THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 150/2012

Not reportable

In the matter between:

JOHAN GEORGE WILHELMUS BASSON	**Appellant**
and	
BENITO HITLER NIEMANN	**First Respondent**
JACOB JACOBUS DE KLERK	**Second Respondent**
DEON STORM	**Third Respondent**
FRANCOIS CHARL LE ROUX	**Fourth Respondent**

Neutral citation: *Basson v Niemann* (150/2012) [2012] ZASCA 203 (30 November 2012)

Coram: Mpati P, Nugent, Malan, Leach and Theron JJA

Heard: 19 November 2012

Delivered: 30 November 2012

Summary: Prescription ─ knowledge of the facts ─ respondents having acquired knowledge of all facts material to their claim more than three years before the service of their summons ─ respondents' claim prescribed.

O R D E R

On appeal from: North Gauteng High Court, Pretoria (Erasmus J sitting as court of first instance):

1. The appeal is upheld, with costs.
2. The order of the court a quo is set aside and substituted with the following:

‘(a) The special plea of prescription is upheld.

(b) The plaintiffs’ claims are dismissed with costs.’

J U D G M E N T

LEACH JA (MPATI P, NUGENT, MALAN AND THERON JJA concurring).

[1] The parties to this appeal formerly practised together in partnership as attorneys in Pretoria. As will be set out in greater detail in due course, after the dissolution of the partnership the respondents instituted action in the North Gauteng High Court, seeking an order declaring the appellant to be liable to them in respect of certain partnership debts and ordering him to pay various amounts they had paid to persons who had lodged claims against the partnership. The appellant raised a special plea of prescription. This the high court ordered should be determined as a separate issue, with the merits of the claim standing over for later decision. After hearing evidence on the issue of prescription, the high court dismissed the special plea with costs. An application for leave to appeal was similarly unsuccessful. This appeal is brought with the leave of this court.

[2] The firm of attorneys in which the parties practised was one of long standing, its partners having changed from time to time over the years. At the beginning of 1999 there were six partners, namely, the appellant, the four respondents and a Mr Louw

Erasmus. When the latter left the firm on 28 May 1999, the partnership was dissolved and replaced by a fresh partnership between the parties. The appellant was a senior partner, and headed the firm's litigation and commercial practice. The first respondent, who had been a partner in the firm since 1973, and the other respondents were conveyancers.

[3] On 1 March 2000, the structure of the firm changed once more when its practice was taken over by a company of which the appellant and the first to third respondents, together with Mr DS Jacobs who until then had been employed by the firm as a professional assistant, became shareholders and directors. At the same time, the fourth respondent left the firm and took up employment in the commercial sector. Although this new company has since conducted the practice, apart from one issue that I shall mention in due course, nothing in the present dispute really turns on the nature of the firm's juristic personality and, for convenience, I intend for the most part to refer to both the partnership and the company which replaced it simply as 'the firm'.

[4] On 31 March 2008, the appellant resigned as a director of the firm. He was later called to the bar and was practising as an advocate when the proceedings against him were instituted in the high court. Before the appellant left the firm, dissention between he and his former partners had grown arising out of his dealings with a client of the firm, Anglo-Euro Company (Pty) Ltd, some nine years earlier which subsequently led to the respondents instituting action against him in the North Gauteng High Court by way of a summons served on 3 December 2009.

[5] Briefly put, in their particulars of claim the respondents alleged the following:

(a) Anglo-Euro had to the knowledge of the appellant marketed a scheme to the public holding out that foreign financial loans could be obtained from certain of the world's leading banks at attractive interest rates.

(b) As part of the scheme, various persons (whom for convenience I shall refer to as 'investors') had applied to obtain foreign loans through Anglo-Euro and, in order

to do so, had been obliged to pay substantial deposits to the firm which had been held on their behalf in the firm's trust account.

(c) From approximately April to August 1999, the appellant had negligently, and in breach of his obligations as a reasonable attorney and the rules of the Law Society of the Northern Provinces, paid certain of these deposits to Anglo-Euro without having had the necessary authority of the investors to do so.

(d) Consequently, as partners in the firm, the respondents had been obliged to reimburse a number of these investors who had claimed repayment of their deposits.

(e) In terms of their partnership agreement, the parties had agreed that in the event of the partnership suffering damage due to negligence or unprofessional conduct of a partner, the partner responsible would indemnify the partnership or the innocent partners against such damage and that, in the event of the partnership, after its dissolution, being held liable for damage suffered as a result of a partner's negligence or unprofessional conduct during the existence of the partnership, each individual partner would be entitled to claim his pro rata share of the damage from the responsible partner.

