

**IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG DIVISION, JOHANNESBURG**

**CASE NO: 41715/2015**

REPORTABLE: YES / NO  
OF INTEREST TO OTHER JUDGES: YES/NO  
REVISED.  
5/03/2021

In the matter between:

**GODFREY KGOBISI MASHEGOANE**

Plaintiff

and

**ABSA BANK LIMITED**

First Defendant

**PATRICK SHAIN LAMENT**

Second Defendant

**JUDGMENT**

**SOUTHWOOD, AJ:**

1. This judgment concerns a special plea of prescription raised by the first defendant, ABSA Bank Limited (**'ABSA'**).
2. Before dealing with the merits of the special plea, I record that the plaintiff (**'Mr Mashegoane'**) did not appear and I continued with the hearing of the special plea in his absence. My reasons therefor are set out below.

**A. Mr Mashegoane's absence**

3. The combined summons is dated 19 November 2015 and signed by R Masilo of R Masilo Attorneys. From at least that date until 27 January 2021, R Masilo Attorneys were the attorneys of record for Mr Mashegoane.

4. The matter was first set down for trial on 1 August 2019. On 7 August 2019, an order was made in terms of Rule 33(4) directing that ABSA's special plea of prescription would be decided first and staying the remainder of the issues in the action. The matter was then set down for hearing on 20 April 2020 for determination of the special plea. In terms of the Judge President's Practice Directive of 24 April 2020 consequent on the national lockdown, all trial cases set down between 14 April to 30 April 2020 were automatically removed from the roll and re-enrolled. Matters enrolled on 20 April 2020 were re-enrolled for hearing on 25 June 2020. By agreement between Mr Mashegoane and ABSA, the matter was removed from the roll.

5. On 12 November 2020, ABSA's attorneys served a notice of set down for the trial on 1 February 2021 on Mr Mashegoane's attorneys.

6. Absent any indication that Mr Mashegoane was not aware of the date for this hearing, such service constituted compliance with the rules.

7. On 27 January 2021, R Masilo Attorneys served a notice of withdrawal as attorneys of record for Mr Mashegoane on attorneys representing ABSA and the second defendant ('**Mr Lament**'). The notice indicated Mr Mashegoane's contact details as:

7.1. street address: [...] N[...] Street, Mhluzi Location, Ext 4, Middelburg, Mpumalanga;

7.2. cellphone number: [...]; and

7.3. postal address: PO Box 216, Skhukhune.

8. The notice did not reflect compliance with Rule 16(4)(a) of the Uniform Rules of Court which requires notice to *inter alia* Mr Mashegoane; and Rule 16(4)(d) which requires that Mr Mashegoane be informed of his obligations in terms of Rule 16(4)(b).

9. R Masilo Attorneys were, accordingly, requested, through my registrar, to upload onto CaseLines, proof that Rule 16(4)(a) and Rule 16(4)(d) read with (b) had been complied with. In response to the request, a notice, dated 27 January 2021, and titled, Notice in terms of Rule 16(4)(d) read with Rule 16(4)(b), was uploaded onto CaseLines. The notice reiterated the withdrawal of R Masilo Attorneys as Mr Mashegoane's attorneys and informed Mr Mashegoane of his obligations in terms of Rule 16(4)(b). The notice indicated that it would be served on the defendants' attorneys via email.

10. Accompanying the notice, was a service affidavit deposed to by one Mr de Heus, an attorney employed by R Masilo Attorneys.

11. He indicated that both notices of withdrawal had been served on Mr Mashegoane by registered post sent on 29 January 2021 to Mr Mashegoane's address at [...] N[...] Street, Middelburg. It is doubtful whether Mr Mashegoane would have received these notices before the hearing on 1 February 2021.

12. However, Mr de Heus also explained why his firm had withdrawn.

13. Mr de Heus indicated that from November 2020 until the withdrawal of his firm on 27 January 2021, R Masilo Attorneys had experienced great difficulty getting hold of Mr Mashegoane in order to consult and prepare for the trial.

14. In November 2020, R Masilo Attorneys contacted Mr Mashegoane on his cellphone number ([...]) in order to consult with him in preparation for the hearing. Mr Mashegoane undertook to confirm a date for consultation in early December 2020. This did not occur.

15. In the beginning of January 2021, R Masilo Attorneys contacted Mr Mashegoane again on his cellphone and arranged a consultation at the firm's offices on 18 January 2021. Mr Mashegoane failed to attend the consultation. Mr de Heus states that he also tried to contact Mr Mashegoane by calling his mother and two brothers. They indicated that Mr Mashegoane was not living at the address given to the firm and they refused to disclose his whereabouts.

