ... ." (My emphasis.)

Sight was, it seems, lost of the fact that the words emphasised soon received judicial attention and that they were qualified in *Benson and Another v Walters and Others* 1984 (1) SA 73 (A) at 82D-E in these words:

> "In parenthesis it may be pointed out that, if it was intended to formulate a principle of general application, the words

"liquidated" and "money" were clearly used *per incuriam*, since there is no doubt that prescription runs in regard to unliquidated claims for damages and also claims not sounding in money. It should be borne in mind, however, that in Back's case the relevant obligation was indeed one to pay a liquidated amount of money, and that the only question was whether that amount was 'presently claimable'."

It was said in *List v Jungers* 1979 (3) SA 106 (A) 121C-D that -

"the date on which a debt arises usually coincides with the date on which it becomes due, but that that is not always the case. The difference relates to the coming into existence of the debt on the one hand and the recoverability thereof on the other hand."

And *Cape Town Municipality and Another v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C) at 321, among others, confirms that a debt becomes due in terms of the Act when the creditor acquires a complete cause of action for its recovery; further, that a cause of action is the entire set of

facts which a plaintiff must prove to succeed.

In order to determine the respondent's complete cause of action or entire set of facts which the respondent had to prove for a successful claim under clause (c), one first has to interpret the agreement. The object of the clause, as the court below noted, was to bring about a situation where the respondent's attorney would submit a proposal concerning the taxable amount of her costs (probably in the form of a draft bill of costs, I would think) and that only in the event of an agreement not being concluded between them would the respondent have her bill taxed.

Whether the respondent could have enforced compliance with clause (c) in the absence of an agreement or taxation depends on whether, on the one hand, agreement or taxation simply formed the formal method of liquidating and quantifying the amount of the indebtedness or

whether, on the other, it was an agreed condition for payment or that payment was contingent thereon. Put differently, was agreement or taxation a simple procedural step to or was it of the essence of liability? It seems to me that the answer, perforce, has to be that the parties could not have intended that the respondent could recover her costs without a prior agreement or taxation. Any summons claiming payment of costs not agreed upon or not taxed would have been met by a successful exception. From a different angle: in *Van Vuuren v Boshoff* 1964 (1) SA 395 (T) at 400E, Colman J held that a simple procedural step which the creditor, *without extraneous aid*, can take any time cannot delay the commencement of prescription. Agreement or taxation may, conceivably, be termed simple procedural steps, but both require extraneous aid of third parties over whom the respondent had no control. One can compare the case with one where a person undertakes to pay the amount fixed by an

architect's certificate or by a referee or an arbitrator. Payment, no doubt, can only be "due" once the amount has been so fixed. See also *Rogers, N O, en 'n Ander v Erasmus, N O, en Andere* 1975 (2) SA 59 (T) 71 - 72.

To test this conclusion. If the parties had settled the quantum of costs or if taxation occurred shortly before 17 September 1995, can it be said that the claim would still have become prescribed on that date? I think not.

In order to meet this conclusion, the appellant relied heavily, if not exclusively, upon two principles which he sought to extract from *Uitenhage Municipality v Molloy* 1998 (2) SA 735 (SCA).

The first alleged principle is that there is a difference between a debt that is due and one that is recoverable (*Molloy* at 741B-C) and that the cases that suggest that a debt becomes "due" when the

creditor acquires the right to institute action or has a complete cause of action did not deal with that difference (at 740J-741D). In the present case, said counsel, costs may not have been recoverable without agreement or taxation, but were nevertheless due on 17 September 1992.

This argument is superficially attractive, but fails upon a proper analysis of *Molloy*. The case concerned an employee's claim for overtime pay. Payment for work performed was payable at the end of each month concerned. However, s 30(3) of the Basic Conditions of Employment Act 3 of 1983 contained so-called "conditions" before wages could be "recovered" by way of civil proceedings. These "conditions", it was found, were not prerequisites for the institution of action, but requirements for the obtaining of judgment (at 740E-F). In this setting it was held that the concepts of "recoverable" in Act 3 of 1983 and of "due" in the Prescription Act are different, and that the fulfilment of the

"conditions" was not required before an employee had the right to institute action for recovery of wages. It follows that *Molloy* did not, as submitted, introduce any new principle; it is, in this regard, of no relevance to this case.