[6] On the strength of these allegations, the respondents sought an order declaring the appellant to be liable to them in respect of any claim arising from the appellant having paid investors' deposits held by the firm to Anglo-Euro without the necessary authorisation to do so. In addition they claimed payment of various amounts they had been obliged to pay a number of such investors.

[7] It was to these claims that the appellant filed his plea of prescription.[1] It is common cause that the prescriptive period for the respondents' claim was three years. Section 12(1) of the Prescription Act 68 of 1969 provides that prescription begins to run 'as soon as the debt is due'. However s 12(3) goes on to provide that a debt

[1] His initial plea of prescription related solely to the claims brought by two claimants against the former partnership, but the special plea was later amended so as to relate to the respondents' claim as a whole.

'… 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.'

The appellant alleged that his conduct on which the respondents relied had occurred in 1999 and that the respondents had either known, or could have known had they exercised reasonable care, both of his identity as the alleged 'debtor' and of the facts out of which his alleged 'debt' had arisen more than three years before service of the summons on 3 December 2009.

[8] The respondents sought to meet this by relying on s 12(2) of the Prescription Act which provides that should a debtor wilfully prevent 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'. They alleged that the appellant had assured them that he had in fact been authorised to pay the amounts that he had paid out of trust to Anglo-Euro, that they had accepted his assurances in that regard and that they had learned only in May 2007 that the appellant had not in fact been properly authorised to make such payments. They therefore averred that prescription had only commenced to run from that time and that the three year period of prescription had not elapsed before summons was served on 3 December 2009.

[9] The high court judgment, while not a model of clarity in respect of the facts it found to have been proved, appears to have been premised on a finding that the respondents, through no lack of reasonable care on their part, only learned of their claims against the appellant and the facts giving rise thereto in May 2007. As appears from what follows this flies in the face of certain of the basic undisputed facts which clearly showed that the respondents had knowledge of the relevant facts well before then and had, indeed, paid many of the investors' claims more than three years before they instituted action against the appellant.

[10] It is common cause that the deposits of various investors in the Anglo-Euro scheme were paid into the firm's trust account. The appellant appears also to concede that during the period April to August 1999 he paid certain of these deposits

to Anglo-Euro (in his plea he disputed that he had acted negligently or improperly in doing so but a decision on that issue is irrelevant in considering the plea of prescription). Prescription of the respondents' claims would therefore have commenced to run once they knew, or could reasonably to have known, (a) of the appellant having paid the investors' deposits to Anglo-Euro and (b) that such payments were improperly made without the necessary authority to do so.

[11] In regard to the first of these requirements, it is clear that shortly after the payment of investors' deposits had been made by the appellant, allegations surfaced that they had been improperly made and the respondents were aware thereof. Indeed a number of summons were either threatened or issued against the partners of the firm in which disgruntled investors claimed payment of the deposits they alleged had been irregularly paid out by the appellant. The respondents were thus aware from the outset that investors alleged that their deposits had been improperly paid out of the firm's trust account and their defence to prescription related simply to the second requirement ie whether they knew or could reasonably have ascertained that the appellant had lacked the necessary authority to make the disputed payments. The foundation of their case in that regard was that the appellant was their partner in whom they were entitled to have the utmost faith, and he had reassured them that he had not acted improperly and had been duly authorised to act as he had done

[12] Of particular significance in considering whether the relevant facts were within the respondents' knowledge is the application brought by two such investors, Mr C Visscher and Mr F du Toit, on 1 December 1999 in the Pretoria High Court. They cited the appellant, the firm, the individual respondents in the present appeal and Anglo-Euro as respondents and claimed payment of various amounts totalling R1,6m allegedly improperly paid by the appellant out of trust to Anglo-Euro (for ease of reference I intend to refer to this simply as 'the Visscher claim'). The firm reported the matter to the insurance brokers who handled its compulsory professional insurance. This, in turn, led to the firm's insurers appointing an attorney, Mr Michael

Leinberger (at the time a member of the Pretoria firm of attorneys Savage, Jooste & Adams) to deal with the claim on behalf of the firm.

[13] Precisely what occurred immediately thereafter is not clear as the records of Savage, Jooste & Adams relating to the Visscher claim had fallen into disarray in the period of almost 12 years that had intervened before the special plea in the present matter came to trial. Be that as it may, it appears as if the affidavits filed by the opposing sides gave rise to disputes which the parties decided should best be determined by way of arbitration. This led to senior counsel, Adv JJ Gauntlett SC, being appointed as arbitrator to determine whether an obligation had arisen, in either contract or delict, between Visscher and Du Toit on the one hand and the firm and its partners on the other.

