IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

Case No.: CA78/2017

Date Heard: 16 April 2018

Date Delivered: 8 May 2018

In the matter between:

MBULELO MTATI Appellant

and

WHITESIDES ATTORNEYS Respondent

JUDGMENT

EKSTEEN J:

[1] The appeal concerns the application of section 12(1) of the Prescription Act, 68 of 1969 (the Prescription Act) and the determination of when prescription commences to run.

[2] The appellant issued summons against the respondent for damages in delict as set out more fully later herein. There are material disputes of fact relating to the merits of the appellant's case, however, the respondent entered a special plea of prescription. At the hearing of the matter the special plea was separated from the remaining issues and the trial proceeded only in respect of the question of prescription. The magistrate upheld the plea of prescription and dismissed the appellant's claim. The appeal is directed against this order.

The background

[3] The alleged history which underpins the appellant's claim began in 2010. On 28 October 2010 the appellant entered into a written deed of sale (the deed of sale), as purchaser, in terms of which he purchased an immovable property (the property) situated in the municipal area of Makana from Mr and Mrs Bacela, as sellers (hereinafter referred to as "the sellers"). The deed of sale provided that the purchase price in the sum of R50 000,00 was payable by the purchaser to the seller upon registration of transfer. It further stipulated that transfer of the property was to be passed by the sellers' conveyancer, the respondent herein. The respondent duly accepted the mandate.

[4] The deed of sale was prepared by the respondent and was signed in the offices of the respondent on 28 October 2010. On this occasion the appellant tendered payment of the full purchase price. It is the appellant's case that Ms Amsterdam, a partner in the respondent at the time, instructed the appellant to pay the purchase price over to one Cynthia, an employee of the respondent, in order for it to be held in trust pending the transfer of the property. It is not in dispute that there was at the time a bond registered against the property. No further particulars relating to the extent of the bond which was registered against the property emerged from the pleadings or the evidence. The unchallenged evidence of Ms Amsterdam is that she informed the appellant on the date of signature of the agreement that the monies were to be paid into the respondent's trust account and would be utilised for the cancellation of the bond, the payment of rates and service charges accruing against the property prior to the date of transfer and that the balance would be paid

over to the sellers. Her evidence accords in this respect with the appellant's case as pleaded.

[5] The purchase price was, however, never paid into the respondent's trust account. Instead, the full purchase price in the amount of R50 000,00 was paid over directly to the sellers. There is a material dispute of fact between the parties relating to the circumstances which gave rise thereto and each party blames the other for this occurrence. By virtue of the separation of the issues this dispute was not before the magistrate and need not be addressed in the present proceedings.

[6] The sellers, having received the full purchase price, refused to co-operate thereafter. They raised a dispute relating to the amount which had been paid over to them and denied liability for the settlement of the bond registered against the property. In the circumstances, transfer of the property into the name of the appellant never materialised and the sellers retained the money which had been wrongfully paid over to them.

The plaintiff's claim

[7] It is necessary for purposes of determining when the appellant had actual knowledge of the "facts from which the debt arises" to clarify the nature of the appellant's claim. (see **Kelbrick and Others v Nelson Attorneys and Another** [2018] ZASCA 55 (16 April 2018)) The material portions of the particulars of claim state:

"6. The Plaintiff was directed by Ms Amsterdam to pay the purchase price over to one CYNTHIA, an employee of the Defendant, with such purchase price to be held in trust pending the transfer of the property.

7. The Defendant's employee, Cynthia deliberately failed, *alternatively*, neglected to receipt the money she had received from the Plaintiff and instead tendered it directly to the Sellers.