16. On 26 January 2021, Mr de Heus was contacted by a Mr Masenya from Masenya Inc, shortly before emailing him a letter, dated 2 December 2020, stating that Masenya Inc. was acting for Mr Mashegoane and requesting '*a full account of what you have done since March 2015 to date hereof*' in relation to Mr Mashegoane's claim against ABSA and Mr Lament. Masenya Inc has never entered appearance in this matter as Mr Mashegoane's attorneys.

17. On 27 January 2021, Mr de Heus addressed a letter to Mr Mashegoane at his street address ([...] N[...] Street, Middelburg) and his postal address (PO Box 216, Sekhukhune) to inform him of the firm's withdrawal as his attorneys. The letter goes on to state, '*You ignored our calls and messages notwithstanding the fact that you knew it was urgent and that there were looming court proceedings on 1 February 2021. We would strongly advise you to attend court on 1 February 2021 in order to address the judge alternatively to appoint another attorney to represent you at the proceedings in order to avoid the proceedings continuing in your absence*'. The letter was also sent by email to Mr Masenya on 27 January 2021.

18. On 29 January 2021, my registrar sent my directive regarding the virtual conduct of the hearing and the Microsoft Teams link to the defendants' attorneys via email. The directive commences by confirming that the matter will be heard on 1 February 2021 at 10h00. My registrar also sent a photograph of the directive to Mr Mashegoane on cellphone number [...]. She requested Mr Mashegoane to indicate if he would need assistance from the court to access the online link or to provide his email address so that she could email him the online link.

19. On the same date, an affidavit was deposed to by one Ayanda Lungani, an attorney in the employ of ABSA's attorneys. She indicated that, on 28 January 2021,

a text was sent to Mr Mashegoane's last known cellphone number, as indicated in the notice of withdrawal, in which ABSA's attorneys confirmed the withdrawal of Mr Mashegoane's attorneys, the trial date being 1 February 2021, the court address, and that the matter would be heard virtually.

20. She also alleged that, on 29 January 2021, a text was sent to Mr Mashegoane containing the Microsoft Teams' link for the hearing as well as a copy of my directive relating to the conduct of the trial virtually over CaseLines and Microsoft Teams and the safe-guarding of witness evidence.

21. In regard to Mr Mashegoane's last known physical address, a return of service is attached to Ms Lungani's affidavit. The return indicates that on 29 January 2021, the sheriff in Middelburg served ABSA's answering affidavit in a joinder application brought by Mr Mashegoane, by affixing it to the principal door at [...] N[...] street, Mhluzi Extension 4, Middleburg, after Mr Mashegoane refused to accept service and informed the sheriff to send him a copy of the document via WhatsApp.

22. My registrar attempted to speak to Mr Mashegoane on multiple occasions.

23. My registrar attempted to speak to Mr Mashegoane on his cellphone on 28 January 2021 to confirm that he was aware of the hearing commencing on 1 February 2021 and that the hearing would proceed virtually. No-one answered the first two calls. A third call was answered. My registrar indicated who she was and was then interrupted with '*Sorry madam, Godfrey isn't here*'.

24. On 29 January 2021, my registrar made numerous attempts to speak to Mr Mashegoane on his cellphone. The calls were not answered or terminated, or the phone was turned off. There was no option to leave a voice message. She, thereafter, sent the text, referred to above, as well as a text indicating who she was and that the trial would commence on 1 February at 10h00.

25. On 1 February 2021, prior to the hearing, my registrar made various attempts to contact Mr Mashegoane, to no avail. She then contacted Mr Masenya and

informed him that she was experiencing difficulty speaking to Mr Mashegoane. She asked whether he was able to contact Mr Mashegoane and if he would assist her by asking Mr Mashegoane to take her call. Mr Masenya agreed and shortly thereafter phoned her to inform her that he had spoken to Mr Mashegoane and that she should phone Mr Mashegoane as he would take the call.

26. My registrar immediately did so. Mr Mashegoane answered her call and confirmed that he had received the text, sent on 29 January 2021. When asked if he would be accessing the trial remotely or make use of the court's resources, he indicated that he was in a rural village in Limpopo and would not be attending court nor did he have the resources to use the Microsoft Teams link.

27. My registrar informed me that the voice of the man that she spoke to on 1 February was the same as the voice of the man that she spoke to on 28 January 2021.

28. In view of the foregoing, I am satisfied that Mr Mashegoane was aware of the trial date, that his attorneys had withdrawn and that he should attend the hearing. His absence is intentional. ABSA indicated that it wished to proceed, and the hearing proceeded in the absence of Mr Mashegoane.

