

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH GAUTENG, JOHANNESBURG)**

CASE NO: 42728/2012

In the matter between:

LIVING HANDS (PTY) LIMITED N.O

First Plaintiff

WILHEMINA JACOBA LUBBE-PRELLER N.O

Second Plaintiff

and

PETER DITZ

First Defendant

JEOFREY LLEWELYN GOVER

Second Defendant

IVANKA ATCHESON

Third Defendant

DONOVAN GUTHRIE

Fourth Defendant

HARDY MILEHAM

Fifth Defendant

JOHNTY GIBBS

Sixth Defendant

DANISA BALOYI	Seventh Defendant
STEINWAY TRUSTEES (PTY) LIMITED N.O	Eighth Defendant
HARDY MILEHAM N.O	Ninth Defendant
IVANKA ATCHESON N.O	Tenth Defendant
PACIFIC STAR TRADING (PTY) LIMITED	Eleventh Defendant
JEOFREY LLEWELYN GOVER N.O	Twelfth Defendant
INVESTEC BANK LIMITED	Thirteenth Defendant
JOSEPH ARTHUR WALTER BROWN	Fourteenth Defendant
ANDREW HERBERT TUCKER	Fifteenth Defendant
HJALMAR MULDER	Sixteenth Defendant
PHILIPPUS JOHANNES MALAN	Seventeenth Defendant
JOHANNES DE JONGH	Eighteenth Defendant
OLD MUTUAL UNIT TRUST MANAGERS LIMITED	Nineteenth Defendant

CASE SUMMARY

This is a judgment on an exception. The plaintiffs have issued summons in which they seek judgment in the amount of R1 billion against all the defendants, jointly and severally. The claim arises from dissipation and loss of certain trust beneficiary funds (the funds) The funds were invested by a trust company on behalf of widows and orphans of mine workers. The trust company invested the trust funds with the nineteenth defendant, Old Mutual Unit Trust Managers Ltd (Old Mutual). The thirteenth defendant (Investec) was a shareholder in the trust company. It and other shareholders sold their entire share capital in the trust company, to the Fidentia Group, which resulted in the latter assuming total control of the funds.

The funds were immediately thereafter allegedly dissipated/and or stolen by individuals who were directors of, or associated with, the Fidentia Group. The plaintiffs, who are the trustees of the trust company, sued among others, Investec and Old Mutual, for the recovery of the dissipated funds. Investec and Old Mutual had respectively, taken exception to the plaintiffs' amended particulars of claim, on the basis that they lacked averments necessary to sustain an action, and that the claim against it had prescribed. In addition, Old Mutual had alleged that certain paragraphs in the plaintiffs' particulars of claim are vexatious and scandalous, and sought to strike them out.

The case for Investec's liability was based on alleged duties Investec had when it (as a shareholder) sold its shares to the Fidentia Group, whose divisions ultimately are said to have caused the dissipation of the funds. As there is no such liability in our law, the court determined that what the plaintiff in fact sought against Investec was an extension of delictual liability. On considerations of legal and public policy, the court declined to extend such liability. Investec's exception was thus upheld.

The case against Old Mutual, on the other hand, was based on its duties as a financial investment institution. Having explored the common law and statutory duties of Old Mutual, the court dismissed Old Mutual's exception and its application to strike out certain allegations in the plaintiff's particulars of claim. One of Old Mutual's grounds of exception was that of prescription. The question arose as to whether the defence of prescription could properly be raised by way of an exception, as opposed to a special plea. The court found that while in suitable circumstances this could be done, as a matter of general principle, a defence of prescription should be raised by a special plea, and that case law to the contrary should not be followed.

Judge TM Makgoka

Judges' Chambers, Pretoria