8. At all material times hereto and on 28 October 2010:

8.1 The said Amsterdam and Cynthia were employed by the Defendant and were acting in the course and scope of such employment;

8.2 The Defendant owed a legal duty to the Plaintiff:

8.2.1 to exercise the appropriate amount of care, skill and due diligence as could be reasonably expected of an attorney in carrying out the Plaintiff's instructions;

8.2.2 to perform such services as was expected of it and to carry out its mandate in a proper and professional manner and without negligence;

8.2.3 to deposit any moneys paid by the Plaintiff into its trust account and to only disburse such moneys in strictest accordance with the Plaintiff's instructions;

8.2.4 to account to the Plaintiff for all monies received in trust and which had been disbursed in good faith and in accordance with the Plaintiff's instructions;

8.3 The Defendant and its employees failed to take any steps necessary to protect the Plaintiff's interests, resulting in the Plaintiff suffering damages.

8.4 Alternatively, it was an express, alternatively an implied, term of the sale agreement that the Defendant would exercise all reasonable care, skill and due diligence in performing its obligations in respect thereof and as would be reasonably expected of an attorney in such a positon.

8.5 By reason the Defendant's employee's failure to discharge its obligations to the Plaintiff, the Plaintiff suffered and continues to suffer severe financial determent.

9. In and as a result of the aforegoing the Plaintiff has suffered damages in the amount of **R50 000.00**."

[8] The averments set out in paragraph 6, 8.1, 8.2 and 8.4 are not in dispute. I pause to record, that whilst the averments set out in paragraph 8.4 are admitted, the respondent was, as a matter of fact not a party to the deed of sale and the contract did not impose any duty on it. It had accepted a mandate from the sellers to act as the sellers' conveyancer. In accepting the mandate it attracted a legal duty of care to the appellant. The claim advanced on behalf of the appellant relates to a claim in delict rooted in the alleged conduct of Cynthia as set out in paragraph 7 of the particulars of claim which constituted a breach of the respondent's admitted legal duty to the appellant.

[9] The special plea of prescription acknowledged, correctly, that the appellant's claim against the respondent is based on the alleged breach on 28 October 2010 of a legal duty of care owed towards the plaintiff by the defendant. It proceeds to allege

that the appellant had knowledge of the identity of the respondent and the facts from which the debt arose on 28 October 2010. In the alternative, the special plea, as amended, recorded that the appellant had acquired knowledge of the facts from which the debt arose on 18 May 2012, at the latest, when it became clear that the money allegedly transferred to the sellers would and could not be recovered from them by exercising reasonable care and that he is deemed to have had such knowledge by such date, at the latest, by virtue of the provisions of section 12 of the Prescription Act. It is accordingly contended that prescription commenced to run at the latest on 18 May 2012. The summons was served on 23 March 2016. The magistrate upheld the special plea.

[10] In its replication to the special plea, the appellant specifically acknowledged that the negligent actions of the respondent or its employees occurred on 28 October 2010, however, it denied that the debt against the respondent had prescribed by virtue of a number of features relating to the subsequent conduct of the respondent which is set out in the replication.

[11] The material portion of the replication records:

> "2.2 …[I]t is denied that the debt against the Defendant has prescribed for the reasons as pleaded below.
>
> 2.2.1 On 4 November 2010, the Defendant addressed a letter to the Sellers requesting that they make payment of the purchase price into their trust account in order to enable them to satisfy the debt owing in respect of the bond that had been registered over the property;

2.2.2 On 11 February 2011, the Defendant addressed a letter to the Sellers, indicating that the Plaintiff wished to negotiate with them regarding the settlement of the bond registered over the property;

2.2.3 On 23 March 2011, the Defendant addressed a letter to the finance division of Rhodes University, in support of the Plaintiff who wished to secure a loan in order to settle the bond in the amount of R27 476,83;

2.2.4 On 23 March 2011, the Defendant addressed further correspondence to the bond holder, Nedbank's attorneys and advised them that would provide them with an update once they were in a position where they could guarantee that debt would be paid;

2.2.5 On 26 March 2012 and 23 May 2012, the Defendant instructed First National Bank to invest the sums of R20 000.00 and R7 476.38, being sums received from the Plaintiff for the purpose of paying for the transfer costs;