[14] The arbitration was a long and drawn out affair conducted between April 2004 and March 2005. In his award delivered on 14 March 2005, the arbitrator ruled in favour of the claimants, and held that the appellant had been duty bound not to make payments out of trust except upon the investors' explicit instructions.

[15] Unhappy with this outcome, the appellant, the respondents and the firm appealed to an arbitration appeal tribunal consisting of a retired judge of this court and two practising senior counsel. On 23 June 2005, it dismissed the appeal, having concluded that written instruction from the investors had been a pre-condition for payment of their deposits to Anglo-Euro.

[16] In the light of this finding, it would have been an obvious step for the respondents to have asked the appellant to produce the written authority of each investor whose deposit had been paid out to determine the validity of the claims brought against them, particularly as it would have been obvious that the appellant's stance, rejected on arbitration, had been that no such written authority had been required. The respondents appear to have left their defence to the Visscher claim up to the appellant (their litigating partner) and their insurers, but a reasonable person in their position, on learning of the unsuccessful outcome of the arbitration, would

surely not have continued to be listless and supine in regard to a case in which they had been sued for payment of an enormous sum of money but would have demanded to be fully informed; to have insisted on seeing the arbitrators' rulings; and to have ascertained whether the appellant had indeed had the necessary written authorisation to have made the payments he did. If not already running by then, after the outcome of the arbitration appeal the prescription clock surely began to tick.

[17] In the meantime, a number of other investors had either claimed payment of their deposits paid by the appellant to Anglo-Euro or had indeed already instituted action for payment of such deposits. The appellant and the respondents were therefore exposed to substantial claims from numerous investors. Consideration was given to seeking further relief in another forum, but in the end it was decided that there was no realistic prospect of avoiding liability. The appellant testified that in regard to the Visscher claim in particular, their decision was largely influenced by the judgment of this court in *Hirschowitz Flionis*[2] delivered on 22 March 2006 and the advice of counsel that, in the light thereof, the decisions of the arbitrator and the appeal tribunal could not be assailed. This was not challenged by the respondents.

[18] Accordingly, the parties accepted being liable to the various investors whose deposits had improperly been paid out of trust by the appellant. Unfortunately for the parties, their insurers were not prepared to meet the full amount of all the claims and, consequently, during the period 19 January 2006 to 26 September 2006 they were called upon to and did make a number of payments to various investors, including Visscher and Du Toit, to settle their claims. Details of these payments, which the third respondent required for income tax purposes, are set out in a letter Mr Leinberger addressed to him on 3 November 2006 which reads:

'1. Re: Adriaan Hendrik Van Wyk NO plus two other Plaintiffs.
R75 600.00, ie R18 900.00 each paid on 19 January 2006 and 28 February 2006.

2. Re: G Visscher, FH Du Toit and Finansiële Advies Dienste
2.1 R194 400.00 ie R48 600.00 each on 3 April 2006;

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[2] *Hirschowitz Flionis v Bartlett* 2006 (3) SA 575 (SCA).

2.2 R2 880.18 ie R720.05 each in respect of interest on the abovementioned amount on 6 June 2006.

3. Re: GB du Plessis
R60 480.00 ie R15 120.00 each paid on 26 September 2006.'

[19] Interestingly, the first payment mentioned (to AH Van Wyk NO and two other claimants which resulted in each former partner having to pay R18 900) was made seven months after the arbitration appeal tribunal had dismissed the appeal and before the appeal in *Hirschowitz Flionis* was heard in this court. The judgment in the latter case could therefore have played no part in the decision taken to make this initial payment, and the inference is irresistible that the payments made by the appellant out of trust had been improper had already sunk in by then (which is understandable given the findings of the various arbitrators) and was later confirmed by the decision in *Hirschowitz Flionis* a few months later (before the parties made their payment in respect of what had not been paid by their insurers in respect of the Visscher claim).

[20] Of the respondents, only the first respondent testified in the court below. According to him, despite their having made these payments, the appellant continued to assure them that he had been authorised to make the payments. The first respondent averred that it was only in May 2007 that they came to realise that the appellant had not been so authorised. This occurred when the respondents met with Mr Leinberger who explained that the appellant had not had the necessary written authority to make the payments he had made to Anglo-Euro and explained the extent of their potential liability due to their insurers refusing to make further payments on their behalf.

[21] However, the respondents' argument that prescription only commenced to run at this point in time cannot be accepted. Indeed the first respondent conceded that if he had exercised care he would have learned everything necessary to institute action against the appellant by 2006. This in itself is fatal to the respondents' case.

