THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

In the matter:

Case No: 648/09
No Precedential Significance

ATB CHARTERED ACCOUNTANTS (SA) **Appellant**

and

EDNA BONFIGLIO **Respondent**

Neutral citation: **ATB Chartered Accountants (SA) v Edna Bonfiglio (648/09) [2010] ZASCA 124 (30 September 2010)**

Coram: NUGENT, CLOETE JJA, R PILLAY, BERTELSMANN AND EBRAHIM AJJA

Heard: **27 AUGUST 2010**

Delivered: **30 SEPTEMBER 2010**

Summary: Extinctive Prescription – Prescription Act 68 of 1969 – subsections 12(1) and 12(3) – prescription begins to run from the time the debt becomes due – subsection 12(3) – from time creditor acquires knowledge of facts from which debt arises – claim based on contract to render professional advice in relation to agreement of sale of business to third party – default by purchaser – regard to circumstances – debt prescribed.

ORDER

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

1. (a) The appeal is upheld with costs.

(b) The order of the North Gauteng High Court is set aside in its entirety and substituted with the following order:

'The special plea of prescription is upheld and the plaintiff's action is dismissed with costs.'

JUDGMENT

R PILLAY AJA (Nugent, Cloete JJA and Bertelsmann and Ebrahim AJJA concurring)

[1] The issue in this appeal is whether the court below, which granted leave to appeal, was correct in dismissing the appellant's special plea of prescription.

[2] The respondent sued the appellant (ATB), a firm of Chartered Accountants, for damages. The summons was served on 30 June 2006 .Her claim was based on the alleged failure of ATB to properly carry out a contractual mandate with adequate knowledge and diligence that could reasonably be expected of chartered accountants, alternatively, negligence in that it breached a duty of care towards the respondent in advising and negotiating the sale of her business.

[3] The respondent was the sole member of a close corporation, M Klisser CC (the corporation), a stationery retailer. ATB was its auditor. The

respondent requested ATB to find a buyer for the corporation, which was experiencing financial hardship. On 5 April 2002 ATB and the respondent concluded an oral agreement in terms of which ATB undertook to procure a buyer for her interest and loan account in the corporation and to render professional advice in regard thereto. ATB was represented by Mr Martin Venter (Venter).

[4] On the same day Venter introduced her to Jacobus Wilhelm Raath (Raath) another of ATB's clients, as a prospective buyer. Thereafter, Venter drafted a document headed 'Offer to Purchase' and presented it to the respondent after Raath had already signed it. The respondent signed it and accepted the offer, thereby selling her interest and loan account in the corporation for R825 000-00. Payment was to take place in terms of a stipulated schedule of monthly instalments, the first of which was to be paid on 30 April 2002, in an amount of R10 000-00 'plus interest'. All concerned, including the respondent, knew that Raath intended to finance payment of the purchase price for the respondent's interests in the corporation out of the profits of its retail operations. After the conclusion of the written agreement, Raath took over the running of the stationery business. It turned out that he later converted the corporation into a company, namely, C Klisser Co (Pty) Ltd.

[5] Raath failed to make the first payment. Thereafter respondent, legally represented, entered into correspondence with Raath and ATB. It is not necessary to deal with all the correspondence, save for a few material letters. Early in May 2002, respondent's attorneys wrote a letter to ATB expressing concern about Raath's failure to pay. They also wrote a subsequent letter dated 7 August 2002 to ATB, the relevant portion of which reads as follows:

'We also have instructions to inform you at this early stage, that our client will hold you liable for all damages and losses she may suffer as a result of the transaction she entered into with Mr J W D Raath on your advice, and particularly as a result of the 'offer to purchase' you drew up and assisted our client in signing.'

[6] Further communication between the legal representatives of the respondent and Raath resulted in a new short term schedule for the payment of the purchase price being negotiated and finally agreed upon by the respondent and Raath. ATB was informed of the new arrangements by letter dated 11 November. Raath's financial position did not improve to any great extent and he made infrequent payments to the respondent, in breach of the new schedule.

[7] On 19 March 2003, respondent instituted action against Raath for the balance of the purchase price. On 3 April 2003 she received a letter, dated 1 April 2003, from Raath's attorney, the effect of which was that Raath was unable to make payment to her and that C Klisser Co (Pty) Ltd had been liquidated.[1] On 22 May 2003 respondent nonetheless obtained summary judgment against him. On 26 June 2003 a warrant of execution was issued against the property of Raath and pursuant thereto, the sheriff filed a *nulla bona* return on 7 July 2003.

[8] The respondent then turned her attention to ATB. She instituted action against ATB in the High Court, Pretoria claiming damages in an amount of R856 400-10 on the basis that it had failed to comply with the terms of the contract it had entered into with her. She alleged that in advising and negotiating the transaction referred to above, ATB expressly, tacitly or impliedly undertook: (i) to take reasonable steps to ensure that the purchaser was in a sound financial position in order to comply with his financial obligations; (ii) to ensure that proper security was furnished and (iii) that it would exercise the care, knowledge and diligence reasonably expected of chartered accountants in rendering professional services and would execute its duty in a proper professional manner and without negligence. The alternative claim is based on negligence for breaching a duty of care and was couched in similar terms.

