IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case No.:
9757/2017

In the matter between:

ABSA BANK LIMITED Plaintiff

and

TERBLANCHE MARX N.O First Defendant

KOBUS GROENEWALD N.O Second Defendant

PIETER DE WIT WESSELS N.O Third Defendant

JUDGMENT DELIVERED ON 29 MARCH 2018

HOLDERNESS, AJ:

Introduction

[1] This is an application for the setting aside of the defendants' claim in reconvention ('the counterclaim'), as an irregular step, in terms of uniform rule 30(1) and (3) ('the main

application'), and a counter application instituted by the first to third defendants ('the defendants') for *inter alia* condonation for the late filing of their claim in reconvention ('the counterclaim'), in terms of rules 24(1) and 27.

[2] The following relief is sought in terms of the counter application:

2.1 that the plaintiff's application in terms of Rule 30, and the counter application be heard together, but that the plaintiff's application be postponed until judgment in this counter application is delivered;

2.2 that the late filing of the counterclaim, dated 22 August 2017, be condoned and therefore permitted;

2.3 In the alternative to 2.2 above, that the defendants be permitted to deliver the counterclaim that is annexed as 'B1' to the rule 28(1) notice, which in turn is annexed to the founding affidavit of Graeme Falck and marked as 'A2' ('the new counterclaim'), within 7 (seven days) of this order;

2.4 Costs of the application, only if opposed; and

2.5 Further and / or alternative relief.

[3] The defendants are the trustees of the Van Dyk Family Trust ('the Trust').

[4] Before dealing with the merits of the application and the counter application, it is necessary to set out the procedural background to the matter, which bears on the relief sought by both the plaintiff and the defendants.

The procedural background to the matter

[5] The chronology of the action can be summarised as follows:

5.1 The plaintiff's declaration was delivered on or about 14 November 2014;

5.2 The defendants' plea was delivered on or about 14 January 2015. The defendants did not cause a claim in reconvention to be delivered simultaneously with their plea;

5.3 On 22 August 2017, two and a half years after the delivery of their plea, the defendants delivered the counterclaim. They failed to give the plaintiff any prior notice of their intention to do so, and failed to obtain leave from the court, in terms of rule 27(1), alternatively rule 24(1), for the late delivery of the counterclaim;

5.4 The counterclaim was therefore from the outset deemed to be an irregular step, in terms of rule 24(5). The defendants conceded in their heads of argument that the filing of the counterclaim out of time constitutes an irregular step;

5.5 On 24 August 2017, the plaintiff served a notice on the defendants, in terms of rule 30(2)(b), informing them of the irregularity, and affording them an opportunity them an opportunity of removing the cause of the complaint within the prescribed ten days;

5.6 Notwithstanding delivery of the abovementioned rule 30(2)(b) notice, the defendants failed to apply for an order for an extension of time within which the counterclaim was required to be delivered;

5.7 On 24 August 2017, the defendants' attorney addressed an email to the plaintiff's attorney, inquiring informally whether the plaintiff would 'reconsider to allow the filing of the Counter Claim on its own. *(sic).*'

5.8 This request was declined by the plaintiff, on 14 September 2017, and no further steps were taken by the defendants, at that stage, to address the irregular delivery of the counterclaim;

5.9 On or about 29 September 2017, the plaintiff launched the present application,

5.10 In the defendants' answering affidavit in the main application, they belatedly gave notice of a counter application for the relief as set out in paragraph 2 above.

5.11 The new counterclaim was annexed to the defendants' answering affidavit as an annexure to a notice in terms of rule 28(1) to amend the plea by replacing it

in its entirety with the plea attached thereto marked 'B1', and the counterclaim by replacing it in its entirety with the new counterclaim, attached thereto marked 'B2';

5.12 Due to an oversight by the defendants' attorney, the notice of opposition, and notice of motion in respect of the counter application, were not served together with the founding affidavit in support of such counter application. Counsel for the defendants, Mr. Walters, stated that the combined notice of opposition and notice of motion were supposed to be served with the affidavits, and not the Rule 28(1) notice as found at pages 17 to 19 of the record. Copies of these notices were provided to the plaintiff's attorney and counsel prior to the hearing. Mr. Walters submitted that there can be no prejudice to the plaintiff by the notices being handed up at the hearing as the relief sought therein is also recited in the founding affidavit in the counter application.

