IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 4623/2012

In the matter between:

ANNALIZE RAUTENBACH N.O. Applicant

and

CMW OPERATIONS (EDMS) BPK Respondent

CORAM: RAMPAI, AJP

JUDGMENT BY: RAMPAI, AJP

HEARD ON: 11 NOVEMBER 2014

DELIVERED ON: 19 FEBRUARY 2015

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[1] These were subsidiary motion proceedings. The plaintiff, an executrix of the deceased estate, sues the defendant for damages in the main action proceedings. Her cause of action is the defendant's alleged failure to fulfil a legal duty. The heart of her case is the assertion that the defendant neglected to ensure that appropriate life insurance policy was taken out to cover the entire

indebtedness of her husband to the defendant in the event of his death. The action is defended.

[2] Simultaneous with its plea, the defendant also filed a special plea to the plaintiff's claim. The defendant asserted that the plaintiff's claim has been extinguished by prescription in that a period longer than 3 years had elapsed from the date on which the debt of the plaintiff fell due to the date on which summons of the plaintiff was served on the defendant.

[3] On 2 October 2014 Jordaan J made an order in terms of rule 33(4) that the dispute as regards the defendant's special plea of prescription and the plaintiff's replication thereto, be adjudicated first and that the rest of the issues be deferred for later adjudication. The order was made by agreement between the parties following a formal application for separation brought at the defendant's instance.

[4] The subsidiary matter subsequently came before me in accordance with the aforesaid separation order. I heard oral evidence. The version of the defendant was narrated by two witnesses, namely Mr Horn and Mr Futter. The version of the plaintiff was narrated by Mr Becker and Ms Rautenbach, the plaintiff or executrix.

[5] There were material facts which were common cause between the parties. The plaintiff's husband, Mr Abraham Petrus Cornelius Rautenbach, was a farmer in the district of Memel. His farm was known as Petrusvlei farm. He and the defendant concluded a written agreement at Memel on 24 July 2008. In terms of the agreement the defendant lent and advanced money to the plaintiff to facilitate his farming operations. The agreement was attached to the particulars of claim as "Annexure A".

[6] The farmer, in other words Mr A P C Rautenbach, was obliged to take out life insurance policy on his life for the full duration of the agreement. The defendant proposed that such insurance policy be purchased from an insurance entity called Capital Alliance Risk Group – see clause 11 "Annexure A".

[7] Apart from the written agreement, Mr Rautenbach also signed two further documents, *viz* form 22 and form 24. By virtue of those documents, which were attached to the main agreement, Mr Rautenbach authorised the defendant in terms of section 106(5) National Credit Act of 2005 to obtain the proposed life insurance policies on his behalf; accepted that he would be responsible to

pay a monthly premium of R700 in order to service such life insurance policy; authorised the defendant to pay the premium monthly to Capital Alliance Risk Group on his behalf; further authorized the defendant to debit his accounts with the defendant every month and nominated the defendant as the beneficiary of the life insurance policy entitled to retrieve the full settlement amount from the aforesaid life insurer.

[8] These material facts were averred in paragraphs 3 – 6 of the plaintiff's particulars of claim. They were admitted by the defendant in paragraphs 1 and 19 of the defendant's plea.

[9] The plaintiff's husband died on 13 July 2009, approximately 12 months after the conclusion of his agreement. Since the conclusion of the agreement until the date of his death, the plaintiff's husband regularly paid the premium to the defendant in order to cover his entire indebtedness to the defendant in the event of his death. However, the defendant failed to pay such premiums over to the insurer, Capital Alliance Risk Group. In fact the defendant continued to debit the account of the plaintiff's husband for some months after his death. About three weeks or so after his death, on 7 August 2009 to be

precise, the Master of the High Court appointed the plaintiff as the executrix of estate late A P C Rautenbach. On 11 August 2009 she assigned her powers to Mr P A Becker of Noble Trust as her agent to administer the deceased's estate on her behalf.

[10] Ms A E Rautenbach, the deceased's mother, had bound herself as surety in favour of the defendant for the payment of her son's debt due to the defendant. To that effect she registered a mortgage bond against her property, portion 3 of Erf 260 Memel, one-third undivided share in the remainder thereof in favour of the defendant as security for the repayment of her son's debt.