**B. The first defendant's legal point**

29. After leading evidence and closing his case on the issue of prescription, ABSA's counsel, in argument, raised what he termed a legal point, namely whether the claim for a statement and debatement of account is competent against ABSA.

30. Given that I am seized with the separated issue of prescription only, I have declined to determine this point. I turn now to the special plea.

**C. The special plea**

31. Mr Mashegoane claimed against the defendants, jointly and severally, the one paying the other to be absolved:

31.1. payment of the sum of R1 265 700.00;

31.2. that ABSA be ordered to account to Mr Mashegoane fully from April 2005 to June 2011 in relation to all bank accounts and statements of Mr Mashegoane and Mr Lament held by it within 15 days of the court order;

31.3. payments of further damages as determined and proved after debatement of accounts; and

31.4. interest at 9.5% [per annum] on the amounts to be paid from date of judgment to date of final payment.

32. ABSA framed its special plea as follows:

*'1. In the plaintiff's action and particulars of claim, the plaintiff claims as follows:*

*1.1 payment of the sum of R1 265 700.00;*

*1.2 an order that the first defendant be ordered to account to the plaintiff fully from April 2005 to June 2011 in relation to all bank statements and statements of the plaintiff and the second defendant held by the plaintiff; and*

*1.3 payments of "further damages as determined and proved after debatement of accounts".*

*2 The alleged debts and/or claims that form the subject matter of the plaintiff's action and particulars of claim vis-à-vis the first defendant arose and/or became due:*

*2.1 on or during 2010, alternatively*

*2.2 on or during November 2012, further alternatively*

*2.3 on a date prior to, but no later than, 24 November 2012 alternatively 3 December 2012.*

*3 The plaintiffs (sic) action as against the first defendant was commenced by the issuing of the plaintiff's action and thereafter service of the plaintiffs (sic) summons and particulars of claim on the first defendant on*

*a date on or after 4 December 2015; being a date more than three years after the date(s) alleged in paragraph 2 above.*

*4 In the premise (sic), and in terms of section 11(d) of the Prescription Act, No. 68 of 1969, any indebtedness allegedly owed by the first defendant and as claimed by the plaintiff in his action and particulars of claim has become prescribed.'*

33. Section 11(d) of the Prescription Act<sup>1</sup> provides:

*'The periods of prescription of debts shall be the following: ... (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt'.*

34. Sections 12(1) and (3) of the Prescription Act provide as follows:

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

*(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 acquire it by exercising reasonable care'.*

35. Mr Mashegoane did not replicate. Accordingly, ABSA bore the onus of proving all the facts underlying the special plea.<sup>2</sup>

36. In particular, ABSA was required to establish:

36.1. that the debts became due for the purposes of section 12(1) of the Prescription Act on a date in excess of three years prior to the interruption of

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**1 68 of 1969**

**2 Masuku v Mdlalose 1998 (1) SA 1 (SCA) at 11D-E**



prescription (4 December 2015, the date of service of the combined summons on ABSA, as evidenced by the return of service);

36.2. the date when Mr Mashegoane acquired knowledge of the identity of the debtor, and of the facts from which the alleged debts arose, as contemplated by section 12(3) of the Prescription Act.

37. The first issue to be determined is whether the relief claimed constitutes a debt.

38. The Prescription Act does not define debt.

39. ABSA's counsel referred me to *Off-Beat Holiday Club*<sup>3</sup> to contend that before an analysis can be undertaken as to whether the claim constitutes a debt, it must first be established what the correct characterisation of the claim is.<sup>4</sup>

40. What this means is that the relief sought must be compared to the narrow test enunciated in *Escom*<sup>5</sup> which held that a debt is anything which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another.<sup>6</sup>

41. The test was confirmed and explained in *Makate*<sup>7</sup> which indicated that there is nothing in *Escom* that remotely suggests that a debt includes every obligation to do something or refrain from doing something, apart from payment or delivery.<sup>8</sup>

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**3** *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Limited and Others* 2017 (5) SA 9 (CC)

**4** *Off-Beat Holiday Club (supra)* at [33]

**5** *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Limited* 1981 (3) SA 340 (A) ('Escom') at 344F

**6** *Eskom* at 344F; *Off-Beat Holiday Club (supra)* at [49]

**7** *Makate v Vodacom (Pty) Limited* 2016 (4) SA 121 (CC)

**8** *Makate (supra)* at [93]

42. ABSA's contention that the claim, properly characterised, is one of an alleged theft/fraud/embezzlement of funds by Mr Lament from Mr Mashegoane during the period 2005 to 2010 is misplaced. The contention fails to assess the claims in relation to the narrow test in *Escom*.