The defendants' stance in relation to the main application

[6] The stance adopted by the defendants, at the outset, was that because they conceded that the late filing of the counterclaim constitutes an irregular step, the outcome of the matter 'should be determined by the outcome of the counter application. Or if it succeeds, the plaintiff's application becomes moot.'

[7] This of course loses sight of the issue of costs, which are sought by the plaintiff on an attorney and client scale. I shall revert to this aspect later.

[8] The first question which arises is the following: has a proper case been made out for the relief claimed first by the plaintiff, for the setting aside of the counterclaim in terms of rule 30(3), and costs, pending the determination of the defendants' counter application?

[9] Before turning to consider this question further, it is necessarily to consider the explanation furnished by the defendants' attorney for the two-and-a-half-year delay in delivering the counterclaim, and, to a more limited extent, the merits of the counterclaim which the defendants wish to institute.

The delay in the delivery of the counterclaim

[10] Rule 24(1), provides that:

> '*A defendant who counterclaims shall, together with his plea, deliver a claim in reconvention setting out the material facts thereof in accordance with rules 18 and 20 unless the plaintiff agrees, or if he refuses the court allows it to be delivered at a later stage.*'

[11] In *Lethimvula Healthcare (Pty) Ltd v Private Label Promotion (Pty) Ltd*[1], the court was also faced with the introduction of a counterclaim subsequent to the delivery of a plea, where, as in this case, the plaintiff has refused to consent thereto.

[12] In *Lethimvula supra,* Van Oosten J, in setting out the principles applicable to a matter such as the present application, found as follows:

[1] 2012 (3) SA 143 (GSJ)

'It is necessary to consider what the criteria are in an application for relief under rule 24(1). First, there must be a reasonable and acceptable explanation for the lateness. In the present matter I am satisfied that the explanation for the lateness satisfies this requirement, and this was in any event not challenged. Secondly, the defendant must show an entitlement to institute a counterclaim. Had it not been for the lateness, the defendant, as provided for in terms of rule 24(1), would have been entitled, together with the plea, to introduce a counterclaim 'setting out the material facts thereof in accordance with rules 18 and 20'. Would these requirements be any different now that the leave of the court is sought to introduce a counterclaim? Put differently: should the defendant, finding itself in this position, be required to establish more onerous requirements in order to succeed?

[9] Counsel have not been able to refer me to any direct authority on the point, nor was I able to find any. Useful guidance in the quest to find an answer is, however, provided in the judgment of Schabort J, in Hosch-Fömrdertechnik SA (Pty) Ltd v Brelko CC and Others 1990 (1) SA 393 (W). In that matter the court dealt with an application by the defendant under the provisions of rule 24(2) for leave to institute a claim in reconvention against the plaintiff and others. In regard to the requirements to be satisfied in order to succeed, the learned judge held that it was necessary for the applicant to disclose its locus standi and, further, to disclose the cause or causes of action upon which the action against them would be based. To this the learned judge added:

'The need to establish a prima facie case of potential success in an action against the said persons does not enter the picture. A condition rendering entitlement to take action subject to success in the action seems absurd and would be misplaced in the context of Rule 24(2). Cf Shield Insurance Co Ltd v Zervoudakis 1967 (4) SA 735 (E) at 737G – 738A. I do not think that the condition in Rule 24(2) must be construed in this way.' [At 395H.]

The same reasoning, in my view, for the reasons that follow, must apply to an application under rule 24(1).

.. Once an acceptable explanation for the lateness has been tendered, all that remains for the defendant to show is its entitlement to institute a counterclaim which, in draft form, complies with rules 18 and 20. The acceleration of the application to the stage akin to the end of the trial, as has now happened before me, requiring at this stage a final decision on the merits of the defendant's counterclaim, without having had the benefit of oral evidence, in my view, will result in a premature determination of the issues. The plaintiff, moreover, should the counterclaim be allowed, will not suffer prejudice that cannot be cured by an appropriate costs order at the end of the trial. Once the counterclaim has been filed, it remains open to the plaintiff, in terms of the rules of court, should it wish to do so, to address such causes of complaint as there may be. Those complaints, accordingly, ought to be dealt with at that stage, and then in terms of the relevant rules of court.

[12] Finally, the wording of rule 24(1) indicates the conferment of a discretion on the court.'

[13] It is well established in our law that condonation of the non-observance of court orders and rules is not a mere formality. A party seeking condonation must satisfy the court that there is sufficient cause for excusing the non-compliance. Whether condonation should be granted or not is a matter of discretion that has to be exercised having regard to all the circumstances of the particular case[2].