[11] On 21August 2009 a firm of attorneys, Theron & Neethling, enquired, on behalf of the surety, about the deceased's debt from the defendant, Cape Mohair Wool Operations (Pty) Ltd. The lawyer enquired about the outstanding balance of the debt owing by the deceased farmer to the defendant and whether the deceased had a life insurance cover in respect of such debt – see p.50 Bundle.

[12] On 27 August 2009 Mr Roger Futter, the defendant's attorney, answered the enquiry by

Theron & Neethling. He advised that the outstanding balance of the deceased's debt as on 25 August 2009 was R755 726,82; that on that day the defendant received an amount of R300 000 from Capital Alliance Risk Group; that such receipt reduced the outstanding balance to R455 726,82 and that the defendant would cancel the mortgage bond once the surety had settled the outstanding balance – see p.52 bundle, email from the defendant's attorney to the surety's attorney.

[13] On 28 March 2009 there was a telephonic conversation between Mr Becker and Mr Futter.

[14] By 1 September 2009 the defendant's representative, Mr Horn, already knew that the defendant had not complied with its obligation to take a full life cover policy on the plaintiff's husband but failed to advise Mr Becker accordingly.

[15] On 10 August 2011 Mr Becker prepared the liquidation and distribution account in the deceased estate of the late Abraham Petrus Cornelius Rautenbach. Item number 44 thereof had a bearing on an entity described as CMW. It was an undisputed fact that the abbreviation CMW was an acronym for Cape Mohair Wool, in other

words the defendant. The defendant was, according to the account drawn by the agent of the executrix listed as one of the 28 creditors of the deceased estate – see p. 39 bundle. The account was signed at Kimberley on 10 August 2011 by Mr P A Becker who certified at the foot of the relevant page that according to his knowledge the account was a true and accurate account of his administration and distribution of the deceased's estate – see p.42 bundle.

[16] The plaintiff's agent obtained a copy of the insurance policy contract during or about October 2010 or November 2010. He became aware of the precise terms and conditions thereof in general and the evidence of the so-called free cover limit.

[17] The dispute between the parties revolved around the date on which prescription commenced to run against the plaintiff's claim. On behalf of the defendant it was contended that the crucial date was 24 July 2008. The defendant argued that the debt fell due on that particular date, being the date on which the plaintiff's late husband and the defendant contracted and that the summons served on 16 November 2012 was belated since the 3 year prescriptive period had lapsed on 23

February 2011 – see paragraph 2 “hoofaksie” pleadings.

[18] The question in the case was whether the claim had prescribed on 16 November 2012 or not.

[19] Mr De Bruin, on behalf of the defendant, submitted that at best for the plaintiff the summons was supposed to have been served within 3 years from 27 August 2009. Since it was not done by the last ate of that period being 26 May 2012, the debt had prescribed. Accordingly counsel urged me to dismiss the plaintiff’s claim with costs.

[20] However, Mr Swanepoel disagreed. He contended that the defendant failed to establish that the plaintiff was deemed to have had imputed knowledge of the negligence on 27 August 2009. Counsel submitted that the plaintiff’s summons was served well within a period of 3 years from the time she gained knowledge of the material breach of the defendant’s mandate. Accordingly, counsel urged me to dismiss the defendant’s special defence of prescription raised as a point *in limine.*

[21] It is settled law that the *onus* rested on the defendant to prove both the date of prescription

and the date of completion of the period of prescription. **Gericke v Sack** 1978 (2) ALL SA 111 (A) of 116.

[22] In terms of sec 10(1) read with sec 11(d) Prescription Act 68/1969 the applicable prescription period in the instant matter is three years.

[23] Section 11(d) Provides:

> "(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt."

[24] Sec 10(1) provides:

> "(1) Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt."

[25] Sec 12(1) provides that prescription commences to run as soon as the debt is due unless subsection 3 of section 12 is applicable. Now section 12(3) provides:

> "(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."

[26] When did prescription commence to run in the instant matter? Put differently: when did the debt become due? The plaintiff answered that on or before the conclusion of the contract on 24 July 2008, the defendant was appointed as an agent of the plaintiff's husband with a specific mandate and that the defendant breached the mandate there and then. In this instance it was immaterial whether the plaintiff's cause of action was contractually or delictually grounded. I have to point out that nowhere in the particulars of claim was any negligence attributed to the defendant. There can be no doubt that it was given and breached at the very latest on 24 July2008.