2.2.6 On 14 May 2012, the Defendant addressed a letter to the Sellers requesting that they present themselves at their offices in order to sign the transfer documents;

2.2.7 On 17 May 2012 Ms Amsterdam prepared transfer documents including a conveyancing agreement and power of attorney;

2.2.8 On 5 June 2013 the Defendant sent the Deed of Transfer to Nedbank's attorneys, thereby indicating that they were in position to guarantee satisfaction of the outstanding debt;

2.2.9 On 14 August 2013, the Defendant reimbursed the sums of R20 000.00 and R7 476.38 to the Plaintiff.

> 2.3 The Plaintiff pleads that following the Seller's breach of the purchase agreement, the Defendant and or its employees undertook to make demand of and secure the Plaintiff's purchase price."

No evidence was adduced in respect of para 2.2.1; 2.2.2; 2.2.4 or 2.2.8. I shall revert to the evidence in respect of the remaining issues below, to the extent that it is material.

[12] It is the appellant's case that prescription did not begin to run against the respondent until he was ultimately advised, as a fact, that the transfer of the property would certainly not occur. I emphasise, however, that the plaintiff's claim is one founded upon the deliberate, alternatively, negligent conduct of Cynthia which occurred on 28 October 2010. The damages suffered by the plaintiff are alleged to arise from this conduct (para 8.5 of the particulars of claim), not from the failure to pass transfer of the immovable property.

Legal framework

[13] Section 10(1) of the Prescription Act provides that "… a debt shall be extinguished by prescription after the lapse of a period which in terms of the relevant law applies in respect of the prescription of such debt". Section 11 provides for the periods of prescription of debts. There is no dispute between the parties that the appellant's claim constitutes a debt as envisaged in the Prescription Act and that the prescribed period of prescription relating to the debt is three years as provided for in section 11(d) of the Prescription Act.

[14] Section 12 of the Prescription Act lies at the heart of the dispute between the parties. The material portions of the section 12 provides:

> "(1) Subject to the provisions of subsections (2), (3) and (4) prescription shall commence to run as soon as the 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 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.
> (4) …"

The provisions of subsections (2) and (4) find no application to the current dispute.

[15] It is for the party raising the issue of prescription, in this case, the respondent, to allege and to prove both the date of the inception and the date of completion of the period of prescription. (See **Gericke v Sack** 1978 (1) SA 821 (A) at 827H-828A; **Van Staden v Fourie** 1989 (3) SA 200 (A) at 216B; and **Santam Limited v Ethwar** 1999 (2) SA 244 (SCA) at 256G.) The respondent was accordingly required to show when the debt was due as envisaged in section 12(1). I do not think that it is necessary to prove that the running of prescription began to run on a specific day, provided that it is proved that prescription began to run more than three years prior to the issue of summons (compare **Gericke**, *supra*, at 828D and **Kelbrick**, *supra*, at para [25]).

[16] I pause to acknowledge that there is a difference between the date when a debt comes into existence on the one hand and the date when it becomes recoverable on the other, although, depending on the facts of the case, they may coincide (see **List v Jungers** 1979 (3) SA 106 (A) at 121C-D).

[17] Moreover a debt may only be due after the occurrence of some future event. (See **Electricity Supply Commission v Stewarts & Lloyds of SA (Pty) Ltd** 1981 (3) SA 340 (A); **Olthaver & List Trust Co Ltd v Stauch NO** 1972 (4) SA 48 (SWA); **Pereira v Marine and Trade Insurance Co Ltd** 1975 (4) SA 745 (A) at 757F-785F; **Cape Town Municipality and Another v Alliance Insurance Co Ltd** 1990 (1) SA 311 (C).)

[18] In **Truter and Another v Deysel** 2006 (4) SA 168 (SCA) at 174 para [16] the Supreme Court of Appeal dealt with the meaning of the phrase "debt due" it stated:

> "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 will entitle the creditor to institute action and to pursue his/her claim."

