IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 226/98

In the matter between :

DONALD GEORGE COOPER — First Appellant
D G AND H J COOPER NNO — Second Appellant

and

SYFRETS TRUST LIMITED — Respondent

CORAM : NIENABER, OLIVIER, SCHUTZ JJA, FARLAM, MPATI, AJJA

HEARD : 24 AUGUST 2000

DELIVERED : 11 SEPTEMBER 2000

JUDGMENT

Investment advice negligently given in 1990 to the appellant by an employee of the respondent to invest in Masterbond - whether such advice held firm for a reinvestment made by the appellant in Masterbond in 1991 - Masterbond thereafter placed under curatorship causing the appellant loss - appellant not proving what dividends may be paid to him in future.

NIENABER JA/

NIENABER JA :

[1] The respondent, a public company, by its own admission held itself out as an expert in the field of financial advice and estate planning. The first appellant, a qualified accountant, was a potential investor both in a personal and in a representative capacity. I shall refer to him as the plaintiff and to the respondent as the defendant. He approached the defendant, known to him by reputation as "a solid investment company", for advice on two "secure" investments which he was keen to make. He was referred to a Mr Van der Merwe. This was in September 1990. Van der Merwe was employed by the defendant at the time as an executive investment manager in its Johannesburg office. The plaintiff stated that he was looking for a "long-term safe investment". Van der Merwe recommended an investment in "Masterbond". The exact nature of Masterbond was not explained to the plaintiff nor was it explored in evidence but it appears to have been the designation for a cluster of associated companies and close corporations soliciting

money from the public which was invested in a spread of speculative property development schemes controlled and operated by the group. Van der Merwe spoke of Masterbond in such glowing terms that the plaintiff was persuaded to place his two investments with it. He handed two cheques to Van der Merwe, both dated 3 September 1990 and both made out to "Masterbond Trust" (an abbreviation for Masterbond Participation Bond Trust Managers (Pty) Ltd). One was a personal cheque for R500 000. The other, a cheque for R100 000, was signed in his capacity as a co-trustee with his wife of the D. Cooper Children's Trust ("the Children's Trust"). Van der Merwe appears to have placed the investments with Masterbond through the agency of a certain Lofty van Staden. On 14 September 1990 Masterbond Trust issued a letter "To whom it may concern" confirming that the plaintiff had invested "an amount of R500 000 with Masterbond Trust" and in November 1990 the plaintiff was furnished with two certificates issued by Masterbond Trust. The one certified the issue of 500 "Secure

Debentures of R1 000 each" to the plaintiff and the other the issue of 100 such debentures to the Children's Trust, each bearing interest at a fixed rate of 20,5% and each stating that "Leuwin Developments CC hereby acknowledges that it is indebted to and will on the date on which the principal monies hereby secured become payable" pay to the plaintiff (and to the Children's Trust) the capital sum reflected therein. In each instance the investment was for one year maturing on 3 September 1991. Each certificate was issued by Masterbond Trust, described in the document as "the Trustee". *Ex facie* the document the capital was repayable by a close corporation which was not a party to it and the interest by a company (not Masterbond Trust) which was not identified in it. As it happens the interest was regularly paid by Masterbond Trust. During August 1991 Masterbond Trust enquired whether the investments were to be extended or repaid and asked in each instance for the return of the "secured debenture certificate" as this would become "null and void" on its maturity date. [2] There is a major dispute between the

parties as to whether the plaintiff thereupon telephoned Van der Merwe for his recommendations about maintaining the investments in Masterbond. I return to this issue later in the judgment. What is not in dispute is that the plaintiff approached Masterbond himself and that, on 3 September 1991, without the intercession of the defendant, he completed a fresh "Application to make a short-term bond investment" with Masterbond Trust on interest terms less favourable than before. The investment period on this occasion was 18 months and the investment was due to mature on 3 March 1993.

[3] Shortly thereafter, during October 1991, before Masterbond Trust had placed the investment and while the money was still held by it under general security, a provisional order of liquidation was issued in respect of Masterbond Participation Bond Trust Managers (Pty) Ltd. On 12 August 1992 it was placed under final curatorship. Some payments were and may indeed still be made by the curators to the plaintiff but in the net result, so the plaintiff alleges, both he and the

Children's Trust have suffered substantial losses.

[4] During August 1994 the plaintiff instituted two actions against the defendant in the Witwatersrand Local Division, claiming damages (as ultimately calculated) in his personal capacity of R724 300,82 and in his representative capacity, together with his wife as co-trustee of the Children's Trust, of R144 642,14. With the consent of all concerned the two actions were consolidated and it was agreed that the outcome of the second action should follow the result of the first.