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[1] 'Dit spyt ons om u mee te deel dat ons kliënt nie in staat was om finansieël die mas op te kom nie. Alle gelde wat oor die afgelope ses (6) maande gein is, moes aangewend word om betalings aan uitstaande skuldeisers te maak.

Ons bevestig dan dat M Klisser & Co (Pty) Ltd dan gelaas gelikwideer is.'

[9] ATB entered a special plea of prescription, the validity of which, as indicated above, is the issue in this appeal. It asserted that prescription in relation to the respondent's claim commenced to run, in terms of section 12(1) of the Prescription Act 68 of 1969 on 5 April 2002 when she entered into the agreement of sale (upon the advice of ATB). Alternatively, at best for the respondent, so ATB contended, the debt became due when her attorney informed it by letter dated 7 August 2002, that she intended to hold it liable for any losses that she may have suffered as a result of entering into the agreement of sale on its advice.

[10] In her replication to the special plea, the respondent denied that prescription commenced to run on 5 April 2002 or at any time before 7 July 2003 when a nulla bona return was filed. She contended that she only then became aware that the debt as against ATB had become due.

[11] At the hearing of this appeal, ATB applied to amend its special plea. The application was not opposed and this court granted the amendments. The effect thereof is that the alternative date from which it contended prescription had begun to run, namely, 7 August 2002 was amended to 1 April 2003, being the date of the letter informing the respondent that Raath was unable to pay her and that C Klisser Co (Pty) Ltd had been liquidated. It was alleged that the claim was therefore extinguished on 31 March 2006.

[12] It is common cause that the respondent's claim falls within the parameters of subsection 11(d) of the Act which provides a prescription period of three years.

[13] Section 12 of the Act sets out when prescription starts to run. The relevant subsections provide:

'(1) Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as a debt is due.

(2) . . .

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge is he could have acquired it by exercising reasonable care.

(4) . . .'

[14] In *Truter & another v Deysel* [2] at para 16 the following was said:

'For the purposes of the Act, the term 'debt due' means a debt including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.'

[15] It was submitted on behalf of the appellant that the respondent's debt became due when ATB breached the contract with the respondent when the latter concluded the sale agreement on the alleged negligent advice of ATB. It was submitted further that it was then that the wrong occurred and that the respondent sustained the loss although it was not yet apparent.

[16] There is support for that submission in various cases cited in R H Christie: *The Law of Contract in South Africa.*[3] Thus in *Burger v Gouws & Gouws (Pty) Ltd*[4]*,* for example, in which the defendant breached a contract by delivering to the plaintiff the wrong variety of onion seed, Franklin J said the following at 588 A:

'The plaintiff has claimed damages as a result of the defendant's breach of contract in failing to deliver the "Caledon Globe:" variety of seed. That was the single completed wrongful act by the defendant; and the fact that the nature and extent of the damages ultimately sustained by the plaintiff may only manifest themselves after the seed has been planted is in my view irrelevant, provided that it is proved at the trial that the plaintiff suffered damages as a result of that single completed wrongful act.'

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[2] 2006 (4) SA 168 (SCA).
[3] R H Christie assisted by Victoria McFarlane 5ed p 487.
[4] 1980 (4) SA 583 (W)

[17] The respondent's counsel, on the other hand, submitted that the right of action was complete only when the writ of execution resulted in a nulla bona return. It was not before that event, so it was submitted, that it could be said that Raath was unable to pay the purchase price. I do not think that can be correct. On that approach it might just as well be said it would not be known that Raath was unable to discharge his debt to the respondent until the judgment debt had expired after the period of thirty years because at any time before then he may have acquired the necessary funds to do so.

[18] But I do not think it is necessary to decide in this case precisely when the right of action arose. I have pointed out that s 12(3) of the Act delays the running of prescription until the creditor has knowledge of the identity of the debtor and the facts from which the debt arises (a creditor is deemed to have such knowledge if he or she could have acquired it by exercising reasonable care). The purchase price of the corporation (company) was to be paid from the profits that it made but on 3 April 2003, the respondent was advised not only that Raath had been unable to make payment, but also that the company had been placed in liquidation. There can be no doubt that at least by that time the prospect of receiving the purchase price was minimal, if it existed at all. Had a court been called upon to determine at that date, as a matter of probability, whether the respondent had suffered loss, it is plain what its finding would have been. I think it must follow that by no later than that date the respondent's right of action had indeed accrued, and that she had knowledge of all the facts which gave rise to that right of action.

[19] Thus in my view prescription had commenced to run from no later than 3 April 2003 and the claim prescribed no later than three years thereafter ie on 2 April 2006. The summons was issued only thereafter – on 30 June 2006 – and the special plea ought to have been upheld.

[20] In the result, the following order is made:

(a) The appeal is upheld with costs.

(b) The order of the North Gauteng High Court is set aside in its entirety

and substituted with the following order:

'The special plea of prescription is upheld and the plaintiff's action is dismissed with costs.'

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R PILLAY
ACTING JUDGE OF APPEAL

APPEARANCES:

For appellant:	H H STEYN	
	Instructed by:	Couzyn Hertzog & Horak, Pretoria Naudes Inc, Bloemfontein
For respondent:	T W G BESTER	
	Instructed by:	Corrie Nel Attorneys c/o Jacques Roets Attorneys, Pretoria Christo Dippenaar Attorneys, Bloemfontein