[27] The legal position as to when in such circumstances a debt, in other words a claim for compensation, became due was comprehensively discussed by Basson J in **Harker v Fussel & Another** 2002 (1) SA 170 (T). Seeing that the reasoning and application of the existing principles in that case were clear, that decision was subsequently followed in **Primavera Construction SA v Government, NWP & Another** 2003 (3) SA 579 (B) 602 and **Burley Appliances**

Ltd v Grobbelaar N.O. & Others 2004 (1) SA 602 (K) 610.

[28] In **Harker's** decision, *supra,* Basson J referred to decided cases such as **Electricity Supply Commission v Stewarts & Lloyds of SA (Pty) Ltd.** 1979 (4) SA 905 (W), **Erins v Shield Insurance Co. Ltd.** 1980 (2) SA 814 (A) and **Hawkins v Olympic Pads (Pty) Ltd.** 1979 (3) SA 224 (T).

On p174 Basson J concluded after review of the aforesaid cases:

> "The correct view appears to be that such breach or wrongful act (which in casu occurred at the latest on 12 August 1991 - supra) gives rise to a single cause of action and that the period of prescription begins to run from the date of the breach, whether or not the damages have become apparent."

I am in respectful agreement. That provided an answer to the question as to when prescription commenced to run. See sec 12(1). The crucial date was 27 July 2008, being the date of the contractual breach (**Harker's** decision, *supra*). The 3 year period from that date of inception expired on 26 July 2011.

[29] The email of 27 August 2009 was significant. From the email it appeared that Mr Pierre Horn, the defendant's representative, had a discussion with Mr Becker, the plaintiff's agent, on 26 August 2009, a day before the email. The email from the defendant's attorney, Mr Roger Futter to Mr Becker was crafted as follows:

> "The outstanding balance excluding further interest claimed from 27 August 2009, due to CMW is R455 726,82 which amount is calculated as follows: R755 626,82 less R300 000,00 equals R455 726,82.
>
> The R300 000,00 was received from Capital Alliance Group Risk and paid to CMW on 25 August 2009. A copy of the proof of payment is transmitted herewith for your perusal and records.
>
> As security for his credit facility with my client, Mr Rautenbach's Mom, Mrs AE Rautenbach, registered a surety mortgage bond in favour of CMW. Theron & Netthling Attorneys represent Mrs AE Eautenbach and have made enquiries concerning the cancellation of the bond. My instructions are that CMW will only cancel the bond upon payment in full. Please advise whether you are in any position to give us an indication at this stage whether the deceased estate will be able to pay my client?
>
> Please acknowledge receipt and should you wish to discuss any aspect hereof do not hesitate to contact me. I look forward to receipt of your reply."

[30] The aforegoing email, item 8, was substantially the same as item 9, an email to Mrs N E Rautenbach's attorneys. A copy of proof of payment in the amount of R300 000 received from Capital Alliance Risk Group was annexed to each of the two mails. Both emails were sent on 27 August 2009. In the email marked item 9, Mr Futter informed the surety's attorneys that the defendant required payment of the outstanding balance in order to cancel the bond against the surety's property.

[31] In the mail marked item 8, Mr Futter further enquired from the plaintiff's agent whether the deceased's estate would be able to pay the outstanding balance due to the defendant. He concluded the email by inviting Mr Becker to contact him should he wish to discuss any aspect of his client's claim.

[32] Pursuant to that email, Mr Futter and Mr Becker had a telephonic discussion about the matter the very next day on 28 August 2009. Mr Futter wrote a note of that conversation – see "exhibit a".

[33] In these circumstances, Mr De Bruin submitted that the summons should have been issued and served, at the very latest, within three years from

27 August 2009. Since it was never done, the debt claimed prescribed.

[34] Mr Swanepoel disagreed with the submission. Counsel contended that the inception date of prescription could not have been 27 August 2009. He submitted that, as on that day, the plaintiff did not have knowledge of the basic facts on which the debt owing by defendant to the deceased's estate was based. He stressed that the plaintiff's replication to the defendant's special plea was based on the provisions of sec 12(3).

[35] The section provides that until the creditor has knowledge of the identity... of the debtor and the facts on which the debt arises, such debt shall not be deemed to be due. The practical effect of the section is that it postpones the inception of prescription until a future date on which the executrix, in other words the claimant, becomes aware of the material facts which gave rise to the claim. The section does not postpone the inception of prescription nor suspends its running until a creditor has gained knowledge of all her rights.