This passage was referred to with approval in the Constitutional Court in **Links v Department of Health** 2016 (4) SA 414 (CC).

[19] Finally, in **Minister of Finance and Others v Gore NO** 2007 (1) SA 111 (SCA) Cameron JA and Brandt JA stated at para [17]:

> "This Court has, in a series of decisions, emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action."

When was the debt due?

[20] I have recorded earlier that the respondent was not a party to the deed of sale. It accepted a mandate from the sellers to act as the sellers' conveyancer in passing transfer of the property in terms of the deed of sale. In doing so it assumed the legal duties of care to the respondent as set out in paragraph 8.2 of the particulars of claim. The deed of sale provided expressly for the purchase price to be paid to the sellers on the date of transfer. It is the appellant's case that he paid the entire purchase price to the respondent on the date of signature of the agreement for it to be held in trust pending the transfer. The sellers' entitlement to receive the purchase price, less the costs attendant upon the settlement of the bond and liabilities incurred in respect of the property to the relevant authorities accrues on the date of transfer. A conveyancing attorney's obligation is to hold such monies for and on behalf of the purchaser pending the disbursement thereof in accordance with the contract in order to pass transfer. Accepting the appellant's version of events, as I must do for purposes of the special plea, the money paid to the respondent remained his property and the respondent was required to hold such monies in trust for and on his behalf.

[21] In conflict with the provisions of the deed of sale and the instructions of the appellant it was allegedly paid by the respondent to the sellers. It is common cause

that this payment occurred on 28 October 2010. Whatever the circumstances may have been which gave rise to this payment being made directly to the sellers, it is the unchallenged evidence of Ms Amsterdam that shortly thereafter, during or about October or November 2010 the matter was discussed with the appellant when she reiterated to him that the money was meant to be paid into the trust account of the respondent and that registration would now pose a difficulty as certain payments had to be made from the purchase price on the date of registration for which she now held no money in trust. As recorded earlier this predicted difficulty in due course became a reality as the sellers declined to offer any further co-operation.

[22] Notwithstanding the attitude of the sellers, the appellant remained desirous to obtain transfer of the immovable property. To this end he was advised by Ms Amsterdam that he would be required to pay an additional amount, over and above the purchase price stipulated in the deed of sale, in respect of the cancellation of the bond in order to enable the transfer to proceed. This, it would appear, he agreed to do. The appellant paid two instalments in March and May 2012, respectively, in the amounts of R7 476,83 and R20 000,00. The appellant testified that he was advised by Ms Amsterdam sometime during 2010 that he would be required to pay the additional approximately R27 000,00 in respect of the settlement of the bond. The payments eventually made in 2012 were in response to the advice in 2010. This seems to me to accord with the unchallenged evidence of Ms Amsterdam that the matter was discussed shortly after the wrongful payment had been made during or about October or November of 2010.

[23] On 23 March 2011 Ms Amsterdam addressed a letter to the Department of Finance at Rhodes University, where the appellant was employed as a cleaner. She recorded:

> "Mr Mtati has paid a portion of the purchase price and transfer costs and has indicated that he wishes to apply for a loan in respect of the balance owing in the amount of R27 476,83."

[24] It is, of course, not in dispute that the full purchase price in the amount of R50 000,00 was paid on the date of signature of the agreement. That is the amount now claimed. Whilst no evidence was tendered as to the purpose of the letter the appellant pleaded in its replication:

> "On 23 March 2011, the Defendant addressed a letter to the finance division of Rhodes University, in support of the Plaintiff who wished to secure a loan in order to settle the bond in the amount of R27 476,83."