[5] The trial eventually commenced before Melamet AJ after an adjournment to which reference will be made in par 10 below. The plaintiff was the only witness. The defendant closed its case without leading any evidence. The plaintiff's evidence that he consulted Van der Merwe in August 1991 about a renewal of his investments was disbelieved. Mainly for that reason the trial court absolved the defendant from the instance with costs.

[6] The plaintiff with leave granted to him on petition thereupon appealed to the

full court of the Transvaal Provincial Division. Two judgments were delivered. In terms of the majority judgment (delivered by Eloff JP with whom Flemming DJP concurred) the appeal was dismissed with costs; in terms of the minority judgment (delivered by Stegmann J) it should have succeeded. The plaintiff once again sought leave to appeal and once again such leave was granted, this time to this court.

[7] The plaintiff presented his case on the pleadings as one of breach of contract alternatively delict but in argument counsel for the plaintiff confined himself to the contractual claim and I shall do likewise.

[8] The agreement as initially pleaded was said to have been entered into orally on 3 September 1990. In terms thereof:

> "4.1 the defendant would advise the plaintiff on the long term investment of R500 000,00 ('the capital sum') and recommend a secure investment for the capital sum;
>
> 4.2 the defendant would recommend an investment that would not

bear extraordinary and/or unusual risk of loss of the capital sum;

4.3 the aforesaid service would be rendered expertly and without negligence;

4.4 the defendant would take those steps reasonably necessary to render the expert advice in regard to the investment;".

Paragraph 7 reads:

"7. In purported compliance with its contractual obligations Van der Merwe on behalf of the defendant advised the plaintiff that:

7.1 the investment in Masterbond was and would be secure and without extraordinary and/or unusual risk of loss of the capital sum;

7.2 Masterbond was an investment company that had complied with all its obligations owed to its various clients."

The breach alleged is the defendant's failure to comply with the obligations as set out in par 4 thereof. The defendant, in its plea, denied that an agreement was entered into between the plaintiff and Van der Merwe acting on its behalf. It did not

seek to allege an agreement on terms different from those pleaded by the plaintiff. But it did admit that Van der Merwe was its employee and that the defendant held itself out as an expert in the field of financial and estate planning.

[9] The agreement as initially pleaded by the plaintiff therefore dealt solely with the advice given to him during September 1990. He was asked in a request for further particulars for trial what the terms were that were "recommended by the defendant" to which he responded in par 7 of his reply: "The terms recommended by the Defendant were to invest in Masterbond for one year and that the investment should be renewed annually." In response to a further question (whether he renewed the investment "on his own initiative") it was stated:

> "9. AD PARAGRAPH 7.1, 7.2 AND 7.3
>
> "The Plaintiff renewed the investment in accordance with the advice set out in paragraph 7 above. No further advice was given on or near the renewal date".

[10] Three days before the trial was due to commence the plaintiff applied for

various amendments to his pleadings (which amendments were in due course granted) to accommodate the advice allegedly given to him telephonically in August 1991 by Van der Merwe acting on behalf of the defendant. This led to an adjournment of the trial at the plaintiff's expense. Paragraph 4 of the particulars of claim was amended by the addition of a new par 4.5 which read:

> "4.5 it was an implied term of the said agreement that the defendant when deciding whether or not to advise a renewal of an investment previously recommended by it would:
>
> (i) not recommend an investment which would bear extraordinary risk and/or unusual risks of loss of the capital sum:
>
> (ii) take all reasonable steps to ascertain the state of the finances of the recommended investment prior to recommending the renewal of such investment."

In a new par 12.3 the appellant alleged "... the Plaintiff telephoned Van der Merwe, at the Defendant's premises, ... and requested his advice as to whether or not he should extend his investment with Masterbond;" Then followed par 12.4 which

read:

> "In response to the plaintiff's enquiry, Van der Merwe informed the plaintiff that according to recent information which he (Van der Merwe) had been given, Masterbond 'was doing extremely well' and that he strongly recommended extending the said investment."

And this was followed by par 12.5:

> "Acting upon the said advice given by the said Van der Merwe the Plaintiff renewed his investment with Masterbond for a period of 18 months."

The plaintiff's further particulars for trial were also amended *inter alia* by retracting the whole of par 9 of the earlier averment (referred to in par 9 above) that the investment was renewed in accordance with the 1990 advice and that no further investment advice was given "at or near the renewal date". It was now alleged:

> "9.1 AD PARAGRAPH 7.2
>
> The Plaintiff was advised to renew his investment by Mr Cyril Van der Merwe, the duly authorised agent and employee of the Defendant.
>
> 9.2 AD PARAGRAPH 7.3
>
> The said advice was given by the said Van der Merwe in a

> telephone conversation with the Plaintiff in and during August 1991 ..."