[36] On 27 August 2009 Mr Becker received an email, item 8 bundle, from Mr Futter. Attached to the

email was written proof of payment. The attachment described as proof of payment was an email dated 25 August 2009 from one Brony .... to one Nigel. The subject was confirmation of electronic fund transfer from Capital Alliance Risk Group.

The email reads:

> "Dear client,
> Scheme name: Cape Mohair Wool Credit Life Scheme (RT665)
> Member's name: Rautenbach Petrus (2)
> We hereby wish to advise that Capital Alliance Group risk has paid the Death benefit for the above mentioned member in favour of the payee mentioned below:
> **Payee Details:**
> In accordance with instruction received by Capital Alliance Group Risk, the amount mentioned below was paid as follows:
> **Payee**: Cape Mohair & Wool
> **Banking Institution:** Rirstrand Bank Limited
> **Branch code:** 261050
> **Account number:** [……]
> **Account type:** CURRENT/CHEQUE
> **Transmission date:** 20090825
> **Amount:** 300000.00
> **Less Tax:** .00
> **Net Amount Paid:** 300000.00
> **Claim Type:** Death
> **Reference Number:** 881410."

[37] It appeared *ex facie* item 8 that the email was triggered off by the telephonic conversation of the previous day, 26 August 2009, between Mr Horn, the defendant's representative, and Mr Becker, the plaintiff's agent. Mr Becker initiated the communication process between the parties. He did so because the plaintiff had informed him that her husband had an insurance cover in respect of the defendant's claim. When he received the email he gained the following constructive knowledge: that the plaintiff's husband was indeed a member of Cape Mohair Wool Credit Life Scheme; that the insurance life policy contract was issued by Capital Alliance Risk Group; that the deceased estate of the plaintiff's husband was indebted to the defendant in the sum of ± R755 226,82 as on 6 August 2009; that the insurer did not settle the defendant's claim in full; that the payment of death benefit in the amount of R300 000 still left the outstanding balance of R455 726,82 and that the defendant demanded payment of such balance from the executrix.

[38] According to the evidence, the plaintiff was not satisfied with the amount of death benefit paid. She knew that her husband was supposed to have insurance life cover for an unlimited amount in

respect of the defendant's claim. She also knew that the monthly premiums were regularly paid and that there were no arrears at all. The only problem was that she did not have the policy contract.

[39] The evidence indicated that the plaintiff, her mother-in-law as well as Mr Horn had expected that the insurer would pay off the defendant's claim in full. When that was not done, the questions were asked. The trail of emails between Mr Horn and Mr Alberts on p.53 bundle demonstrated the point.

> "Hello Briony
> I see that an amount of R300 000.00 was paid as a death benefit. Our monthly contribution was over R750,00 p.m. as the total loan was more or less R750 000.00.
> Are there any explanation (sic) regarding the full outstanding amount not been paid?
> Your urgent attention will be appreciated.
> Thank you
> P. Horn"

[40] It can, therefore, be noted that following the initial discussion he had on 26 August 2009 with Mr Becker, Mr Horn wasted no time enquiring about the insurer's reasons for the shortfall. His first email to Capital Alliance Risk Group was dated 30

August 2009. A day later he received a copy of the insurance policy contract as well as the so-called rate review letter. The abbreviation "FCL" in the emails from the insurer was an acronym for "Free Cover Limit."

[41] Mr Swanepoel's argument was that before it could be found that Mr Becker became aware of the existence of the plaintiff's claim against the defendant, it must first be shown that as on 27 August 2009 Mr Becker would have known:

41.1 That payment of only R300 000 as opposed to the entire outstanding amount had not been an error on the part of the insurer and that the insurer did not intend to make any further payment;

41.2 That the only reason as to why the insurer did not pay the full death benefit to the defendant was that the defendant had breached its obligations by failing to arrange a full insurance cover.

41.3 That a "free cover limit" was an available option which Mr A P C Rautenbach could have taken in order to have a complete cover for his entire indebtedness to the defendant.

41.4 That the defendant, as the appointed agent of Mr A P C Rautenbach, failed to advise him accordingly.

[42] It is probably correct to argue that Mr Becker did not have such knowledge as on 27 August 2009 notwithstanding the information contained in Mr Futter's email. However, it is certainly incorrect to contend, as counsel for the plaintiff did, that "the aforesaid email simply records that an amount of R300 000 was credited to the account of Rautenbach and that R455 726,82 was still owing to defendant." The email contained more than that. I have earlier outlined informative aspects of the email. I deem it unnecessary to repeat them here.