[25] The pleading accords both with the evidence of Ms Amsterdam relating to the discussion late in 2010 and the evidence of the appellant that he had been advised in 2010 already that he would now be required to pay again to settle the bond in order to obtain transfer. Important for purposes of the present enquiry is the fact that appellant knew in 2010 that he could no longer obtain the property in terms of the deed of sale but that, as a result of the premature payment of the purchase price to the sellers, he would now be required to find a further R27 476,83. The appellant, however, remained desirous to obtain transfer of the property notwithstanding this. He duly paid the said amounts as set out earlier. Ms Amsterdam accordingly prepared all the necessary documentation in order to secure transfer of the property

for signature by the sellers, presumably on the strength of the undertaking by the appellant to settle the outstanding bond. Ms Amsterdam invited the sellers to sign the documentation at the offices of the respondent on 17 May 2012. Despite attending the scheduled meeting the sellers declined on this occasion to sign any further documentation.

[26] Ms Amsterdam states that she contacted the appellant either on the same day, 17 May 2012, or the following day, and that the appellant was then informed of the sellers refusal to sign the documentation. It is this communication which underlies the alternative date set out in the special plea. The communication by Ms Amsterdam to the appellant is disputed, the appellant contending that he received no communication whatsoever from Ms Amsterdam at any time during 2011 or 2012. He first heard that the transfer of the property would not proceed at some stage during 2013. I shall revert to this issue later.

[27] Whatever the positon may have been it is not in dispute that the final payment in respect of the settlement of the outstanding bond was received either prior to 18 May 2012 or shortly thereafter. This is evident from the fact that Ms Amsterdam invested a sum of R20 000,00, to be added to the earlier investment of R7 476,83 on 23 May 2012.

[28] I revert to the question as to when the “debt” was “due”. I have been at pains to emphasise that, accepting that the money was in fact paid to the respondent, as alleged by the appellant, the obligation of the respondent was to hold such monies in trust for and on behalf of the appellant pending the transfer of the property. He was

advised of this fact and the reasons therefor were explained to him by Ms Amsterdam at the time of signature of the agreement. The fact of the payment of the monies directly to the sellers and the potential consequences thereof were discussed shortly after the conclusion of the agreement during 2010. On the undisputed evidence tendered before the magistrate the appellant knew in October or November 2010 that the purchase price had been paid to the sellers in advance, contrary to the deed of sale and the instruction of Ms Amsterdam as recorded in paragraph 6 of the particulars of claim. His money which was required, *inter* alia, for the cancellation of the bond so as to enable transfer of the property to be effected had been wrongfully disbursed and the problems which flow from this had been explained to him. His money had been lost. He was entitled forthwith to demand of the respondent to reinstate an amount of R50 000,00 in their trust account to be held for and on his behalf and, if necessary, to institute proceedings to ensure that it occurred. Nothing more was required.

[29] It is necessary at this juncture to refer in some detail to the judgment in **Kelbrick**, *sup*ra which illustrates the application of these principles. In **Kelbrick** each of the appellants had sold their respective immovable properties in terms of written deeds of sale dated 4 September 2006 to a developer for a purchase price of R1 400 000,00. In terms of the deeds of sale their respective properties would be transferred to the developer, who would then demolish the appellants' homes and thereafter construct 16 upmarket townhouses in a sectional title development on the consolidated property. In lieu of payment of the purchase price to the appellants the developer would build one townhouse for each of the appellants.

[30] In order for the construction to proceed the properties had first to be rezoned and consolidated and certain restrictive conditions reflected in the tile deeds of the properties had to be removed. In June 2006 the Nelson Mandela Metropolitan Municipality consented to the rezoning subject to the consolidation of the properties and the removal of the restrictive conditions of title. The properties were accordingly transferred to the developer during July 2007. During 2008 the process to remove the restrictive conditions of title commenced. A final order was obtained in the High Court, Port Elizabeth on 26 August 2008 for the removal of the said conditions of title. Construction of the townhouses commenced in October 2008, however, the project grounded to a halt in February 2009 when the developer encountered financial difficulty. The developer was eventually liquidated prior to the completion of any of the townhouses. The sole member of the developer, a close corporation, was sequestrated.