[11] According to the amended pleadings the advice was accordingly given to the plaintiff by Van der Merwe on two separate occasions. This was not, however, presented as two separate and successive agreements but as a single agreement (entered into in September 1990) but with two separate components: advice relating to the immediate future in 1990 and advice relating to the future a year later. But the advice which caused the investment which in turn caused the plaintiff's loss, according to para 12.5 (of the particulars of claim) and 9.1 and 9.2 (of the particulars for trial), was the advice given to him during the disputed telephone conversation in 1991.

[12] To complete the overview of the pleadings the defendant admitted that if it had come to the attention of its board of directors or senior management that one of its investment managers in September 1990 was recommending an investment

in Masterbond it would have advised the client receiving such advice not to do so; and in response to further questions the defendant admitted that while Van der Merwe had authority to recommend investments in approved institutions only (and not in Masterbond or entities in the Masterbond group) the defendant nevertheless was "prepared for the purposes of this action, to assume responsibility for the actions and advice of Van der Merwe as if he were authorised thereto". The defendant further admitted "that Van der Merwe acted negligently if in September 1990 he recommended the investment which plaintiff made as being a secure investment".

[13] So much then for the pleadings. What about the evidence? The evidence is transcribed in truncated form as the tapes recording it have somehow been mislaid. The record is a reconstructed one. The plaintiff testified. Van der Merwe, although available to do so, did not. The plaintiff's evidence-in-chief about his encounter with Van der Merwe in 1990 reads as follows:

> "I told Van der Merwe that I had a lot of money to invest and told him I would want a long term safe investment. Van der Merwe told me he knew of investment and said it was Masterbond. Van der Merwe spoke of it in glowing terms, and said it was growing rapidly ... Van der Merwe told me the initial investment was for a year, but should be renewed annually as a matter of course."

The cross-examination on the point was equally terse:

> "I told Van der Merwe I had money to invest and had ideas of my own, but I deferred to his advice. I can't remember exactly what ideas I had, I was looking to him to give me suggestions. Van der Merwe told me that Masterbond rates together with banks. I was happy to be introduced to such an investment. I didn't question his advice. At the time I accepted advice given, knowing it comes from such a reputable company."

No contrary version was put to the plaintiff. Nor was he challenged about the averments in his particulars for trial or as to the phrase that the investments were to be renewed annually "as a matter of course". This is hardly surprising because by the time this evidence was led the entire focus of the case had shifted from the advice given to him verbally by Van der Merwe in September 1990 to the advice

given to him telephonically a year later in August 1991.

[14] His evidence-in-chief as to what happened after he received Masterbond Trust's letter enquiring whether he wished to renew the investment was to this effect:

> "In response to this letter, I phoned van der Merwe and asked what to do. I asked him whether in his opinion I should renew. He told me that Masterbond was doing exceptionally well. If I had not received his recommendation, I would have not invested. I did not give my attorneys this information when I went to see them originally about getting my money back from Masterbond, due to the fact that I had forgotten about this conversation with Masterbond. Hence, when my attorneys gave further particulars in answer to defendant's request, they did not inform the defendant's attorneys that I had had a further conversation with van der Merwe regarding their renewal of the policy. I had forgotten about it."

When he was advised by his legal advisors "that there was likely to be a problem" his wife reminded him of the discussion he had had with Van der Merwe in 1991. Under cross-examination he reiterated that when he instructed his legal representatives initially he had mentioned only the earlier conversation of September

1990 and had forgotten all about the conversation of a year later. He was forewarned that "there would be difficulty if no conversation at time." On a different point he was asked: "If advice was invest for one year, then renew, why go back?" and his answer was: "I wanted an update."

[15] As stated earlier the trial court did not believe the plaintiff. It said:

> "I have great difficulty in accepting that plaintiff could have forgotten the advice of Van der Merwe which was the motivating factor for his re-investing in Masterbond. It was such an important issue in the case being brought against defendant that it is inconceivable that he could have overlooked the advice which, according to him, is the basis of his decision to re-invest the money."

And again:

> "This seems to me to be a most improbable version. This was after all the information that had induced him to make the investment. It should have been paramount in his recollection surrounding the re-investment. The plaintiff is an experienced accountant and from his appearance in the witness box, a very careful and studied accountant and this all adds up to the improbability of his version. Plaintiff's evidence on this issue which is the basis of his claim, does not bear the impress of truth and in the circumstances it cannot be held that he

> succeeded in discharging the onus of proof resting on him to prove that the advice, if any, received from the agent of defendant was the motivating factor in inducing him to re-invest ..."

