SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF THE JUDGMENT DELIVERED

FROM	The Registrar, Supreme Court of Appeal
DATE	17 December 2020
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Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Bester and Others NNO v Gouws and Others (851/2019) [2020] ZASCA 174 December 2020

Today the Supreme Court of Appeal (SCA) dismissed the appeal by the appellants against the judgment of the Western Cape Division of the High Court, Cape Town.

Mr Herman Pretorius had operated a fraudulent Ponzi scheme, through the RVAF Trust, which collapsed when he committed suicide. The Trust was sequestrated. The appeal involved the question of whether claims, brought by the appellants, as trustees of the insolvent estate of the Trust, to recover commissions paid to brokers who solicited those investments, had prescribed.

The provisional sequestration order was granted on 1 August 2012. The appellants were appointed as provisional trustees on 7 August 2012. On 17 August 2012, the appellants obtained an order granting them the necessary power to institute legal proceedings in terms of s 18(3) of the Act. They were appointed final trustees on 23 October 2012.

The respondents were all investment brokers recruited by Mr Pretorius. Together with the brokers, Mr Pretorius succeeded in enticing investors to invest huge amounts in his scheme on the basis that it would yield returns far exceeding those achieved by conventional established institutions.

The appellants instituted action against the respondents claiming repayment of the commissions earned by them on the investments. The actions were instituted on two bases: under the common law (on the basis of unjust enrichment); alternatively, under s 26 and s 32 of the Insolvency Act. The respondents raised two pleas of prescription. Only the first was relevant to the appeal. It was premised on s 12 (3) of the Prescription Act, which provides that a debt becomes due when a 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 issue was whether the appellants had, or should have had the requisite knowledge under s 12(3) by 17 August 2012 or, at the latest, by 23 October 2012 (the date on which the appellants were appointed as final trustees) to institute action against the respondents.

The high court found that the appellants obtained the necessary power to institute proceedings in terms of the s 18(3) court order on 17 August 2012. The appellants did not appeal that finding. Secondly, it held that the appellants had, or could reasonably have had, the requisite knowledge to institute action against the

respondents by 23 October 2012. The challenge to this finding formed the basis of the appeal.

The appeal court found that by 23 October 2012, the trustees should, through reasonable care, have known that the investment scheme was a fraudulent Ponzi scheme; that the Trust was insolvent from inception; that the scheme was dependant on the participation of the brokers, who had introduced their clients to the scheme and had been paid commissions therefor; and what amounts were paid to the brokers as commissions. The knowledge of these facts comprised the requisite facts upon which the enrichment and the statutory claims were based.

The finding was based upon the following. The appellants had access to the premises from which the Trust operated from 8 August 2012. Soon thereafter they became aware that the files relating to the brokers and the commissions earned by them, were under the control of an employee who would have been able to provide all the necessary information relating to the claims against the brokers. The trustees however made a decision to prioritise the investors' claims and the inter-group transfers. There was no investigation into the claims against the brokers during 2012. The auditors and the trustees only began the investigations of the claims against the brokers in January 2013. They instituted action in November 2015, more than three years after the cut-off date, being 23 October 2012.

It was held that a creditor is not permitted to postpone prescription through his own inaction The requirement of reasonable care requires diligence in ascertaining the facts underlying the debt as well as an evaluation of the significance of those facts. The question is whether by the exercise of reasonable care, the relevant facts necessary to institute action against the respondents should have been ascertained, by 23 October 2012.

The court held that the prioritisation of other issues cannot be a reason for not exercising reasonable care to ascertain the facts giving rise to a debt. The appellants' explanation that they prioritised other matters shows that they failed to exercise reasonable care in ascertaining the information giving rise to the claims against and the identity of the respondents.

The plea of prescription was thus upheld and the appeal was dismissed with costs.

The court found it necessary to comment on the persistent failure by attorneys and counsel to comply with rule 10A(ix) of the Supreme Court Rules which enjoins counsel to provide a list reflecting those parts of the record that in the opinion of counsel are necessary for the determination of the appeal. The appellants' practice note stated that the entire record should be read. The record comprised some 1870 pages. Approximately 40 percent of the documents in the record were irrelevant to the issue in the appeal. The court thus ordered that 40 percent of the costs incurred in the preparation, perusal and copying of the record should be disallowed.