[31] The appellants issued summons against Nelson Attorneys (Nelson), a firm of attorneys in Port Elizabeth to claim from them what they were unable to recover from the developer. Nelson had drawn the deed of sale and acted as the conveyancer in transferring the properties. The appellants alleged that Nelson owed them a duty of care by virtue of the fact that it drafted the deeds of sale and acted as conveyancers. In doing so it was alleged that they had breached their duty of care in that they had negligently failed to advise the appellants at the time of signature of the agreement of the risk inherent in the transaction and the development. Summons was served on 30 August 2011. Nelson entered a special plea of prescription. The special plea was upheld in the court of first instance but dismissed on appeal.

[32] The Supreme Court of Appeal held that the plaintiff's claims were "that the negligent and wrongful conduct of the respondent caused the appellants to suffer loss as a result of the breach by (the developer) of its obligation to construct the dwellings. Therefore, the appellants would only have a claim against (the developer) when they became aware that it would not construct the dwellings. Their claim against Nelson could not arise any earlier" (my emphasis). The pleaded loss in **Kelbrick** was alleged to arise from the failure to construct the dwellings. In the event that the contract was fully performed no harm could be done to **Kelbrick**. The legal impediment to the commencement of the construction which was envisaged in the deeds of sale, namely the restrictive conditions of title, were only removed on 26 August 2008. Construction commenced less than two months later. It was only in February 2009 that a prospect of harm arose. Although the cause of action was founded upon Nelson's negligence in 2006 no harm was suffered and no claim could arise until it became clear that the townhouses would not be constructed.

[33] The present matter is distinguishable from the facts in **Kelbrick**. I have stressed earlier that it is necessary first to ascertain the nature of the appellants' claim. The appellant's case is that the loss of his funds arose from the wrongful disbursement of his money which was to have been held in trust on his behalf in order, amongst other things, to cancel the outstanding bond so as to enable the respondent to pass transfer of the property.

[34] In **Truter**, *supra*, as recorded earlier, the Supreme Court of Appeal noted that the constituent elements of a delictual cause of action are a combination of factual and legal conclusions, namely a causative act, harm, unlawfulness and culpability or

fault. Culpability, unlawfulness and fault, it was said, are not factual ingredients. It is necessary, however, for the respondent to show knowledge on the part of the appellant of both a causative act and harm, in order to succeed in its plea of prescription. On the undisputed evidence of Ms Amsterdam and the express evidence of the appellant himself the fact of the wrongful payment made to the sellers was known at some stage during 2010. He was then, or in any event before the end of 2010, advised, on his own admission, that as a result of the payment he would now be required to pay again for the cancellation of the bond over and above the purchase price, in the event that he wished transfer of property to proceed. The inescapable conclusion to be drawn therefrom is that he knew in 2010 that he had sustained harm as a result of the alleged conduct on the part of Cynthia. It is not necessary, for purposes of section 12 of the Prescription Act, for him to have known the extent of the harm. The debt arises once harm has indeed been suffered. (See **Loni v Member of the Eexcutive Council, Department of Health, Eastern Cape Bhisho** [2018] ZACC 2 (22 February 2018); and **Harker v Fussell and Another** 2002 (2) SA 170 (T) at 173E-174B.) The knowledge of the unlawfulness of the payment, to the extent that an appreciation thereof is relevant, is incontrovertible as it flows from the contract to which the appellant himself was a party. In view of the events described earlier he clearly knew the identity of his debtor.

[35] In the circumstances, I consider that the respondent had established that the appellant had actual knowledge of the identity of the debtor and all the facts from which his claim arises by no later than the end of 2010.

[36] The appellant, as recorded earlier contended that the "debt" only became "due" and the cause of action arose at the time when he got to know that the transfer was no longer going to proceed. This, I consider, is the wrong focus on the facts of this matter. His loss was suffered on 28 October 2010 when his money was wrongfully paid to the sellers. He was entitled there and then to demand of the respondent to return an amount of R50 000,00 to their trust account to his credit. Once he had knowledge of the facts from which his claim arises (ie once the debt has become due) a subsequent failure or refusal on the part of the respondent to perform does not create a new debt. (See **Munnikhuis v Melamed NO** 1998 (3) SA 873 (W) at 887I.)

