THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 125/10

ANGLORAND SECURITIES LIMITED Appellant

and

DIVHANI DAVID MUDAU First Respondent
RUDOLPH RASHAMA Second Respondent

Neutral citation: ***Anglorand Securities Ltd v Mudau & another*** **(125/10) [2011] ZASCA 76 (26 May 2011)**

BENCH: **HEHER, PONNAN, MAYA JJA, MEER and PLASKET AJJA**

HEARD: **20 MAY 2011**

DELIVERED: **26 MAY 2011**

SUMMARY: Prescription Act 68 of 1969 – prescription – commencement of running of – whether interrupted.

ORDER

On appeal from: Limpopo High Court (Thohoyandou) (Hetisani J sitting as court of first instance).

1. The appeal is allowed with costs.
2. The order of the court below is set aside to be replaced with:

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

JUDGMENT

PONNAN JA (HEHER, MAYA JJA, MEER and PLASKET AJJA concurring):

[1] This appeal raises two linked questions: the first concerns the commencement of the running of prescription in regard to the claim of Mr Divhani David Mudau, the plaintiff in the court below (the plaintiff), against the present appellant, Anglorand Securities Ltd (Anglorand); and the second is whether an interruption took place.

[2] Those issues arise for determination against the following backdrop. The plaintiff instituted action in the Limpopo High Court (Thohoyandou) against Anglorand as the second defendant and one of its former employees Mr Rudolph Rashama (Rashama) as the first defendant. Rashama took no part in the proceedings. The basis of the plaintiff's claim is contained in paragraphs 5 – 11 inclusive of his declaration, which reads:

‘5

During or about December 2001, and at THOHOYANDOU, the 2nd Defendant being represented by Rudolph Rashama (1st Defendant) who was at that time within the scope of his employment, and the Plaintiff acting personally, entered into an oral agreement of sale of shares and investment in terms of the following:-

5.1.1 That the Plaintiff must deposit an amount of R160 000-00 (One Hundred and Sixty Thousand) rands to the 2nd Defendant’s banking account no: 4052178047 (ABSA) Bank Limited being for sale of shares which the Plaintiff was purchasing from Johannesburg Stock Exchange.

5.1.2 That the Defendant(s) will buy shares for the Plaintiff immediately after the Plaintiff deposited the said money into the 2nd Defendant’s Banking account and invests the remaining amount with any banking institution in the Republic of South Africa.

5.1.3 That the Defendant(s) shall within 7 (seven) working days after deposit of the said money provide the Plaintiff with investment booklet reflecting the rate of interests which will accrue to the money deposited by the Plaintiff.

5.1.4 That the Plaintiff shall have the right to withdraw the capital amount deposited at anytime after the period of 3 (three) months from the date of the deposit of the money.

5.1.5 That the Defendant(s) will at all the material times act as agents for the Plaintiff in the said transaction.

6

On or about the 04th day of December 2001, the Plaintiff duly deposited an amount of R160 000-00 (One Hundred and Sixty Thousand) rands to the 2nd Defendant’s Banking account no: 4052178047 (ABSA) Bank Limited at THOHOYANDOU branch as per agreement between the parties.

7

From the period 15th of December 2001 until the period March 2002, the Plaintiff was at all the material times thereto keep on checking his postal box to see if investment booklet had already been sent to him from the Defendants.

8

During the period April 2002, the Plaintiff went to the 2nd Defendant’s premises to enquire about his shares, investment and the money which he had deposited into the 2nd Defendant’s Banking account.

9

At the 2nd Defendant’s premises, the Plaintiff was advised by one of the directors of the 2nd Defendant that his money is reflecting in the 2nd Defendant banking account but same could not be withdrawn at that time since insurance claim had been lodged against Rudolph Rashama for an alleged fraud and that repayment of the Plaintiff’s money would be effected within 6 (six) month.

10

During November 2002, on the 2nd Defendant’s premises, the Plaintiff demanded withdrawal of his capital amount which he had deposited into the 2nd Defendant’s banking account, and one of the directors of the

2nd Defendant advised the Plaintiff that cheque of the capital amount will be drawn on Plaintiff's favour within 6 (six) month.