The appellant also relied upon the alternative reasoning in *Molloy* (at 741G-B):

> "Assuming in favour of the respondent that his claims against the appellant only became 'due' within the meaning of s 12(1) of the Prescription Act after one of the conditions in s 30(3)(a), (b) or (c) of the [Basic Conditions of] Employment Act is satisfied, can he rely on the fact that they were not so satisfied if he himself took no steps to procure such satisfaction?
>
> In my view, he cannot do so. Section 30(3)(c) of the [Basic Conditions of] Employment Act, for example, is a condition which can easily be satisfied on the initiative of the respondent himself. It requires simply a certificate from the Director-General stating that the respondent has requested that s 27 of the [Basic Conditions of] Employment Act shall not be applied in respect of his claim.
>
> An employee who elects not to apply for a certificate

> in terms of s 30(3)(c), cannot contend that his or her claim [for remuneration] was not 'due' because such a certificate had not been issued. The remedy lies in the employee's own hands. Such an employee cannot profit by his or her own inaction."

Having quoted authorities dealing with the last proposition - a proposition previously examined critically by Lubbe *Die Aanvang van Verjaring waar die Skuldeiser oor die Beskikbaarheid van die Skuld kan beskik* 1988 (51) THRHR 135 - Mahomed CJ concluded (at 742E-743A):

> "It is perfectly true that the fulfilment of the conditions specified in s 30(3)(a) or (b) did not lie within exclusive competence of the respondent - in order to satisfy s 30(3)(a) the Attorney-General had to issue a certificate stating that he had refused to prosecute the employer, and in order to fulfil the conditions set out in s 30(3)(b) the court had to acquit the employer. But in both cases the respondent prevented the possibility of having the relevant condition fulfilled by failing or refusing to make the complaint or to prefer charges, or initiate any other steps which could have led to the prosecution of the appellant.
>
> The rationale in the cases which have held that a creditor cannot 'by his own conduct postpone the

commencement of prescription' by refraining from satisfying the condition which would render a debt due and payable, apply equally where the creditor has failed to take or initiate the steps which fall within his or her power to make it possible for such a condition to be satisfied. Were it otherwise, an employee seeking to pursue an old claim in terms of the [Basic Conditions of] Employment Act, who fears that the claim may be defeated in court by the production of the employer's records, could overcome this difficulty by waiting to pursue that claim civilly until those records had been destroyed in terms of s 20(3) of the [Basic Conditions of] Employment Act.

One of the main purposes of the Prescription Act is to protect a debtor from old claims against which it cannot effectively defend itself because of loss of records or witnesses caused by the lapse of time. If creditors are allowed by their deliberate or negligent acts to delay the pursuit of their claims without incurring the consequences of prescription, that purpose would be subverted."

In *The Master v I L Back & Co Ltd and Others supra* at 1005H, Galgut AJA referred to *Mostert v Mostert* 1913 TPD 255 at 259 for the proposition that 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". The words quoted were used in *Mostert v Mostert*, but must, as usual, be read in context. The argument in that case was that the right of action only arose upon demand and that, therefore, prescription could not have began to run prior to a demand. It was in this context that it was said that a failure to demand cannot "postpone" the right of action. *Lamprecht v Lyttleton Township (Pty) Ltd* 1948 (4) SA 526 (T) explains the principle. The plaintiff claimed transfer of two immovable properties sold to him in terms of two deeds of sale against tender of the unpaid balance of the purchase prices. The contracts were concluded in 1929 and the purchase prices were payable in monthly instalments, the last of which were payable in 1932 and 1936, respectively. The defendant filed a special plea, claiming the prescription of the plaintiff's claim in terms of Act 26 of 1908 (Transvaal) read with the Prescription Act 18 of 1943, on the ground that no acts had been performed by either party since 1934. In

an exception to the special plea as disclosing no defence, the plaintiff contended that his right of action had first accrued when he first tendered the balance of the purchase prices in 1947, as this was the first occasion on which he could have demanded transfer of the properties from the defendant. The exception was dismissed, and Murray J dealt with the flaw in the argument in these words (at 530):