[37] At the hearing of the matter, however, after the conclusion of the evidence, the parties agreed for purposes of argument that the special plea could be dealt with purely on the basis of the factual issue regarding the date of the communication to the plaintiff, in other words, whether he was informed in 2012 that the transfer would not take place or in 2013 as he avers. The magistrate approached the matter on this basis. By virtue of the conclusion to which I have come I too will approach he matter on this basis.

[38] I have recorded earlier the evidence of Ms Amsterdam that after the sellers had refused to sign the transfer documents on 17 May 2012 she had, on the same day, alternatively, the following day, contacted the appellant and he was advised then that the sellers had refused to sign the transfer documents. The conduct of the sellers was unmistakably a repudiation of the contract. This notwithstanding the appellant wished her to attempt to persuade the sellers holding out the hope that

they may yet sign the documents. For this reason the monies deposited with the respondent for purposes of settling the bond, which was to have been settled from the purchase price in terms of the deed of sale, were invested in terms of section 78(2) of the Attorneys Act.

[39] When Ms Amsterdam testified, it was put to her that the appellant would state that he was advised on 14 August 2013, for the first time, that the transfer would not be proceeding. When the appellant testified, however, it was not his evidence at all. He disavowed any knowledge of where his attorneys might have obtained the instruction for the proposition which was put to Ms Amsterdam. He contended that he had no recall of the date upon which he advised that the transfer would not proceed and, at one stage, testified that he had never been advised of this fact. The thrust of his evidence, however, is that it occurred at some stage in 2013 because he had no communication whatsoever with Ms Amsterdam during 2011 or 2012. It is against the background of these two mutually destructive versions that the aforesaid agreement was concluded.

[40] The magistrate was accordingly confronted with these two conflicting versions. Neither witness was without blemish. The magistrate gave due consideration to the impression which he formed of the witnesses whilst testifying, to the content of their evidence and to the probabilities as he perceived them. He preferred the version of Ms Amsterdam.

[41] The thrust of the argument before us is that the magistrate erred in accepting the evidence of Ms Amsterdam as credible. There is no merit in this argument. It is

well-established that the trial court is in a far better position to assess the credibility of witnesses and that a court of appeal will be slow to interfere with credibility findings unless such findings are patently in conflict with the record of proceedings. I do not think that this is such a case. Moreover, in a civil matter the credibility of witnesses is inexorably tied up with the probabilities of the case. Usually the probabilities will show where the truth probably lies. This the magistrate recognised.

[42] In her evidence of the meeting with the sellers on 17 May 2012 Ms Amsterdam stated that:

> "They refused to sign the transfer documents at the time, because they alleged that they did not have a bond with Nedbank and also that they had not been paid the full purchase price."

[43] Ms **Stretch**, who appears on behalf of the appellant, argues that although the sellers may not have been prepared to sign the transfer documents on 17 May 2012 they were prepared to sign the documents in the future should certain conditions be met – for example, repayment of the balance of the bond. For this reason she contends that it is "far more probable that the appellant was informed on or about 18 May 2012 that the sellers were not prepared to sign the documents *yet*."

[44] There are a number of difficulties with the argument. Firstly, there is no basis in the evidence for the suggestion that the sellers were prepared to sign the documents in future. Secondly, the appellant was entitled to demand transfer of the property into his name in terms of the deed of sale. On the undisputed evidence he already knew late in 2010 that his money which was to be kept in trust by the

respondent for that purpose had been wrongfully disbursed without his authority and contrary to the deed of sale. Once it is demanded of him, as occurred in 2010, that he should make further payments over and above the purchase price in respect of the cancellation of the bond, which is not provided for in the contract, the inescapable inference is that he has suffered harm in consequence of the unlawful disbursement of his funds which were to be utilised for that very purpose. That, in my view, is sufficient to establish the commencement of the running of prescription (see **Loni,** *supra*, para [30]). Thirdly, the entire argument proceeds on an acceptance that the plaintiff's claim only arose when he was finally advised that transfer of the immovable property would certainly not proceed. For the reasons set out earlier herein the premise from which the argument proceeds is in my view incorrect.