11

Despite promises on several occasions and on demand,

11.1 The cheque was never drawn to the Plaintiff's favour from the Defendants;

11.2 Investment booklet(s) was never sent to the Plaintiff from the Defendants;

11.3 Shares were never bought for the Plaintiff from Johannesburg Stock Exchange or anywhere by the Defendants;

11.4 the Defendants never refunded an amount of R160 000-00 to the Plaintiff.'

[3] For a better appreciation of the history to the matter it is necessary to record that with effect from 1 March 2001 Anglorand purchased from Cahn Shapiro Incorporated (Cahn Shapiro), a member of the Johannesburg Stock Exchange (JSE), the latter's client base, which included the plaintiff. By that stage, so the allegation went, the plaintiff had already invested or more accurately believed that he had invested R300 000 with Cahn Shapiro to enable it to purchase on his behalf listed securities, financial instruments and money market investments as defined in the JSE's Rules. That investment of R300 000 the plaintiff had made through Rashama, who was then employed by Cahn Shapiro. It, like the subsequent one for R160 000, was allegedly misappropriated by Rashama.

[4] The plaintiff's summons elicited, in response, inter alia, the following special plea:

'8

Plaintiff's claim is based on an alleged oral agreement concluded between Plaintiff and Second Defendant during or about December 2001.

9

Plaintiff, through his appointed attorneys, and in writing, demanded payment from Second Defendant on 14 October 2002. A copy of the demand is annexed, marked "B".

10

Plaintiff's claim according became due on 14 October 2002.

11

Plaintiff had to serve Summons commencing action on Second Defendant before or on 13 October 2005.

12

Plaintiff's Summons under Case No. 1312/06 was served on Second Defendant on 16 August 2006.

ALTERNATIVELY

13

Plaintiff pleads that during November 2002 one of the directors of Second Defendant advised Plaintiff that a cheque for the capital amount will be drawn on (sic) Plaintiff's favour within six month (sic).

14

Six months would have expired during May 2003.

15

Plaintiff had to serve Summons commencing action on Second Defendant during or before May 2006.

16

Plaintiff's Summons in case No. 1312/06 was served on Defendant on 16 August 2006.

17

Second Defendant accordingly pleads that Plaintiff's claim against Second Defendant became prescribed prior to service, on Second Defendant, of a Summons commencing action.

WHEREFORE Second Defendant prays that its Second Special Plea be upheld and Plaintiff's claims be dismissed with costs.'

[5] The plaintiff's letter of demand dated 14 October 2002 (Annexure B to the defendant's plea) was marked 'urgent' by the plaintiff's then attorney. It reads:

'We wish to advise that we act on behalf of Mr Mudau in the above matter who instructs us as follows:-

1. That he invested a total amount of R460 000-00 since 1999 to date initially through CAHN SHAPIRO and subsequently with Anglorand Securities (yourselves).

2. That all the funds were deposited in Account No: 01029071698 (Cahn Shapiro) 4052178047 (Anglorand Securities).

3. That the initial account code was 237370 but when our client made the last investment of R160 000-00 one Rudy Rashama, your employee phoned our client advising him to use the account code 4230728 and it later transpired that it was his personal account.

4. That you advised our client that the account given to our client by one Rudy Rashama was in the names of your said employee.

5. That our client became suspicious with regard to his investments as he was no longer receiving the normal portfolio valuation statements but some papers which had the logo of Anglorand Securities.

6. That our client approached your company regarding his investments of funds totalling R460 000-00 but in vain.

We have been instructed to kindly request yourselves to refund/pay back our client's investment of R460 000-00.

We have written this long letter to yourselves with the hope that the matter could be resolved amicably without resorting to civil litigation of which your company will be liable to pay legal costs incurred.

However should the matter not be resolved we will have no option but to proceed with further legal steps.

Kindly let us have your response within 10 (ten) days of receipt of this letter.'

[6] The plaintiff replicated to the special plea of prescription as follows:

'Save for denying that the Plaintiff had to serve summons commencing action to the second Defendant during or before May 2006,

The Plaintiff avers that he was always promised that, his money will be refunded even after the expiry of six month on demand, and therefore there was no reason for the Plaintiff to issue summons at the time of the promises in bona fide belief that his money will be refunded and was further advised that, insurance claim was lodged for an alleged fraud committed by the 1st Defendant and the Plaintiff will be informed of the "future" progress of his claim.'