It was on the basis of that finding that absolution from the instance was granted by the trial court.

[16] Before the full court counsel for the plaintiff was unable to persuade either the majority or the minority to reverse that finding of fact. Nor was the finding expressly challenged in the heads of argument filed on behalf of the plaintiff in this court. But in argument senior counsel for the plaintiff (who did not draw the heads of argument) once again sought to rely on the new version that the plaintiff had a further conversation with Van der Merwe in 1991. The attempt, I am afraid, is to no avail. The trial court's reasoning cannot be faulted. Its finding must stand. Consequently counsel in this court was constrained, as was his predecessor in the court below, to resurrect the old version and to argue the matter on the strength of the version presented by the plaintiff prior to the introduction of the amendments

to his pleadings.

[17] The rejection of the plaintiff's new version, according to counsel for the plaintiff, left the old one intact. It meant, so it was contended, that the plaintiff's evidence as to what happened in August 1991 must as it were be edited out of the record. I cannot agree. What was rejected by the trial court was the plaintiff's attempt to introduce evidence of a telephone conversation with Van der Merwe in August 1991. His evidence that he realised that it required a reassessment of the situation and a fresh decision to re-invest - an "update" as he put it - survived. So too his evidence that he made further enquiries from Masterbond and personally processed his application for a new investment on new terms. These remain as factors to be taken into account when the evidence is finally to be evaluated.

[18] Moreover, the rejection of his evidence about the telephonic conversation was by no means a neutral factor, as was contended, leaving the old version undisturbed. Indeed, the rejection of the new version contaminated the plaintiff's

case in at least two significant respects:

a) it blighted the plaintiff's credibility. It meant that one was no longer able to accept the truth of anything the plaintiff said in his own favour unless it was supported by the probabilities;

b) it created a probability of its own against the acceptance of the old version i.e. the probability that the plaintiff invented the 1991 telephone conversation to boost his case because he appreciated that the advice he received from Van der Merwe in 1990 pertained only to the 1990 transaction and not to the 1991 transaction.

[19] In attempting to fashion a new case out of the remnants of the evidence the plaintiff was faced with four sizable obstacles:

1) the state of the pleadings after the amendments introducing the new version;

2) the manner in which the defendant, because of the state of the

pleadings after the amendments, had conducted its case;

3) the cogency of the old version as a self-contained cause of action;

4) the proof of the plaintiff's loss.

I deal with each of these difficulties in the paragraphs that follow.

[20] Counsel for the defendant argued that it was no longer open to the plaintiff, having introduced his new version, to resort to the old one. I am inclined to agree. It is true that the new version was superimposed on the old version and as such was in addition to rather than in substitution of it. Even so the reasonable reader of the pleadings in their amended form would be left in little doubt that the loss complained of was due to the 1991 investment and that that investment was the direct result of the 1991 recommendation and not that of 1990. As stated in para 10 and 11 above the only averments in the pleadings identifying the cause of the plaintiff's loss were par 12.5 (of the particulars of claim as amended) and par 9 (of

the further particulars for trial as amended). Those paragraphs relate solely to the reinvestment advice given to the plaintiff in 1991. There is nothing in the pleadings relating the ultimate loss to the advice given to the plaintiff in 1990. The point, in my opinion, was accordingly well taken by the defendant.

[21] That the state of the amended pleadings had an effect on the manner in which the defendant conducted its case can also not be doubted. It is an ancillary point. Counsel for the plaintiff argued that both parties fully covered all aspects relating to the 1990 incident in evidence. I am not so sure that that is correct. As mentioned earlier (in par 13 above) there was little cross-examination about the events in 1990 - at least not to the extent that would doubtless have been the case if this had consistently remained, as it was in argument again destined to become, the centre of gravity of the entire case. A party whose case had unravelled before a trial court cannot stitch together a new one on appeal if it is not properly covered by the pleadings or was not properly covered in evidence. He cannot in fairness

be allowed to advance a case different from the one he presented on paper - be it in the affidavits on motion (cf *Administrator, Transvaal and Others v Theletsane and Others* 1991 (2) SA 192 (A) 195J-197D; *Naude and Another v Fraser* 1998 (4) SA 539 (SCA) 563H-564A) or in the pleadings on trial (*Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) 107E-I). On that ground too the plaintiff must in my opinion fail.

