IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

25/11/2016.

Case Number: 45371/2013

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED. ✓

25/11/16 .....

DATE SIGNATURE

In the matter between:

OMEGA INTERNATIONAL ASSOCIATES LIMITED PARTNERSHIP	1ST PLAINTIFF
OMEGA RISK SOLUTIONS (PTY) LTD	2ND PLAINTIFF

And

JOSIAS ALEXANDER DE WITT	DEFENDANT

JUDGMENT

Fabricius J

1.

Plaintiffs instituted action against the Defendant essentially based on breaches of his fiduciary duties towards the Plaintiffs. In addition, there were allegations that in three instances he had misappropriated monies.

2.

During the course of the trial, First Plaintiff's claims were withdrawn and the costs of the action were tendered. This judgment is therefore only concerned with Second Plaintiff's claims.

3.

First Plaintiff was OMEGA INTERNATIONAL ASSOCIATES LIMITED PARTNERSHIP, a legal entity with limited liability duly registered and incorporated in terms of the laws of the United Kingdom. Its principal place of business was

however the same as that of the Second Plaintiff, which is OMEGA RISK SOLUTIONS (Pty) Ltd. It was initially pleaded that Defendant was a director of the First Plaintiff, but this was deleted by way of an amendment. The relevant allegation therefore was that Defendant had been employed by the First Plaintiff as its Chief Executive Officer. It was also pleaded that First Plaintiff was a shareholder in the Second Plaintiff and 13 other companies registered in various African countries as well as in Kosovo. These companies were known for present purposes as "the OMEGA Group". The Group was financially structured in such a fashion that the Second Plaintiff "acted and was conducted as the treasury for the Group", as it was pleaded. In Plaintiffs' Further Particulars it was pleaded that Defendant had been employed from 2003 until 14 July 2012. The "13 other companies", referred to in Plaintiffs' Particulars of Claim, were identified in the Further Particulars. The Second Plaintiff's name also appears on this list.

4.

Second Plaintiff's Claims:

The first claim relates to an occurrence on 26 January 2009, where allegedly authorized a payment to M. Kraft (Toerien). The second claim relates to the period March 2007 to December 2008, and refers to six payments made in that period to a certain M. J. Khasu, who at the time was the South African Ambassador to Gabon (some R430 000). The third claim refers to the period September 2007 to January 2008, and relates to 12 payments made by the Defendant to W. van der Berg (R 712 000). The fourth claim relates to payments made to Silvestre Motayo, during the period of February 2009 to July 2011. It was alleged in this context that these payments, some of which are substantial, were made to Motayo ostensibly as advances on "Phase 2 of the Gabon Project". The fifth claim relates to a payment in favour of OMEGA FINANCIAL SOLUTIONS, ostensibly as a loan to the said Mr Motayo on 20 February 2009, which amount Defendant however misappropriated for personal purposes. The sixth claim relates to payments made to a Mr van Zyl of OMEGA FINANCIAL SOLUTIONS, of some R 210 000, again ostensibly on the

basis that they would be advanced in favour of S. Motayo. The relevant date here is 29 May 2009. The seventh claim relates to the period January to August 2010. It appears that Defendant had been sued by Securicor Grey Security Services in the North Gauteng High Court, that the matter had become settled, and that a certain sum had been paid to that firm by Second Plaintiff, although Defendant had been sued in his personal capacity.

5.

In my view, certain paragraphs of the Particulars of Claim were excipiable for a number of reasons, but no exception was taken. Defendant filed a Special Plea of Prescription, and also pleaded over. The Plea discloses no identifiable defence in my opinion, but that is not the subject matter of the present litigation. By agreement between the parties, the Special Plea was adjudicated first, and evidence was led thereon. The Second Plaintiff's Summons was served on Defendant on 7 August 2013, which was more than three years after the date on which most of the particular claims arose, and the claims had therefore prescribed in terms of Section

11 of the ***Prescription Act 68 of 1969***. In respect of Second Plaintiff's fourth claim, only the amounts claimed in respect of paragraphs 21.7 to paragraph 21.9 were excluded from the Plea of Prescription. In respect of the seventh claim and the period January to August 2010, it was pleaded that on each of the dates of each monthly instalment pleaded, the Second Plaintiff's seventh claim fell due.

There was no replication to this Special Plea.

6.