[14] Condonation, as pointed out in *Uitenhage Transitional Local Council v South African Revenue Service*[3], 'is not to be had merely for the asking; . . .In considering an application for condonation for the late filing of a notice of appeal, the court noted that:

'Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of

[2] see *Torwood Properties (Pty) Ltd v South African Reserve Bank* 1996 (1) SA 215 (W) at 228B - F
[3] 2004 (1) SA 292 (SCA), para 6

unnecessary delay in the administration of justice (Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Company Ltd and Others [2013] 2 All SA 251 (SCA) ([2013] ZASCA 5) para 11).'

[16] In *Uitenhage Transitional Local Council supra,* a detailed explanation for the delay was given by the party seeking condonation. The Supreme Court of Appeal found that the explanation, such as it was, 'fails at virtually every level. First, Mr Van der Merwe attempts to excuse the delay by invoking advice from his attorney, Mr Cornel Stander. It is well established that a litigant is not permitted to invoke advice which is demonstrably unreasonable. As it was put in *S v Longdistance (Natal) (Pty) Ltd and Others* 1990 (2) SA 277 (A) ([1989] ZASCA 129) at 283I – J, "legal advice has no magic which justifies the recipient in jettisoning common sense", particularly where such advice, as here, is at odds with previous advice.'

[19] In the *Uitenhage Transitional Council*[4] matter the learned judge went on to say, at paragraph 19, that:

'In applications of this sort the prospects of success are in general an important, although not decisive, consideration. It has been pointed out[5] *that the court is bound to make an assessment of an applicant's prospects of success as one of the factors relevant to the exercise of its discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. I have not dealt with the applicant's prospects of success on appeal because, in my view, the circumstances of the present case are such that we should refuse the application for condonation, irrespective of the prospects of success. This court 'has often said that in cases of flagrant breaches of the rules, especially where there is no acceptable explanation*

[4] and the authorities there cited
[5] *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein, and Others* 1985 (4) SA 773 (A) ([1985] ZASCA 71) at 789C

therefor, the indulgence of condonation may be refused whatever the merits of the appeal; . . .'. This applies, even where the blame lies solely with the attorney. Here the breaches of the rules are of such a nature and the explanation offered so unacceptable and wanting that condonation ought not, in my view, to be granted, irrespective of the applicant's prospects of success, which were in any event poor..'

[20] To my mind there is no reason why the principles expounded in the abovementioned decisions, dealing in the main with condonation applications in respect of non-compliance with the rules relating to the noting of appeals, should not apply with equal force to the failure by the defendants to comply with rule 24(1).

The explanation for the delay

[21] In the defendants' composite answering affidavit and founding affidavit in the counter application, it is instructive to repeat verbatim the allegations cited by the defendants' attorney, Mr Graeme Falck ('Falck'), who deposed to such affidavit:

'Explanation for non-compliance with rule 24(1):

9. I assisted the Defendants with the filing of their plea.

10. At the time I was of the view that my instructions would merely make out a defence based on mora creditoris *and that it would not be necessary to file a counter claim in order to rely thereon.*

11. Subsequent to the filing of the plea the action stood still for months, which cannot be laid at the feet of the Defendants as the Plaintiff is dominus (sic) litis. *As will appear from paragraph 53, the Plaintiff was the sole cause of delay in this case of 4 ½ (four and a half years).*

12. When the matter eventually rose from its silent grave I realized (sic) *that it might be more appropriate to institute a counter claim and to amend the plea in order to recover the damages suffered by the Defendants.*

13. *The Defendants are all lay persons when it comes to matters of law and they cannot be blamed for the fact that the counter claim was not instituted on the date that the plea was filed.*

14. *Although the defendants are not in law required to provide an explanation for the delay between the filing of the plea and the late filing of the counter claim, I do feel it appropriate to do so. Hopefully the court will then see that the Defendants are* bona fide *and have not adopted delaying tactics, as suggested by the Plaintiff.*

15. *In order to attend to the drafting of the counter claim the Defendants required further information relating to interest rates and copies of bank statements of the Trust, which still had to be requested from the Plaintiff? This was recorded in par 5 of the Minutes of a Rule 37 Meeting held on 15 March 2017.It had to be requested because Plaintiff failed to disclose the bank statements in the initial discovery affidavit that was delivered on 12 May 2015. A request for trial particulars that was delivered on 2 May 2017, requesting the interest rates and bank statements inter alia* (sic). *A copy thereof is annexed hereto marked "A1".*