[7] The high court (per Hetisani J) was asked to adjudicate the special plea as a preliminary issue. What the learned judge was called upon to decide was whether the claim had become prescribed before the issue and service of the plaintiff's summons on 16 August 2006. Hetisani J concluded 'the claim by the Plaintiff of refund of his R160 000 is hereby upheld against [Anglorand] with costs'. In entering judgment for the plaintiff the learned judge ranged beyond the remit of the limited agreed preliminary issue placed before him for adjudication. He thus plainly misdirected himself and in the result his conclusion cannot stand.

[8] Of the special plea of prescription Hetisani J concluded:

'It is perhaps not surprising that this Court's conclusion on the defence against Plaintiff's claim of refund of his R16.000.00 is nothing but 2nd Defendant's efforts to escape liability, by mere tactics based on legal technicalities . . .'.

Although the learned judge did not specifically say so, given the conclusion reached by him, he must be taken to have dismissed the special plea of prescription with costs. It thus remains to consider whether that conclusion is sustainable.

[9] Prescription commences to run against the debt on the day it becomes due unless delayed or interrupted. It will continue to run until it has completed its course (*Aussenkehr Farms (Pty) Ltd v Trio Transport CC* 2002 (4) SA 483 (SCA) at 495). As stated in *Umgeni Water v Mshengu* (para 5 and 6) [2010] All SA 505 (SCA); 2010 ILJ 88 (SCA):

'Section 10 of the Prescription Act 68 of 1969 (the Act), provides for the extinction of a debt after the lapse of periods determined in s 11. The period of prescription applicable to the plaintiff's claim is that provided for in s 11(d) of the Act, namely 3 years. According to s 12(1) of the Act, prescription shall commence to run "as soon as the debt is due". The words "debt is due" must be given their ordinary meaning.[1] In its ordinary meaning a debt is due when it is immediately claimable by the creditor and, as its correlative, it is immediately payable by the debtor. Stated another way, the debt must be one in respect of which the debtor is under an obligation to pay immediately.[2]

A debt can only be said to be claimable immediately if a creditor has the right to institute an action for its recovery. In order to be able to institute an action for the recovery of a debt a creditor must have a complete cause of action in respect of it. The expression "cause of action" has been held to mean:

" ... every fact which it would be necessary for the plaintiff to prove, . . . in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved"; or slightly differently stated "the entire set of facts which give rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not 'arise' or 'accrue' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action." '[3]

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[1] *The Master v I L Back and Co Ltd* 1983 (1) SA 986 (A) at 1004F.

[2] See *Western Bank Ltd v S J J van Vuuren Transport (Pty) Ltd & others* 1980 (2) SA 348 (T) at 351 and *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 909 and the cases there cited.

[3] See *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838 and the cases there cited by Corbett JA; see also *Truter and another v Deysel* 2006 (4) SA 168 (SCA) para 16, 18 and 19.

A plaintiff must thus have a complete cause of action at the stage when summons is issued or at any rate when the summons is served.[4]

[10] At the hearing before Hetisani J two witnesses testified, the plaintiff and Ms Yolanda Taljaard, who at the relevant time was a director and compliance officer at Anglorand. The learned judge did not express himself on the credibility or reliability of either witness, although his approach to the evidence on this aspect of the case can be gleaned from the following extract from his judgment:

'Regarding the 2nd Defendant's second special plea, which is based on alleged prescription of Plaintiff's claim, the evidence adduced by the witness Yolanda Taljaard shows clearly that Plaintiff was constantly telephoning and visiting 2nd Defendant kept the request for his investments' whereabouts alive and at one stage he was told that his claim had been lodged with an institution operating from London and known as "Loss Adjustors".'

But with respect to the learned judge he misconstrued Ms Taljaard's evidence, who testified:

'I never denied, I am sorry but I never denied that Mr Mudau visited the office. He did visit the office. We never said that we were liable. Anglo Rand never told Mr Mudau that we were going to pay him. He did visit, he did phone and he always got the same answer. We were not going to pay. We did not lodge a claim.'

