CASE NO. 2291/2007

IN THE HIGH COURT OF SOUTH AFRICA
DURBAN AND COAST LOCAL DIVISION

In the matter between

UMESH RAMDIN	Plaintiff
and	
NIJANDRAN PILLAY	First Defendant
RAMIAH NARAIN	Second Defendant
NORMANATHAN MURUGAS GOVENDER	Third Defendant

Delivered :
28 November 2007

J U D G M E N T

LEVINSOHN DJP :

[1] On 2nd March 2007 the plaintiff instituted an action against three defendants, the erstwhile partners in a firm of attorneys practising in Durban, claiming payment of an amount of R590 000-00 together with interest and costs.

[2] The particulars of claim alleged that the plaintiff had over a period of time commencing on 3rd February 1997 to 25 August 2000 paid various

amounts totalling R940 000-00 into the trust account operated by the said firm of attorneys.

[3] It was alleged : -

> "The funds were paid into the Defendants' trust account for the specific purpose of investment on behalf of the Plaintiff on the specific instructions of the Plaintiff"

[4] Properly construed it seems to me that what was intended was that the plaintiff conferred a mandate on the attorneys to make investments on his instructions and that the monies in the trust account were earmarked for that purpose.

[5] The plaintiff alleged that in April 2002 he demanded repayment and notwithstanding undertakings received the monies were not repaid. However, a portion thereof, namely R350 000-00 plus an amount of R15 927,40 in respect of interest, was recovered from the Attorneys' Fidelity Fund. Accordingly the plaintiff claimed the balance, namely R590 000-00, from the defendant.

[6] The action is defended by the first defendant who has pleaded that the action instituted against him has become prescribed.

[7] The action was set down for trial on the expedited roll. At the commencement of the hearing counsel informed me that I would be required only to determine the issue of prescription on the basis of facts which had been agreed in a stated case which was placed before me. It is convenient to quote that in full.

"1. The parties to this action are as set out in paragraphs 1, 2, 3 and 4 of the plaintiff's particulars of Claim;

2. At all material times the First, Second and third Defendants were Attorneys and partners, practicing as partners under the name and style of **NORMAN GOVENDER PILLAY & MARAIN**;

3. During the period June 19997 to August 2000 the Plaintiff entrusted to the Defendants the sum of R940 000,00 (Nine Hundred and Forty Thousand Rands), which deposits were made on the dates and in the amounts set out more fully in Annexures "A1" to A9" hereto;

4. At all material times the Plaintiff was the lawful owner of the funs/monies entrusted to the Defendants;

5. The aforementioned funds/monies entrusted to the Defendants were paid into the Defendants' Trust Account for the purposes of investment at the Plaintiff's instruction;

6. During or about April 2002, the Plaintiff demanded return/repayment of the aforementioned funds/monies from the Defendants;

7. The Plaintiff received a written 'Letter of Undertaking',

a copy of which is annexed hereto marked “B”, from the Defendants in which the Defendants undertook to pay the sum of R450 000,00 (Four Hundred and Fifty Thousand Rands) on or before the 16th April 2002;

8. On or before the 15th March 2006 the Plaintiff received payment of the sum of R350 000,00 (Three Hundred and Fifty Thousand Rands) from the Fidelity Fund in terms of Section 47(1)(g) of the Attorneys Act, No 53 of 1979;

9. The Plaintiff received a further payment of R15 927,40 (Fifteen thousand Nine Hundred and Twenty Seven Rands Forty Cents), as interest.

10. To date the Defendants have failed and/or refused and/or neglected to pay the Plaintiff the aforementioned sum of R940 000,00 (Nine Hundred and Forty Thousand Rands) and/or the balance of R590 000,00 (Five Hundred and Ninety Thousand Rands) or any part thereof.

11. Summons was issued on or about the 7th March 2007 and served on the Defendants on or about the 12th March 2007.

12. The Honourable Court will only be asked to determine the issue of prescription, viz. whether or not the Plaintiff’s claim against the Defendants has prescribed under the relevant provisions of the Prescription Act, No 68 of 1969.”

[8] It will be seen that most of the facts alleged in the particulars of claim accord with those recorded in the stated case. The only additional piece of evidence relates to the letter of undertaking addressed by the first defendant to the plaintiff. In addition there is what appears to be a conclusion of law alleged in paragraph 4.

[9] According to the defendant the debt which is the subject matter of this action became due during 2002 when demand was made therefor. The plaintiff's failure to serve summons on him within three years resulted in the debt becoming prescribed. As indicated above summons was in fact served during March 2007.

[10] Mr *Stewart*, who appears on behalf of the plaintiff, contended however that the monies paid into the attorneys' trust account could, in his words, never prescribe. It was not a debt due within the meaning of the Prescription Act, No 68 of 1969.