43. Prayers 1 and 3 are claims for payment. Applying the narrow test, these claims constitute debts.

44. Is the claim for the rendering of an account and debatement thereof a debt?

45. No authority was referred to dealing pertinently with this question.

46. Instead, ABSA contended that there can be no doubt that the claim for the rendering of an account and debatement thereof concerns the exercise of a personal right. However, as is clear from the judgments in *Makate* and, thereafter, in *Off-Beat Holiday Club*, not all such claims are debts.

47. Does the claim for the rendering of an account and the debatement thereof constitute money, goods or services which one person is under obligation to pay or render to another?

48. In my view, the answer is no.

49. Accordingly, the claim for the rendering of an account and debatement thereof is not a debt.

50. Turning now to the question whether the claims for payment in prayers 1 and 3 of the particulars of claim have prescribed, in order to establish the facts in support of its special plea, ABSA relied on the evidence of Mr Emile Scholtz, an employee of ABSA Insurance and Financial Advisors ('**ABSA Insurance**'), and on the allegations made by Mr Mashegoane in his particulars of claim and in his further particulars.<sup>9</sup>

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<sup>9</sup> See the approach in *Masuku* (*supra*)

51. Accordingly, it is necessary to consider Mr Mashegoane's allegations.

52. In his particulars of claim, Mr Mashegoane alleges that:

52.1. on/or about 2005, he won approximately R20 million by playing in the National Lottery and deposited an amount of R18 million into a bank account held with the ABSA;

52.2. ABSA advised Mr Mashegoane that it had instructed and allocated Mr Lament, who is alleged to be employed by ABSA, to advise and assist Mr Mashegoane on how and where to invest his money to make maximum profit and to build sustainable wealth for him;

52.3. Mr Lament advised Mr Mashegoane that he would be investing in different investment products with different institutions and that he required Mr Mashegoane to sign certain documents to enable him to make such investments;

52.4. Mr Mashegoane signed a myriad of documents. Most of the documents were blank as Mr Lament had advised that he would '*fill the document*' on Mr Mashegoane's behalf.

52.5. Mr Lament advised Mr Mashegoane that the investments would mature at different times with the last of the investments maturing in 2010, at which date Mr Mashegoane could decide to invest further or withdraw the proceeds;

52.6. Mr Mashegoane received monthly income from these investments and in varied amounts. He also made withdrawals for his personal use including buying property and vehicles;

52.7. in 2011, Mr Mashegoane noticed that his monthly income had ceased. He went to the bank to inquire about the investments which were supposed to have matured in 2010. Mr Lament informed him that the funds had been

depleted and that there was no money in his account. He also informed him that the investments would not be paying out as he had sold or ceded them;

52.8. Mr Mashegoane then lodged a complaint with ABSA. ABSA advised him, in a letter dated 21 November 2012, that Mr Mashegoane had sold or ceded his investments and that he had received the proceeds with the result that neither ABSA nor the investment companies were liable to pay any claims on those investments;

52.9. Mr Mashegoane then laid a charge of fraud against Mr Lament, which matter is still pending;

52.10. as a result of the criminal investigation, Mr Mashegoane learnt that Mr Lament had not only sold his policies but had siphoned some of the money in Mr Mashegoane's bank account into Mr Lament's own personal bank account without Mr Mashegoane's knowledge or permission;

52.11. Mr Mashegoane is only aware of unlawful transfers out of his account between 2009 and 2011, in an amount of R1 265 700.00;

52.12. Mr Mashegoane learnt of the pilfering of his money from his account by Mr Lament in May 2013;

52.13. Mr Mashegoane only became aware of these acts of dishonesty, fraud and embezzlement during the investigation of the criminal case in 2014;

52.14. ABSA was *mala fide* and/or negligent in failing to investigate and find that Mr Lament was siphoning funds/money out of Mr Mashegoane's account into Mr Lament's personal account;

52.15. Mr Mashegoane claims payment of the amount that he is aware of being transferred unlawfully out of his ABSA bank account into Mr Lament's bank account as well as any further amounts that are discovered

after the rendering of an account and debatement thereof in relation to Mr Mashegoane's and Mr Lament's bank accounts.

53. It is therefore clear that what Mr Mashegoane claims relates to monies unlawfully transferred out of his ABSA bank account into Mr Lament's bank account.