[11] Ms Taljaard's evidence that right from the outset Anglorand disputed liability to the plaintiff found support in the correspondence adduced in evidence. On 11 June 2002 Ms Taljaard wrote to the plaintiff:

'We refer to your visit to our offices on the 5th June 2002, and your written statement made on the same day.

According to our records, the deposit slip which you submitted to the Bank on 4th December 2001 with your deposit of R160 000.00 gave specific instructions that the moneys were to be allocated to our Client Account No.: 4230728.

We acted in accordance with that instruction, and confirm that the holder of Account No.: 4230728 at the time was Mr Rashama.

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[4] *Mahomed v Nagdee* 1952 (1) SA 410 (A) at 418; *Marine and Trade Insurance Co Ltd v Reddinger* 1966 (2) SA 407 (A) at 413D; *Santam Insurance Co Ltd v Vilakasi* 1967 (1) SA 246 (A) at 253A-F.

We cannot take the matter any further and suggest that you take independent advice.'

And on 24 October 2002 Anglorand's attorney wrote to the plaintiff's then attorney in response to the latter's letter of demand (Annexure B to Anglorand's plea):

'We represent Anglorand Securities Limited.

We have been instructed to respond to your letter dated 14th October 2002, as follows:

1. Our client has no knowledge, and cannot comment on payments allegedly made by your client to Cahn Shapiro;

2. In respect of payments allegedly made to us, our client has already responded, in writing, to your client's enquiries;

3. Our client's attitude remains that it has no liability to your client;

4. Our client is not prepared to debate the matter any further in correspondence and its election not to do so must not be construed as an admission of any of the statements made in your letter'

But even prior to those letters on 12 January 2002 the plaintiff wrote to the client services manager of the JSE Securities Exchange, 'when we approached the company [Anglorand] they were not willing to address this issue and I request the JSE Securities Exchange to intervene in this matter'.

[12] On the view that I take of the matter it is not necessary to subject the evidence of the two witnesses to closer scrutiny or to resolve or reconcile such factual disputes as may exist between them, for, on the undisputed facts at the latest (and most generous for the plaintiff) by 25 October 2002 he knew, not just that payment would not be forthcoming but that liability for his claim was in fact being disputed by Anglorand. It follows that prescription must be taken to have commenced to run from that date.

[13] I now turn to consider the second issue, namely the plaintiff's contention that the running of prescription had been interrupted. In terms of s 14 (1) of the Prescription Act 68 of 1969 (the Act) the running of prescription may be interrupted by an express or tacit acknowledgment of liability by the debtor. In support of the contention that the running of prescription had been interrupted reliance was placed on a letter written to him by Gary Cahn of Cahn Shapiro dated 6 June 2002, which reads:

'This serves to confirm that an insurance claim has been lodged with regard to an alleged fraud committed by Rudolph Rashama, a former employee of Cahn Shapiro Inc.

The procedure is such that the loss adjustors will assess the claim and then forward it to the underwriters in London.

Cahn Shapiro will keep you informed of all future progress with regard to the matter.'

But as Ms Taljaard testified:

'MR PRETORIUS: I want to ask you to tell his lordship briefly what the relationship is between Anglo Rand Securities Ltd and Cahn Shapiro, I think it is incorporated. --- Incorporated. Basically what happened was that Anglo Rand Securities, at that stage it was (Pty) Ltd, bought the client base of Cahn Shapiro Inc. It was just a transaction that was done between two companies. Cahn Shapiro at this stage still exists as a company, not as a broking member though and Anglo Rand literally only bought the client base. We did not take any of the liabilities over.

HETISANI (J): What do you, what would a layman like myself understand by buying the client base? --- Well, in stock broking, the way it works, every member firm has a client base and when a broking member is going to cease to be a member, it usually sells that client base. It would move over to another stock broking firm where the relationship with the client would be taken over.

MR PRETORIUS: And you said as of today Cahn Shapiro is still a registered company, still in existence? --- It is still in existence.