[11] What is a "debt" for purposes of the Prescription Act? The concept is neatly summarized in **The Law of South Africa** (First Reissue), Volume 21 at paragraph 142 : -

> "**142 The commencement of extinctive prescription**
>
> Extinctive prescription commences to run as soon as the debt is due. In the absence of a definition of the term 'debt', the courts have held that it must be given a wide and general meaning. So, for the

purposes of section 12(1) of the Prescription Act of 1969, the word 'debt' includes any liability arising from and being due (*debitum*) or owing under a contract, but obviously includes delictual debts. Consequently, in its broadest sense, the idea of a 'debt' in relation to the Act refers to an obligation to do something, whether by payment or by the delivery of goods and services, or not to do something. The concept of a debt therefore has a proprietary character.

There is a vital difference between the coming into existence of a debt and the recoverability thereof. There can be little doubt that the purpose of the legislature in enacting section 12(1) was to crystallize that difference. Prescription begins to run, not necessarily when the debt arises, but only when it becomes due. In *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty)Ltd* the court held that, for prescription to commence running, there has to be a debt immediately claimable by the creditor; in other words there has to be debt in respect of which the debtor is under an obligation to perform immediately."

See also ***Evins v Shield Insurance Company Ltd*** 1979(3) SA 1136 (W) at 1141 F – G;

and ***Oertel v Dirketuer van Plaaslike Bestuur*** 1983 (1) SA 354 (A) at 370 B.

[12] Counsel for the plaintiff in his heads of

argument submitted that when the defendants received the monies they were in the nature of stakeholders and did not acquire any rights in the funds. Counsel argues that the result of this is that the claim is incapable of prescribing.

[13] It is convenient at the outset to deal with the legal concept of a "stakeholder".

[14] In his heads of argument counsel referred to several cases which discuss the issue of stakeholding. These include ***Verbeek v Maher*** 1978 (1) SA 61 (N); ***Sadie v Currie's City (Pty) Ltd and Other*** 1979 (1) SA 363 (T); ***Probert v Baker*** 1983 (3) SA 449 (D). In my view the most recent and definitive statement of the law on the issue appears in ***Baker v Probert*** 1985 (3) 429 AD where Botha JA said at page 44 : -

"The concept of a stakeholder is best known in our law in the context of a person who holds a *res litigiosa* pending the outcome of litigation between two rival claimants (see eg *Voet* 16.3.12 - 15;

Corrans v Transvaal Government and Coull's Trustee 1909 TS 605 at 621 - 2, 631 - 2; and *Kelly v Lombard* 1927 AD 182 at 187 - 8). It is known also in the context of a person who holds money which is the subject of a wager, to be paid over to the party who turns out to be the winner of the bet (see eg *Voet* 11.5.9; *Sloman v Berkovitz* (1891) 12 NLR 216 and *Clarke v Bruning* 1905 TS 295). In both instances it is of the essence of the stakeholding that at its inception it is uncertain which of the two parties involved will ultimately become entitled to receive what the stakeholder is holding. **The identity of the creditor will only be established on the happening of an uncertain future event - the outcome of the litigation or of the wager.** That being so, it can be said in these instances, that the stakeholder holds the money or the thing on behalf of that one of the two parties involved who will eventually become entitled to it, but it cannot be said that the stakeholder, when he receives the money or the thing, or while he is holding it pending the happening of the future event, is acting as the agent of specifically the one or the other of the two parties."

(My emphasis).

[15] It is also important to mention that Botha JA in ***Baker v Probert***, *supra*, disagreed with the *dicta* of Milne J (as he then was) in ***Verbeek***'s case, supra, to the effect that there was no distinction between a stakeholder who holds a *res litigiosa* and a so-called stakeholder who receives and holds a purchase price in the circumstances that existed in ***Verbeek***'s case, *supra*. (Page 442 B – G). Furthermore, Botha JA differed from Margo J's reasoning in ***Sadie***'s case, *supra*, holding at 444 B that the so-called "stakeholder" who received the purchase price in terms of a clause is the agent of the seller.

[16] ***Sadie***'s case, *supra*, was the main building block upon which the plaintiff's counsel based his argument. There were indeed statements in Sadie's case to the effect that prescription did not run against the purchaser or against his successor in title – in the words of the learned judge in that case –

"Any more than prescription would have run against any other person for and on whose behalf money was held on deposit without any condition attaching thereto, such as a customer who has money in a bank

account, or a client who has money to his credit in an attorney's trust account."

[17] Later in the judgment at page 366 the learned judge said the following : -

"His agreement to hand the money over to the person entitled thereto does not disappear if the main contract fails. He is then under a **contractual obligation** to hand it over the depositor."

(My emphasis)

[18] It seems to me that the acknowledgement by the learned judge in ***Sadie'***s case that a contractual obligation arises at a given stage presupposes that the so-called stakeholder would be obliged to repay the money and there is no reason whatsoever why given the definition of a "debt due" prescription should not come into play.