Defendant gave evidence on aspects relating to the Special Plea and gave details about Second Plaintiff's activities mainly in Africa. In Gabon, a city surveillance contract, and a management contract relating to it, had been entered into and had been worth a substantial amount. The services of the said Mr Khasu had been used to "facilitate payment" by the Gabon Government to Second Plaintiff. This had been known to everyone, because of the precarious financial position of Second Plaintiff at the time. A Mr du Toit had been one of the members of Second Plaintiff's Management Committee. Mr C. Smit had been the Chief Financial Officer and I will

deal with his evidence. Amongst others, Smit had to submit monthly financial statements to the Executive Committee and also had to control the cash flow of the Group. The financial department was on the same floor of the building as the Executive Members. Most persons from the management side were aware of the Gabon contract. As far as the amounts paid to Van der Berg were concerned, he had been interested in purchasing shares in the OMEGA Group and for reasons related to this intent, the particular payments had been made to him. Again, the Executive Committee was fully aware of this transaction. Mr Motayo's role was also concerned with the mentioned contract with the Gabon Government, and he had been entitled to commission in respect of his services rendered in connection therewith. Phase 1 of this contract had apparently been worth 10 million US Dollars, Phase 2, 19 million Euros and Phase 3, 15 million Euros. This contract therefore had been of particular importance to Second Plaintiff, and everyone had been aware of a necessity to receive payment from the Gabon Government as speedily as possible and, apparently by whatever means as possible. The Group Financial Manager had obviously been aware thereof, as well as the Executive Committee of

the First Plaintiff and the Management Committee of the Second Plaintiff. As far as the Securicor transaction was concerned, the Executive Committee had similarly been aware of all relevant details. Mr de Witt also testified that the Chief Financial Manager, Mr Smit, had been quite aware of the role of the said Khasu, and the importance of the Gabon Project for the firm. Similarly he had been quite aware of the payments to Van der Berg. Motayo's role was similarly well-known to the Financial Management personnel again in the context of the Gabon Project, which had been of crucial importance to Second Plaintiff.

7.

If one considered the payments made to Motayo over the period of time, it would be strange if Smit were be heard to say that he had no knowledge of the details or the role of Motayo. Smit had also been aware of the litigation against him in the context of the Securicor case, and the settlement in that case had also come to the knowledge of the Executive Committee.

8.

Mr C. Smit testified on behalf of Second Plaintiff and a document entitled "Job Description" was handed in as an exhibit. His job title was "Group Financial Manager" and he was responsible to the Chief Executive Officer of OMEGA INTERNATIONAL ASSOCIATES LIMITED PARTNERSHIP, First Plaintiff. He was also a member of EXCO and according to this exhibit he contributed to the strategic decisions affecting all operations of the Company. The functions of his role were set out in the same document, and amongst others he had to supply the Chief Executive Officer with weekly cash flow statements. He also had to prepare and consolidate monthly accounts and on a monthly basis provide the Chief Executive Officer with an income statement, balance sheet and cash flow statement. He also had to supply the CEO on a monthly basis debtor and creditor, as well as variants reports, and inform him of any financial matter which could have a serious impact on the Company. His Service Agreement with "OMEGA BUSINESS TRUST", was handed in as an exhibit, and it is clear that the Board of Trustees appointed him as Financial Manager responsible for outsourced Group Finances operations of the

OMEGA Group of companies which is outsourced to the Trust in terms of the outsourced agreement between the Trust and OMEGA Group. It also appears from various documents contained in the agreed upon bundle of documents (Court bundle), that Smit had been aware of relevant transactions, including the Gabon Project and also signed a number of cheques. It is also clear that Mr van Zyl, the Managing Director of OMEGA FINANCIAL SOLUTIONS, was aware of the dealings with Motayo if regard is had to a number of emails which were not disputed.

9.

During his evidence, Mr Smit clearly attempted on a number of occasions to disassociate himself from the intimate knowledge of the transactions which gave rise to Second Plaintiff's claims. Having regard to the objective evidence as per the documents contained in the Court bundle, the evidence of Defendant, his job description, and the activities that such contained, it is in my view certain that he was quite aware of the nature of the transactions and especially the importance of the Gabon Project which involved the said Khasu and Motayo. Similarly, he was

aware of the transactions relating to Van der Berg. An email was addressed to him in this context and having regard to his duties, it is in my view extremely unlikely that he would not have been aware of all the relevant details concerning Second Plaintiff's claim. As I have said, my distinct impression in Court was that he intentionally attempted to underplay his role and his knowledge of these claims. None of the objective facts in this context were challenged by, or on behalf of Plaintiff, and it is abundantly clear therefrom that Smit knew of the Gabon Project and Motayo's role therein. He himself gave evidence to the effect that the cash flow situation of the Company was critical and that it had been of the utmost importance to control expenditure and to ensure that any monies due to the Company were speedily collected. There is no doubt that the entire senior Executive body of both Plaintiffs knew about the Gabon Project and its importance thereof to their survival. Smit and Van Zyl in fact signed cheque requisition forms which referred to the Gabon Project, Phase 2, and the 15% commission due to Motayo.