[45] Fourthly, it is not the appellant's version that he was advised on 18 May 2012 that the sellers were not prepared to sign the documents "yet". On the contrary, his version is that the communication never occurred at all. It is this issue which the magistrate was called upon to decide. The magistrate found that the communication did occur and that it occurred on the 17th or 18th May 2012. He considered that the probabilities supported such communication. I am in agreement with his finding. Firstly, it is apparent from the evidence that the payment of the money directly to the sellers was immediately a cause for great concern within the respondent. In the event that monies deposited to be held in trust for purposes of effecting transfer had been paid out directly to the seller by the respondent it would indeed be cause for very serious concern in any reputable firm of attorneys. For this reason I find her explanation that she has clarity on what occurred, as opposed to precise dates, to be

probable. Her evidence that she immediately advised the respondent as early as 2010 of what the potential consequences thereof are is undisputed. As recorded earlier, on his own evidence the respondent knew in 2010 that in order to obtain transfer he would now be required to pay again, in addition to the amounts stipulated in the deed of sale, some R27 000,00 for the settlement of the outstanding bond. The overwhelming probabilities point to the fact that the transfer documents were prepared on this basis. Notwithstanding these features the sellers refused to sign the documentation not only because they disputed liability for the settlement of the bond but they further disputed that they had received the purchase price in full. The respondent's mandate to pass transfer of the property originates from the sellers. In these circumstances, from the perspective of the respondent, there were no further steps which the respondent was able to take in order to ensure the passing of a transfer. I therefore agree with the magistrate that the probability which emerges from the evidence is that Ms Amsterdam advised the respondent forthwith of the true state of affairs.

[46] The respondent, on the other hand, denies any communication whatsoever with Ms Amsterdam during 2011 or 2012. In his replication, however, he records as follows:

> "2.2.2 On 11 February 2011, the Defendant addressed a letter to the Sellers, indicating that the Plaintiff wished to negotiate with them regarding the settlement of the bond registered over their property;"

The reasons for the letter of 23 March 2011 are discussed earlier herein.

[47] On the probabilities no reputable attorney would embark upon these actions without an instruction from his client. It is true that Ms Amsterdam was challenged to produce her file and file notes in this regard. The file she testified is no longer in existence. I think that her evidence in this regard must be considered in the light of the fact that she is no longer with the respondent and she states that she was required at some stage to move office and that a vast number of files were moved. She was unable thereafter to trace the file. There was no evidence placed before the magistrate to render this explanation improbable.

[48] In all the circumstances I consider that the magistrate was correct in holding that the evidence of Ms Amsterdam was to be preferred. This being so, in consequence of the agreement between the parties to which I have referred earlier I think that the respondent did establish that prescription commenced to run, at the latest, on 18 May 2012.

[49] In the result, I find that the plaintiff's claim is one arising from a delict which is alleged to have occurred on 28 October 2010. The loss of the R50 000,00 was suffered on the same day. The defendant had full knowledge of the identity of the debtor and of the facts from which his claim arose prior to the end of 2010. In any event, even if I err in this conclusion, the defendant had full knowledge of the identity of the debtor and of the facts from which the debt rose by no later than 18 May 2012.

[50] In the result, the appeal is dismissed with costs.

J W EKSTEEN

JUDGE OF THE HIGH COURT

TOKOTA J:

I agree.

B R TOKOTA

JUDGE OF THE HIGH COURT

MAGEZA AJ:

I agree.

T P MAGEZA

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Appellant:	Adv Stretch instructed by N N Dullabh & Co, Grahamstown
For Respondent:	Adv Bester instructed by Whitesides Attorneys, Grahamstown