54. This is confirmed in Mr Mashegoane's further particulars, dated 10 July 2019. In these further particulars, he alleges that Mr Lament's acts of dishonesty, fraud and/or embezzlement consist of Mr Lament's siphoning of money from his bank account and that he discovered these acts during November 2012. He does, however, indicate that he acquired this knowledge as a result of the fraud investigation conducted by police. According to the particulars of claim, this would have been in May 2013 or in 2014.

55. However, in response to a question as to when Mr Mashegoane first learnt that Mr Lament had sold his policies; siphoned some of the money in his bank account; misappropriated some of his money; unlawfully transferred an amount of R1 265 700.00 into his own account from Mr Mashegoane's account; pilfered money from Mr Mashegoane's account, Mr Mashegoane stated that he first learnt of this during November 2012 and when the criminal investigation commenced in May 2015.

56. Also, in his further particulars, Mr Mashegoane states that he became aware of Mr Lament's acts of dishonesty; acts of fraud and acts of embezzlement in January 2010 and, subsequently, 2012, when the police commenced with the investigation.

57. Turning to the evidence of Mr Scholtz, Mr Scholtz is employed and was, at the relevant time (i.e. between September to November 2012), employed as a dispute resolution consultant by ABSA Insurance.

58. Mr Scholtz's evidence was that he had inherited Mr Mashegoane's complaint from his predecessor, one Pieter Swanepoel. This is the complaint which Mr

Mashegoane alleges that he lodged with ABSA regarding his investments having been ceded.

59. Mr Scholtz testified about his investigation which revealed that Mr Mashegoane had ceded his policies and received the proceeds thereof. Mr Mashegoane, therefore, had no claims against either ABSA Insurance or to any proceeds from the policies.

60. The findings were sent to Mr Mashegoane, by post, in letters dated 7 and 21 November 2012, respectively.

61. Mr Scholtz testified that he could not confirm that Mr Mashegoane had received the letters. He assumed that Mr Mashegoane had received the letters because Mr Mashegoane had called him on his cellphone. He concluded that Mr Mashegoane could only have obtained his cell phone number from the letters.

62. Mr Scholtz did not indicate when he received the call from Mr Mashegoane. Accordingly, none of this evidence establishes when these letters were received by Mr Mashegoane. In any event, given my view that the claims relate to the pilfering/siphoning of moneys from Mr Mashegoane's bank account, Mr Scholtz's evidence is irrelevant.

63. ABSA contends that on Mr Mashegoane's own version, he learnt of the acts of dishonesty/fraud/embezzlement in November 2012.

64. As is clear from the allegations in the particulars of claim and the further particulars, referred to above, Mr Mashegoane does not have one consistent version. If Mr Mashegoane proves that he only became aware of the unauthorised transfers/pilfering/theft by Mr Lament out of his bank account in May 2013 or in 2014 or in May 2015, then the claims have not prescribed.

65. As a result, ABSA's reliance on (some) of Mr Mashegoane's allegations is misplaced.

66. ABSA did not plead the date of attributed knowledge in its special plea. However, in the plea, ABSA pleads that, at all material times, Mr Mashegoane would have acquired possession of or had access to the relevant bank account statements and that Mr Mashegoane, by exercising reasonable care, could and would have acquired knowledge of the alleged debtors and the facts from which the alleged debt rose.

67. Given that the special plea was separated out, these allegations do not form part of the issue which I had to decide.

68. If I am wrong in not taking these allegations into account, then, in any event, these allegations, if proved, do not establish that Mr Mashegoane had the requisite knowledge. The bank statements may have alerted him that unlawful transfers were being made out of his account but he would not necessarily have been apprised of the identity of the person effecting such transfers.

69. In Mr Mashegoane's particulars of claim, he alleges that he only discovered the identity of the pilferer when this was disclosed to him by the police. The date of this disclosure is unclear, as indicated above.

70. ABSA has failed to establish that Mr Mashegoane, by exercising reasonable care, could and would have acquired knowledge of the alleged debtors and the facts from which the debt arose at a date prior to 4 December 2012.

71. In the premises, ABSA failed to discharge the onus of proving that Mr Mashegoane's claims had prescribed.

## **ORDER**

72. The first defendant's special plea is dismissed with costs.

**F SOUTHWOOD  
ACTING JUDGE OF THE HIGH COURT**

## GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the defendants' representatives by email and by uploading the judgment onto CaseLines. The date of delivery of the judgment is deemed to be 5 March 2021.

Date of hearing: 1, 2 February 2021  
Date of judgment: 5 March 2021

### Appearances

For the plaintiff: no appearance  
Instructed by:

For the first defendant: M De Oliveira  
Instructed by: Lowndes Dlamini