[22] But in any event, it is clear from the first respondent's own evidence that he in fact had knowledge of the material facts by then. Crucial to this is a directors' meeting of the firm held on 16 January 2006 and attended by the appellant and the first to third respondents, the minutes of which recorded that the appellant would contact an attorney, Thys Cronje, who was acting on behalf of the majority of the investors who had instituted action, to discuss the Anglo-Euro matter with him after which a decision would be taken in regard to the way ahead in regard to settlement.

[23] The first respondent testified that by that stage the respondents knew that the arbitration and the arbitration appeal had gone against them, the appellant's claim that he had been authorised to make the payments notwithstanding. He also conceded that they had realised by then that the appellant's allegation that he had not acted improperly was without merit, that many investors had instituted action against them personally for repayment of their deposits, and that they were liable in respect of those claims (as is borne out by the payments they made to investors). Indeed the first respondent conceded that nothing prevented the respondents from instituting their action against the appellant at that stage, save for the fact that he was their partner and as he told them he was negotiating both with their insurers and Mr Toerin of Anglo-Euro to reimburse them the amounts they were obliged to pay out to the investors.

[24] The respondents therefore paid investors the large amounts mentioned in para 18 in 2006 at a time when they were well aware that they had no defence to the investors' claims. If prescription had not begun to run before then, that was no longer the case by April 2006.

[25] The truth of the matter lies in the first respondent's concession under cross-examination that he could have investigated the merits at a far earlier stage than he said he did. However his (and presumably the other respondents') indifference to the various investor's claims against them, appears to have been due to them having left the litigation in the hands of the appellant and their insurers. It was only in April 2007 that they realised that they were not going to be reimbursed by Anglo-Euro or their

insurers. But of course this did not mean that they didn't already know that they were liable to the investors. That they had known for some time is evidenced by them paying those investors. All they came to realise is that they were not going to be reimbursed, but that was irrelevant to the existence of their claim against the appellant, the material facts relevant thereto having been known to them long before.

[26] It is clear from this that on the respondents' own case, prescription commenced to run against them by early 2006 at the very latest. That being so, the respondents' claims had prescribed before they instituted their action against the appellant more than three years later.

[27] Recognising this difficulty, counsel for the respondents sought in this court to raise for the first time an argument inconsistent with the respondents' pleadings (which were to the effect that prescription commenced to run in May 2007) by contending that although the firm's practice was incorporated on 1 March 2000, its directors effectively practised in partnership until 2008 when the appellant resigned. Accordingly, so the argument went, the partnership between the parties should be regarded as having continued until 2008 and, as the respondents were seeking to enforce a right of recourse against their former partner, their claim only arose in 2008, less than three years before they instituted action in December 2009.

[28] This argument, novel as it is in certain respects, cannot be accepted. In support of the argument the respondents relied on the decision of this court in *Louw v Nel* 2011 (2) SA 172 (SCA). At first blush, such reliance was misplaced. All that the court observed in that matter was that where a private company was formed at the instance of a partnership, 'there ought to exist between the members in regard to the company's affairs a particular personal relationship of confidence and trust similar to that existing between partners in regard to a partnership business'.[3] That is no authority for a proposition that the partnership that existed before the company was incorporated continues to exist.

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[3] *Louw v Nel* para 18.

[29] But in any event, in the present case the so-called 'partners' in the firm after its incorporation were not the same as those who had been partners immediately before incorporation took place. As pointed out above,[4] the fourth respondent left the firm immediately before its incorporation whereafter Mr Jacobs, who had not been a partner, became a director. The partnership between the parties was thus necessarily dissolved when the fourth respondent left, and the members of the firm after its incorporation were not the same as the persons who had been partners at the time of the events giving rise to the respondents' claims (as is borne out by Mr Jacobs not being a party to this litigation).That partnership thus cannot be regarded as only having been dissolved when the appellant left the firm in 2008.

[30] The court a quo therefore erred in not upholding the appellant's plea of prescription. The appeal must therefore succeed and the respondents' claims be dismissed as having prescribed.

[31] It is therefore ordered:

1. The appeal is upheld, with costs.
2. The order of the court a quo is set aside and substituted with the following:

'(a) The special plea of prescription is upheld.

(b) The plaintiffs' claims are dismissed with costs.'

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L E Leach

Judge of Appeal

[4] In para 3 above.

APPEARANCES:

For Appellant:	S D WAGENER SC Instructed by: Pieterse & Curlewis Inc, c/o A L Maree Inc, Pretoria Martins Attorneys, Bloemfontein
For Respondent:	C J VAN DER WESTHUIZEN SC Instructed by: J F Jordaan Inc, Pretoria McIntyre & Van der Post, Bloemfontein