[43] The bone of contention between the parties was what knowledge the plaintiff had on 27 August 2009. Mr Futter testified that on 28 August 2009 Mr Becker telephonically informed him on behalf of the executrix that he repudiated the claim of his client, CMW, for the payment of the outstanding balance; that CMW had failed to arrange full insurance cover in other words Rautenbach's entire indebtedness and that CMW had therefore acted negligently.

[44] Mr Becker testified that he had no recollection of the conversation. However, he added that he would, at best for the defendant, have said that because the defendant had arranged the life insurance cover and that because he had collected premiums from the plaintiff's husband as if the entire amount of the indebtedness was covered – the defendant should consequently resolve the matter. He nevertheless persisted that he did not know at that stage that the defendant had been negligent. He maintained that he only became aware of the defendant's negligence during October 2010 if not November 2010 when he obtained a copy of the policy document from Liberty Life.

[45] I find his alleged awareness of the negligence irreconcilable with his evidence of what he would have told Mr Futter on 28 August 2009. It follows as a matter of logic, he could only have blamed the defendant and repudiated its claim on the ground of its negligence and called upon the defendant to resolve the matter if he already had prior knowledge of the basic facts as outlined in paragraph 48 *supra.*

[46] It is true that on 27 August 2009 not even Mr Horn knew the reason why the insurance did not pay the

death benefit equal to the entire amount of the debt due to the defendant. Indeed he only enquired about the discrepancy on 31 August 2009 and received a copy of the policy on 1 September 2009. Within one day after his request he was able to obtain a copy of the policy from which he readily ascertained why the insurer did not settle the claim in full. Before then, he too, was expecting payment of the full amount of the debt.

[47] I accept that as far back as 1 September 2009 Mr Horn knew that the defendant did not comply with its contractual obligations and that the defendant's representative failed to advise the plaintiff or her agent accordingly. The defendant was, for obvious reasons, reluctant to acknowledge to the plaintiff that it, as an agent of A P C Rautenbach, was to blame for the shortfall. It is not surprising that Mr Horn and Futter were uncooperative. The plaintiff's agent folded his arms. Because the defendant had breached its contractual obligations, he reckoned that "...defendant should consequently resolve the matter."

[48] It is apparent that the widow knew before her husband died that the debt in favour of the defendant was fully insured; that the defendant had collected premiums for the insurance cover

equal to the balance outstanding at the time of death and that the insurer received premiums concerning such full life cover. The evidence showed that her knowledge as reflected in the first two paragraphs was correct. These were material facts which Mr Becker also knew before his first telephonic conversation with Mr Horn on 26 August 2009 and before his first telephonic conversation with Mr Futter on 28 August 2009. The evidence also showed that, contrary to paragraph 3 of Mr Becker's letter, the insurer did not receive the full amount of premiums for a full life cover.

[49] Mr Becker knew, within six weeks after the death of the plaintiff's husband, about the identities of two corporate persons, namely Cape Mohair Wool trading as CMW Operations (Edms) Bpk and Capital Alliance Risk Group – email 27 August 2009. Upon receipt of that email one would have expected an uninformed recipient to have taken the matter up with the insurer as well in order to ascertain the facts, find out what went wrong and identify an entity which was to blame for the shortfall.

[50] I have painstakingly perused the joint trial bundle, but I could find no letter or email from Mr Becker

(or Noble Trust) to Capital Alliance Risk Group in connection with the matter. If such an email or letter exists, then it was not discovered. The importance of the omission is twofold: firstly it suggests that the plaintiff knew all along that the defendant and not the insurer was to blame for the shortfall. Secondly, it suggests that Mr Becker did not immediately, properly and independently investigate the matter. Seemingly he expected the defendant to investigate itself on behalf of the deceased estate.

[51] Indeed it was undisputed that Mr Becker had knowledge of the exact terms and conditions of the policy contract or group insurance scheme between the defendant and the insurer. According to him he received a copy thereof during October or November 2010, approximately some 14 or 15 months after he had received Mr Futter's email of 27 August 2009. The gentleman took his time to get things done. The summons was issued on 12 November 2012, almost two years after Mr Becker or the plaintiff had received a copy of the group insurance scheme. It will be recalled that Mr Horn took immediate, meaningful and practical steps and obtained such a document within one day after his request.