The directors of the two companies, were they the same? --- Not all. Gary Cahn was the director at Cahn Shapiro Inc and at Anglo Rand at the time this transaction took place, it was myself, David Lewis, we had Andriaan Kamper and Hugh Drummond. That was the non-executive director.

Okay. And so it was not a transaction similar to a buying of a going concern? --- No not at all.

It was not even that much, is that correct? --- That is 100% correct.

And did I understand you correctly that the liabilities of Cahn Shapiro was specifically excluded in this transaction? --- That is correct.

What does it mean in layman's terms? --- In layman's terms, what that would mean was that if there was any claims that was coming up for Cahn Shapiro, that Anglo Rand would not be held liability for it.

There after, after the effective date, what was the effective date? --- The effective date was 1 March 2001.

So any transactions after 1 March 2001 that may result in a claim would then be against Anglo Rand? --- That is correct yes.

You were in court, you have listened to what was suggested to Mr Mudau under cross-examination, as to a distinction between the amount of R300 000.00 and the amount of R160 000.00, can you explain to the court why the court should draw such a distinction, should deal with it separately? --- Because it is two separate companies it cannot be viewed together and that was explained to Mr Mudau in January 2002 as well, that it is two separate companies. The claims had to be split.

The R300 000.00 related to events prior to 1 March 2001? --- Prior to 1 March.

The R160 000.00 to events after 1 March 2006, is that correct? --- Correct, that is correct.'

[14] Indeed that distinction between Anglorand on the one hand and Cahn Shapiro on the other was recognised by the plaintiff who testified:

'CROSS-EXAMINATION BY MR PRETORIUS: When did you start investing with Cahn Shapiro?

Yes. --- I think it was 2000.

2000? --- Uh.

And apart from the R160000.00, how much did you invest? --- I invested R300000.00.

So in total it was R460000.00? --- Ja, in total it was R460000.00.

R300000.00 with Cahn Shapiro and R160000.00 with AngloRand, is that correct? --- Ja.

Did you get that R300000.00 back? --- I did not get it all, I just got part of it because the claim, even that one of R300000.00 was also defrauded by him.

The question is, did you get the R300000.00 back? --- No, I did not get it, I just got part of it.

How much is still owed to you on the R300000.00? --- They owe me, if, I am talking of the initial amount, which I injected there, they still owe me R75000.00.

. . .

HETISANI (J): So they paid you how much? --- They paid me R228000.00.

228? --- Ja, R228000.00, out of the R300000.00 I was defrauded.

By Loss Adjusters? --- Yes, loss adjusters.

What is the name of that company? You said, how do you pronounce it? --- Gab, G-A-B.

Oh, just GAB? --- Ja, GAB. It is called GAB International Loss Adjusters.

Thank you.'

[15] An acknowledgement of liability for the purposes of s 14 of the Act is a matter of fact not a matter of law (per Nienaber JA in *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) para 37). What the Act requires is 'an acknowledgement of liability' and not merely 'an acknowledgement of indebtedness' (*Benson & another v Walters & others* 1984 (1) SA 73 (A)). What we have here falls far short of an acknowledgement of the existence of a debt or of a present liability (*Markham v South African Finance & Industrial Company Ltd* 1962 (3) SA 669 (A) at 676F). For, the admission, in short, must cover at least every element of the debt and exclude any defence as to its existence (*Mothupi* para 38). Put another way, it must be an acknowledgment by the debtor that the debt is in existence and that he or she is liable therefor at the time when the statement alleged to be an admission of liability is made. And finally there is of course the point made in *Cape Town Municipality v Allie NO* 1981 (2) SA 1 (C) at 7F-G:

'In the end . . . one must also be able to say when the acknowledgment of liability was made, for otherwise it would not be possible to say from what day prescription commenced to run afresh.' (See also *Benson* at 86E.)

[16] It was for the plaintiff to plead and prove that prescription had been interrupted. I do not think that he has discharged that onus of proof on a balance of probability. It follows, in my view, that the appeal must succeed and it is accordingly allowed with costs. The order of the court below is set aside to be replaced by:

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

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V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	P J J de Wet
	Instructed by: Tatham Wilkes Inc Pietermaritzburg Naudes Bloemfontein
For Respondent:	No appearance