16. *The plaintiff responded with a supplementary discovery affidavit and a reply to the request for trial particulars, by delivering the interest rate schedules and bank statements on or about 19 July 2017.*

17. *It was only at that stage that I was able to quantify the Defendant's claim and draft the counter claim. It was served and filed on 22 August 2017.*

18. *I thought that the Plaintiff would be accommodating and consent to the late filing of the counter claim, but unfortunately I was wrong.'*

[22] Later in the affidavit Falck goes on to say:

'Before I was able to attend to the drafting of the Defendants application in terms of Rule 27(3) read with Rule 24(1), the Plaintiff had already instituted the irregular step application.'

The authority point

[23] The plaintiff relied on a number of grounds of opposition to the condonation sought by the defendants, and in addressing the merits, or non-merits, of the proposed counterclaim.

[24] The first such ground was that the condonation application has not been authorised by the Trust. Mr Falck ('Falck') is not a trustee of the Trust and has not alleged that he has been

authorised to sign the affidavit in support thereof. Moreover, there is no supporting affidavit by any person to confirm the factual basis for the alleged counterclaim.

[25] Falck, contends that the plaintiff's 'sudden challenge' has no merit. He alleges that he has '*been the Defendants' instructing attorney from inception with the widest possible powers to attend to all the necessary litigation on their behalf. Including the bringing of this* [counter] *application.*' In support thereof, a confirmatory affidavit by the first respondent (defendant) was filed, as 'a matter of formality'. A resolution of the trustees of the Trust, that was signed separately by them is annexed, confirming *inter alia* Falck's mandate to act on their behalf in the instant matter, which was ratified verbally by the existing trustees, and further resolving that all earlier acts performed by him in relation to the litigation are ratified retrospectively. In terms of the aforementioned resolution, which is undated, Falck was further purportedly authorised to oppose the main application, and to apply for an order in the terms as set out in the counter application.

[26] Counsel for the plaintiff, Mr. Vivier SC, argued that notwithstanding the resolution which purport to ratify all acts performed by the Trust on the defendants' behalf, it is evident that the Trust did not taken any decision prior to the launching of the counter application, to launch such application, nor did it authorise Falck to depose to the affidavit founding the counter application and opposing the main application.

[27] Mr. Vivier SC referred the court to *Steyn and Others NNO v Blockpave (Pty) Ltd*[6] and the learned author Honore's *South African Law and Trusts*[7] in support of his contention that

[6] 2011 (3) SA 528 (FB) at para 19 to 23 and 28
[7] 5th ed at p.323

it is trite that a trust functions in the external sphere by virtue of its resolutions, which have to be supported by all the trustees, being the full complement of the trust body.

[28] The joint action requirement provides that, in the absence of contrary provisions in a trust instrument, the trustees must act jointly if the trust estate is to be bound by their acts. The rule derives from the nature of the trustees' joint ownership of the trust property, and dates back to 1848. It has thus formed the basis of trust law in this country for well over a century and half.[8]

[29] In the present matter, all of the defendants should therefore have taken a joint decision, so the plaintiff's argument went, to institute the counter application, which they did not do prior to the launching thereof.

[30] The plaintiff thus submitted, persuasively in my view, that the contention by the defendants that their attorney has been acting, '*with the widest possible powers*' to attend to all the necessary litigation on their behalf, conflates the authorisation to defend the main action, as the attorney for the Trust, with the question as to whether the institution of the counter application has in fact been authorised by the Trust.

[31] Relying on *Lupacchini NO & Another v Minister of Safety and Security*[9], the plaintiff further contended that, absent the proper authorisation by the defendants of the launching of the counter application, it is a nullity which cannot be cured *ex post facto* by a purported ratification.

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[8] Land and Agricultural Bank of South Africa v Parker and Others 2005 (2) SA 77 (SCA) at para 15, and the authorities there cited

[9] 2010 (6) SA 457 (SCA)

[32] *Lupacchini supra* concerned the question whether non-compliance with s 6(1) of the Trust Property Control Act 57 of 1988, in terms of which a trustee is precluded from acting in that capacity until he or she has been authorised to do so by the Master, rendered any acts by the trustees a nullity. Action had been instituted by trustees of a trust, but one of them was authorised by the Master to act as a trustee only after the action was instituted.