[52] It was undisputed that Mr Horn knew as early as 1 September 2009 that the defendant had not complied with the contractual obligations towards the plaintiff's husband; that he also failed to advise Mr Becker accordingly, was an undeniable fact. Obviously his loyalty to his employer was greater than his loyalty to his employer's customer. It is in the nature of things for people to behave in that way. He suppressed vital information which was detrimental to the interest of his employer. Mr Becker was naïve to expect Mr Horn to act differently. It was unrealistic to expect Mr Horn to benevolently give such information to the plaintiff at the expense of the defendant. He withheld the information because he did not want to bite the hand that feeds him.

[53] The same can be said about Mr Futter. He would have acted unethically had he divulged, without the consent of his client, information that could potentially harm the interests of his client. It appears that Mr Becker expected too much from the two gentlemen but received very little. I accept the submission that the inescapable conclusion was that the defendant's two witnesses were fully aware that the defendant had failed the plaintiff's husband but kept that knowledge to

themselves. I am of the view that they were not obliged to share such knowledge with the plaintiff.

[54] These proceedings were not concerned with acts of omission committed by the defendant. The focus of these proceedings concerned acts of omission attributed to the plaintiff. It is my considered view that the plaintiff, via her agent, could have acquired knowledge of the identity of the debtor as well as knowledge of the material facts from which the debt, in other words her claim against the defendant, arises, by the exercise of reasonable care – sec 12(3). The plaintiff failed to do so. There was no sound explanation proffered as to why the plaintiff could not do likewise. What is apparent from the undisputed evidence is that the plaintiff did not investigate the matter to ascertain the material facts as envisaged in the section. She expected her adversay to do so on her behalf.

[55] In my view the plaintiff was appraised of the basic facts on 27 August 2009. The defendant was not obliged to appraise the plaintiff of all aspects of her claim – **Nedcor Bank Bpk v Regering,** *supra.* The plaintiff was not required to become aware of all her rights before she could take appropriate steps against the defendant.

[56] The testimony of Mr Becker was that he became aware of the terms of the policy during October or November 2010, some thirteen months, at least, since Mr Horn had become aware of such terms. On his own version, Mr Becker was uncertain as to precisely when he received a copy of the policy document from Liberty Life. The plaintiff discovered no relevant correspondence between Mr Becker's Noble Trust and Liberty Life.

[57] In **Macleod v Kweyiya** 2013 (6) SA 1 (SCA) at 6 the court held:

> "The test is what a reasonable person in his position would have done, meaning that there is an expectation to act reasonably and with the diligence of a reasonable person."

I am in respectful agreement. In this instance, the plaintiff's agent did not act diligently as a reasonable person in his position would have acted given the peculiar circumstances of this particular case. On the facts, I could find no reasonable explanation as to why, at the very latest, the agent could not have gained knowledge of all material facts, say by 1 November 2009, some two long months after the defendant's representative had gained such knowledge.

[58] The fact that the plaintiff's summons was issued on 12 November 2012, almost two years after the plaintiff had, via her agent, allegedly gained constructive knowledge of the material facts, demonstrates the plaintiff did not act with diligence to institute the current legal proceedings. In my view the plaintiff's attendant failure to act with the diligence of a reasonable person constituted negligence and not just innocent inaction as she contended.

[59] Consequently I have come to the conclusion that the defendant has discharged the *onus* of proving both the date of inception and the date of completion of the period of prescription – **Gericke** *supra*. Those important dates were 27 August 2009 and 26 August 2012 strictly speaking since the defendant was able to ascertain not only the basic but rather the facts on 1 September 2009, just 4 days after 27 August 2009, it is not unrealistic to say a reasonably diligent litigant in the shoes of the plaintiff would independently have done likewise within a period of 60 days at most after receipt of Mr Futter's email at 27 August 2009. However, even such generous construction of the evidence, does not redeem the plaintiff.

[60] I am persuaded, on the facts, that the point raised *in limine* was well taken.

[61] Accordingly, I make the following order:

61.1 The defendant's special plea of prescription is upheld.

61.2 The plaintiff pays the costs.

_____
M. H. RAMPAI, J

On behalf of the plaintiff:	Adv. J. J. C. Swanepoel Instructed by: Azar & Havenga Inc BLOEMFONTEIN
On behalf of the defendant:	Adv. H. de Bruin SC Instructed by: Symington & de Kok BLOEMFONTEIN