[19] In ***Cierenberg en Andere v Rorich, Wolmarans & Luderitz Van Wyk en Andere v Lamprecht en 'n Ander*** 2003 (1) SA 40 (T) the facts briefly were that the applicants had paid monies into an attorney's trust account in respect of the purchase price of certain units in a retirement home. The seller of those units had gone into liquidation. The relevant statute applicable to the development of retirement homes provided that upon liquidation all monies paid to an attorney and held and held in trust fell due for immediate repayment to the purchaser. The point of prescription was taken. It was contended before the learned acting judge that ***Sadie***'s case was

applicable. The learned acting judge considered the *dicta* of Margo J and came to the conclusion that the debt in question had become due within the meaning of the Prescription Act by operation of the applicable statute. From that moment prescription ran and the claims had in due course become prescribed. Before the liquidation it is true to say that prescription did not run against the attorneys. However the position was different when liquidation supervened. As the learned judge put it at page 50 D :-

> "Geen verjaring kon inderdaad teen die prokureurs in hulle hoedanigheid as sogenaamde 'stakeholders' plaasgevind het en daar was ook geen skuld na die een of die ander kant toe ontstaan, voordat die voorwaarde soos vervat in art 6(4) nie in werking getree het nie. Daarna het die gelde egter betaalbaar geword."

[20] Reverting to the facts of the instant case, in the first place I do not agree that the defendants were 'stakeholders". In my view they were agents. They accepted the mandate to receive the monies, as is put in the stated case, for the purpose of investment at the plaintiff's instruction. The contractual relationship between the plaintiff and the defendants was correctly characterised by Didcott J in ***V. S. Rajah & Company v Fann*** 1976 (2) SA 351 at 353 G as follows : -

"When the plaintiff's client made the deposit, what had hitherto been her cash was merged with its money. It is true that, having been entrusted with the responsibility of investing for her benefit and having been put in funds with that object, it was liable to account to her for the amount deposited. It is also true that, to ensure that it could do so, it was obliged to maintain a fund sufficient to enable it to apply an equivalent sum to the trust purpose. But it was not required to keep intact, to use for the trust purpose, or to account for the very money paid to it. That became its property as the result of the deposit, and nonetheless so because of the duties which it reciprocally incurred towards her.

All of this, it seems to me, is the effect of the judgments in *De Villiers, N.O. v. Kaplan*, 1960 (4) SA 476 (C), and, even more decisively, *S. v. Gathercole*, 1964 (1) SA 1 (AD).

In the earlier case VAN WINSEN, said (at p. 477E - F):

> 'Money paid to an attorney by a client to be held and dealt with for the client clearly becomes the attorney's property, even although it might be paid into a trust account...'

The appellant in the later case had been convicted of theft from attorneys employing her, who were the applicants for a compensatory order. HOEXTER, A.J.A., concluded his judgment, in which all the other members of the Court concurred, by mentioning that the appellant had stolen money collected by her

on her employers' behalf and by continuing (at p. 25F - G) thus:

> 'Some of the cash received was trust money and some not, but all of it became merged with the money of the applicants and became *quoad* the appellant, the property of the applicants. That position was not, and could not be, affected by the duty of the applicants to maintain a sufficient fund to apply to the purposes for which money had been paid in trust. No doubt the applicants could not be heard to say to their trust clients that they could spend the trust money paid to them as though no trust existed, but *quoad* the rest of the world the applicants could claim that the trust money belonged to them.'"

[21] Having regard to the *dicta* of Didcott J above and the cases relied upon by him it is clear that the admission by the defendants in paragraph 4 of the stated case is clearly wrong in law. I regard it as being a mistake of law and must be tarred with the same brush as Didcott J did in ***V. S.***

Rajah's case, *supra* :-

"I have not overlooked an admission contained in the affidavit of the plaintiff's spokesman, which is to the effect that it was not the owner of the trust funds used to buy the note. What has been admitted, as I see it, is wrong in law. That being so, it cannot and does not bind me. (See *Rosenbach and Co. (Pty.) Ltd. v. Dalmonte*, 1964 (2) SA 195 (N) at pp. 200H - 201 A)."

[22] It seems to me that during April 2002 when the plaintiff demanded return of his money he was effectively terminating the mandate and calling upon the defendants to pay back the funds deposited with them. Even assuming that I am wrong in holding that the defendants were not mere stakeholders, they would have been under an obligation to repay the money when payment was demanded.

[23] It follows that when the plaintiff served his summons his claim had become prescribed.

[24] I make the following order : -

1. There will be judgment in favour of the first defendant;

2. The plaintiff is to pay the first defendant’s costs of the action.

DATE OF JUDGMENT :	28 NOVEMBER 2007
DATE OF HEARING :	19 DECEMBER 2006
COUNSEL FOR THE PLAINTIFF:	MR M. E. STEWART
INSTRUCTED BY :	GARLICKE & BOUSFIELD, DURBAN
COUNSEL FOR DEFENDANTS	MS A. MOODLEY
INSTRUCTED BY :	GEORGE GOVENDER & COMPANY, ESCOMBE, QUEENSBURGH