10.

On behalf of Defendant Mr M. v R. Potgieter SC, placed the most relevant cases relating to prescription before me.

It is settled law that it is for a party invoking prescription to allege and prove the date of the inception of the period of prescription. On the pleadings there is no dispute or discrepancy about the applicable dates for purposes of considering a plea of prescription.

11.

Section 12 (1) and 12 (3) of the ***Prescription Act 68 of 1969*** are of importance. These provide as follows: "12 (1) Subject to the provisions of sub-section (2) and (3), prescription shall commence to run as soon as the debt is due.

12 (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 a debt arises: provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care".

"Debt" does not mean cause of action. It means claim in a general sense. In ***Drennan Maude and Partners v Pennington Town Board 1998 (3) SA 200 SCA at 212 F to J***, the following was said: "In short, the word "debt" does not refer to the "cause of action", but more generally to the "claim"... In deciding whether a "debt" has become prescribed, one has to identify the "debt", or, put differently, what the "claim" was in the broad sense of the meaning of that word". See in this context also ***Barnett and Others v Minister of Land Affairs and Others 2007 (6) SA 313 (SCA) par. 19*** and ***Claassen v Bester 2012 (2) SA 404 (SCA) par. 12 to 13.***

A debt is due when the creditor acquires the right to institute legal proceedings and the debtor is under obligation to perform. It is also clear that a creditor is not able by his own conduct to postpone the commencement of prescription.

See: ***Uitenhage Municipality v Molloy 1998 (2) SA 735 (SCA) at 742 A to D.***

12.

As far as the provisions of Section 12 (3) of the ***Act*** are concerned, either actual or constructive knowledge must be proved. Actual knowledge is established if it can be

shown that the creditor actually knew the facts and the identity of the debtor. Constructive knowledge is established if the creditor could reasonably have acquired knowledge of the identity of the debtor and the facts on which the debt arose by exercising reasonable care. The test is what a reasonable person in that position would have done, which means that there is an expectation to act reasonably and with the diligence of a reasonable person. A creditor can therefore not simply sit back and by inaction arbitrarily and at will postpone the commencement of prescription. What is required is merely the knowledge of the minimum facts that are necessary to institute action and not all the evidence that would ensure the ability of the creditor to prove its case comfortably.

See: ***Macleod v Kweyiya 2013 (6) SA 1 SCA at par. 9***, and ***Gunase v Anirudh 2012 (2) SA 398 (SCA) at par. 15***.

It is also clear that knowledge of legal conclusions is not required before prescription begins to run.

See: ***Claassen v Bester 2012 (2) SA 404 (SCA) par. 14 to 15.***

13.

Where a loan is made without a specific time for performance, the commencement date for prescription in such a case is the date that the advance was made.

See: ***Mahomed v Nagdee 1952 (1) SA 410 (AD) at page 418 G***, and ***Fluxman v Britain 1941 AD 273 page 294.***

14.

Plaintiffs' claims all relate to financial transactions, being credits and debits raised and passed on loan account in respect of the First Plaintiff on the one hand, or payments made by or on behalf of the Second Plaintiff of the other. It is also significant that Annexure A to the Particulars of Claim was prepared by the said Chris Smit, the Group Executive Finance Manager of Plaintiffs. In respect of the claims made by the Second Plaintiff, the relevant records were kept and it is abundantly clear that Smit knew of these transactions at all relevant times. It is clear that Second Plaintiff's claims are for damages based on Defendant's alleged breach of fiduciary duties. These debts became due on the dates that the breaches of fiduciary duty occurred. Requirements of fault and unlawfulness do not constitute

factual ingredients of cause of action, but are legal conclusions to be drawn on the particular facts.