[22] But the main weakness of the plaintiff's new case on appeal is that even on his own showing he failed to prove it. What the plaintiff in his refurbished case set out to prove was negligent advice given to him by Van der Merwe on behalf of the defendant in 1990 pursuant to an undertaking, also given in 1990, to recommend an investment a year later in 1991; it was negligently given because it endorsed Masterbond which Van der Merwe should have realised was an unstable investment vehicle; and because the advice was that the plaintiff should renew the investment annually as a matter of course, the advice, so it was contended, was also operative

in respect of a reaffirmation of the investment in 1991. The argument is squarely based on the proposition that Van der Merwe's undertaking in 1990 to make a recommendation was understood to apply not only to 1990 but also to 1991. But was such an undertaking established on the probabilities? It is true that the plaintiff testified that he wanted a long term safe investment and that Van der Merwe "told me the initial investment was for a year but should be renewed annually as a matter of course". The expression "as a matter of course" is by no means clear, and for the reasons stated earlier in par 13 it was never properly examined or explained in evidence. One possible meaning is of course that it should be renewed automatically for an indefinite period. But in common with the majority decision in the court below I have some difficulty in accepting as a probability that Van der Merwe, given the short-term nature of the investment in a speculative market, would ever have undertaken or presumed in 1990 to give Masterbond a blanket endorsement which would hold firm for 1991 and the years thereafter. Nor could

the plaintiff reasonably have believed that to be the case. As stated earlier in par 18 the very circumstance that the plaintiff sought to inject false evidence into the case about what happened in 1991supports a probability that the 1990 advice was not intended and could not have been understood to extend beyond the 1990 transaction. [23] The advice which Van der Merwe in fact gave the plaintiff, as appears from the documentation, was not "long-term" but short-term. It is so described and would mature in one years time. Thereafter, as the plaintiff was informed by Masterbond Trust, it would become "null and void", which I take to mean that after the date of maturity the investment would not longer yield interest at the stipulated rate. At best for the plaintiff the expression "to renew annually as a matter of course" may mean that the situation would have to be reassessed at the end of each term and that a new decision would have to be taken (all things considered remaining more or less equal) to continue with an investment in the Masterbond group. And that is precisely what the plaintiff did. As a matter of

probability, therefore, Van der Merwe undertook to and indeed gave binding advice only in respect of the one transaction which he arranged and processed for the plaintiff. That advice was admittedly negligently given. But that fact alone does not assist the plaintiff for it has not been shown by him (as it should have been if the plaintiff sought to rely on it as his cause of action) that he would have lost anything if he had elected to encash that investment when it matured. His loss ensued not from his initial investment but from his reinvestment with Masterbond Trust on different terms and for a different period. In my view the latter investment was not covered by Van der Merwe's undertaking and advice given in 1990. And if his undertaking did not extend beyond the lifespan of the initial transaction for which he assumed responsibility the defendant cannot be held accountable in damages for breach of contract for a loss the plaintiff suffered in a later investment which he himself had negotiated. In short, his loss, being self-inflicted, cannot be attributed to the defendant.

[24] And finally there is the question of the proof of the plaintiff's loss. I do not propose to spend time on it. The plaintiff's damages as at the time of the trial were agreed between the parties. The difficulty with the proof of his loss stems from payments that may in future be made to him by the curators of Masterbond Trust which would reduce his claim against the defendant. The plaintiff did not attempt to prove the quantum thereof at the trial as a matter of probability. Instead he tendered to the defendant a cession of any such dividends as may be paid to him in future. The defendant declined to accept the cession. On appeal before the full court it was conceded that the method which the plaintiff sought to employ was contrary to what was said by this court in *Mouton v Die Mynwerkersunie* 1977 (1) SA 119 (A) 144F-147F, the correctness of which was not contested in either the court below or in this one. Instead the plaintiff on appeal to the full court sought to meet the difficulty with a two-pronged application - a post-judgment rule 33(4) application to separate the merits from the quantum of the claim, which was no

doubt intended to seal off all the evidence already led on the merits; and an application to lead further evidence which was intended to enable the plaintiff to round off the proof of his damages. All I need say about these applications is that there is neither authority nor justification for the first one and that the second founders on the authority of a host of cases of which *Colman v Dunbar* 1933 AD 141 162-3 is perhaps the leading one.

[25] For any of the above reasons the appeal must fail. The order I propose to make is the following:

> "The appeal is dismissed with costs including the costs of two counsel."

.....
P M NIENABER
JUDGE OF APPEAL

Concur :

Olivier JA
Schutz JA
Farlam AJA
Mpati AJ