> "In my mind the flaw in the excipient's present argument is that the tender, or payment, of the purchase price is a condition precedent not to the accrual of the purchaser's right of action under the deed of sale but at most merely to the purchaser's right to demand performance of the seller's obligations under that deed. On the conclusion of a binding contract of sale, reciprocal rights and obligations are immediately created - the seller is obliged to transfer or deliver the *res*, the purchaser to pay the price. Neither can, however, actually enforce his right unless he is prepared, simultaneously with the other's discharge of obligation, to perform his own peculiar obligation. Where no time has been specified for the performance of either of these reciprocal obligations, the position is I think clear: extinctive prescription commences to run from the date of conclusion

> of the contract although each party, if desirous of enforcing the contract, must demand performance of such other's obligation, and at the same time tender to perform his own."

Reverting to Galgut AJA's judgment, it concerned the question whether the Master's claim for a levy had become prescribed. The Master had in his possession everything required to calculate the levy - it involved a simple unilateral calculation. In disposing of the Master's submission that the claim for payment of the levy had not become due prior to the making of the calculation, this Court (at 1005F) found that -

> "(t)he amount so calculated is not a fact proof of which was necessary to complete the cause of action. The calculation was merely to prove the *quantum* of the fee. The Court *a quo* correctly found (see at 780 of the reported judgment) that this was a procedural matter relating not to the creation of the cause of action but only to its proof."

Against that background reference was made to the extract from *Mostert v Mostert*.

Both Mahomed CJ and Galgut AJA referred to *Benson and Another v Walters and Others* 1981 (4) SA 42 (C), a decision of Van den Heever J. There (at 49) the learned Judge considered whether, where the day on which a debt becomes due may be unilaterally determined by the creditor, the debt is deemed to be due on the earliest day which the creditor may determine. She answered the question in the affirmative.

If the alternative reasoning in *Molloy* is read against this backdrop and if regard is had to the fact that *Molloy* does not purport to lay down any new principles, it seems to me to be clear that the "conditions" referred to in the judgment are formal requirements essentially within the control of the creditor, and nothing more. Whether a condition is of that sort depends upon an interpretation of the relevant agreement or statute. So read, the judgment fits neatly into an existing legal niche. I have already found that the envisaged agreement

quantifying costs or taxation was not a simple formal requirement under the control of the respondent. The counter argument is that litigants are daily awarded costs, either by way of an order of court or by agreement, and they cannot enjoy an unlimited period to quantify and recover their costs. An untenable situation could arise; for example, the other party would be kept in suspense indefinitely. McLaren J, conscious of the problem, was "quite satisfied that it was a tacit term of the agreement of settlement that the costs were not payable forthwith", and that "it probably was a tacit term of the agreement that failing an agreement regarding the *quantum* of the plaintiff's costs being concluded within a reasonable time, the respondent would submit a bill of costs for taxation within a reasonable time." The implication of this reasoning is that prescription did not commence running upon the acceptance of the offer on 17 September 1992, but some time after the lapse of two periods

of "reasonable time". He deduced the tacit term from the fact that a third party, the taxing master, was involved in the quantification and that the process of taxation inherently takes up considerable time.

I have some reservations about the tacit term and its formulation, but whether such a term ought to be inferred or not is not an issue before us. The appellant's case was that prescription began to run on the date of the conclusion of the contract. No reliance was placed upon any alternative. Since it is for a party invoking prescription to allege and prove the date of the inception of the period of prescription (see *Gericke v Sack* 1978 (1) SA 821 (A) 827H-828A), that is the end of the case.

In the result the appeal is dismissed with costs, including the costs of two counsel.

L T C HARMS
JUDGE OF APPEAL

VAN HEERDEN DCJ)
PLEWMAN JA) Concur
FARLAM AJA)
NGOEPE AJA)