See: ***Truter v Deyssel 2004 (6) SA 168 SCA at par. 17.***

Mr Potgieter therefore argued that it was abundantly clear from the objective evidence and in fact Mr Smit's own evidence and that of Defendant, that there was ample information available to the Second Plaintiff about the payments that were made and the time they were made. Second Plaintiff also knew of the circumstances relating to these payments and in any event, it could have acquired all relevant knowledge by exercising reasonable care. Mr Smit had testified that Mr du Toit, a director, had requested him to investigate the circumstances of all relevant payments that formed the subject matter of the claim against Defendant. He did so, but under cross-examination admitted that nothing new had been discovered.

15.

In argument, Mr G. Alberts SC on behalf of Second Plaintiff had no qualms with the relevant legal principles and with most of the narrative that I have set out. He

confined his argument to one principal submission only, with reference to the decision of ***Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd and Another [2015] 2 ALLSA 403 (SCA)***. The First Respondent in that case, the National Potato Co-operative Ltd, was an agricultural co-operative and in the context of the plea of prescription, the question was asked whether it had knowledge of the identity of the debtor and of the facts or whether it could have acquired such by the exercise of reasonable care. The Court referred to the ***Pennington Town Board decision supra*** and re-emphasized that "this Court has consistently held that all that is required is knowledge of the minimum facts required to institute action. It is unnecessary for the claimant to be aware of the legal consequences of those facts. Where the Plaintiff does not have actual knowledge of those facts, but could by the exercise of reasonable care have acquired that knowledge, that was equivalent to actual knowledge". The issue in that case related to the identity of the persons whose knowledge was relevant to the commencement of prescription. The point before the Court on that particular topic and the point that Mr Alberts SC raised herein is the same, namely, when one is concerned with the

knowledge of a corporate entity, it is necessary to identify the natural persons whose knowledge is to be taken to be the knowledge of the corporate entity. With reference to the decision of ***Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500 (PC) at 507 f***, cited with approval in ***North View Shopping Centre (Pty) Ltd v Revelas Properties JHB CC and Another 2010 (3) SA 630 (SCA) par. 20***, it was said that this is a search referred to as the Rules of Attribution by which Courts determine "whose act (or knowledge, or state of mind) was for this purpose intended to count as an act etc. of the Company?" When prescription is raised by a corporate entity, the ordinary rule of attribution of knowledge to the Company of the knowledge of natural persons of facts given rise to the claim, is satisfied the members of the Board of Directors have that knowledge, could have acquired if they took reasonable care. In the ***National Potato decision supra***, the Court left open the question whether the knowledge of other persons within the entity would also be attributed to it for the purposes of prescription. I would venture to suggest that one would have to enquire for the purposes of this question, whether on the facts of each particular case any other such person or

persons within the entity would be sufficiently close to the activities, interests and duties of the Board of Directors, so that it could reasonably be expected that the relevant facts had come to its knowledge. Having regard to the evidence, the importance of the Gabon Project and the role played by Smit, Khasu and Motayo, and the facts that were known to Smit at the time when the relevant transactions all took place, I hold that on the probabilities the directors of Plaintiffs had knowledge of the claims relevant in these proceedings, or could have acquired them if they took reasonable care at the time when they ought to have done so. It is clear from Mr Smit's own job description and his duties, that he was in any event sufficiently close to the Chief Executive Officer of the Group, so that one can be satisfied with a reasonable degree of certainty, but in any event on the probabilities, that the particular directors had the relevant knowledge or could have acquired it. Mr Smit was a member of the Executive Committee and according to his job description, he contributed to the strategic decisions affecting all operations of the Company. It is clear that it was well-known that there were problems related to bad debts and the shortage of capital. The Gabon Government owed the Plaintiffs substantial amounts,

which were critical to its survival. This has never been in dispute, nor the role that the various persons played in connection therewith.

16.

The result is that Defendant's Special Plea of Prescription in respect of all of Second Plaintiff's claims is upheld with costs including costs of two Counsel, with the exception of the claims pleaded in paragraphs 21.7, 21.8 and 21.9 of Second Plaintiff's fourth claim.

JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

Case number: 45371/2013

Counsel for the Plaintiffs:	Adv G. W. Alberts SC
	Adv F. J. Labuscagne
Instructed by:	Booysen Dreyer & Nolte Inc

Counsel for the Defendant:	Adv M. v R. Potgieter SC
	Adv S. J. van Niekerk
Instructed by:	Senekal Simmonds Inc

Date of Hearing: 14 to 17 November 2016

Date of Judgment: 25 November 2016 at 10:00