[33] It is apparent from *Lupacchini* that, where there is an incapacity to transact or to institute proceedings because of the absence of the specified minimum number of trustees, the transaction or the institution of the proceedings is a nullity and cannot be ratified. In *Lupacchini* itself the second trustee, self-evidently continued to support the proceedings after she received her letters of authority but this was not regarded as saving the proceedings[10].

[34] *Lupacchini* is of course distinguishable from the matter before this court, as there is no evidence to suggest that the specified number of trustees was absent. It is, however, clear from the attached resolution that the institution of the counter application only appears to have been ratified by the defendants retrospectively, unless the court accepts that the institution of the counter application falls within the catch-all authority which the predecessors of the current trustees gave to Falck to defend the main action and 'to do whatever may be necessary to promote the interests of the Trust.

[35] The defendants rely on the full bench decision of this division in *Hyde Construction CC v Deuchar Family Trust and Another supra,* for their contention that even if this court

[10] *Hyde Construction CC v Deuchar Family Trust and Another* 2015 (5) SA 388 (WCC) at para 40

should find that the counter application was not authorised initially, which they deny, the defendants were entitled to ratify such application retrospectively, which they claim to have done. I am not aware of how this decision comes to the assistance of the defendants, however when referring to the judgment in *Lupacchini*, Rogers J noted pertinently that the fact that the second trustee continued to support the proceedings, and that notwithstanding such support the proceedings could not be saved, *'would naturally not have precluded the two trustees from instituting a fresh action. The capacity point was probably pressed because, by the time it came to be argued in the court of first instance (August 2007) and decided (February 2008), the trust's claim for damages, which was alleged to have arisen from police raids conducted during 2003 (see the full bench judgment para 5), is likely to have become prescribed.*[11]'

[35] As will appear hereunder, from the view which I hold regarding the inadequacy of the explanation provided by the defendants for the delay in launching the application, I need not determine whether the authority point is likely to be upheld. It does however, on the face of it, appear to be a stumbling block which the defendants may well not clear.

[36] Which brings me now to the main substantive defence on the merits of the counterclaim raised by the plaintiff, namely, that, any counter claim which the defendants may have had prescribed prior to the late (and defective) delivery of the counter claim.

The prescription issue

[11] At para 40

[37] Mr Walters, who appeared for the defendants, conceded that counter claim could have been instituted at the time the plea was delivered, '*but not for the full extent of the damages as it* (sic) *largely consists of the interest that were* (sic) *charged by the Plaintiff on a monthly basis which was suffered during consecutive months as and only when the interest was charged by the Plaintiff. It thus constitutes damages that were (and still are) suffered on a continuous basis on condition that is* (sic) *actually charged by the Plaintiff.*'

[38] The plaintiff's position is that the defendants' counterclaim has prescribed, and if the late delivery (by over two and a half years) is condoned, it will require the plaintiff to plead to and deal with a prescribed claim, with the resultant delays in the prosecution of its claim in convention.

[39] The defendants' cause of action for their counterclaim against the plaintiff is founded on an alleged repudiation or breach of certain contractual obligations owed by the plaintiff to the Trust.

[40] The *facta probanda* in support of this cause of action are set out in the defendants' plea, which states in some detail the arrangements between the parties regarding the restructuring of the debt towed by the Trust to the plaintiff. This debt arose from the overdraft facilities in respect of the banking account of the Trust ('the overdraft debt').

[41] These averments, which need not be set out in great detail for the purposes of the present application, can be summarised as follows:

41.1 In September 2010, the plaintiff and the defendants entered into a verbal agreement with a view to the restructuring of the overdraft debt. It is alleged that the plaintiff undertook to accept (or approve) any offer to purchase that the Trust might receive in respect of the two immovable properties which it owned ('the properties'), on condition that the purchase price offered was equal to, or less than, 30% of the total outstanding amount of the overdraft debt, in which event the plaintiff would write off 50% of the overdraft debt and the balance would be repayable in instalments, interest free.

41.2 Subsequently certain amendments to this agreement were proposed by the plaintiff, and accepted by the defendants, which amendments the plaintiff then refused to implement.

41.3 During November to December 2010, certain offers to purchase received by the Trust in respect of the properties, lapsed.

41.4 On 9 December 2010, the Plaintiff repudiated the agreement by denying that it had evert entered into such agreement with the defendants.

41.5 The Trust subsequently, in January and March 2011 respectively, received further offers to purchase, to which the plaintiff failed to respond, notwithstanding a demand to do so on or before 30 May 2011;

41.6 The plaintiff's 'obstructive conduct' during the period from November 2010 to August 2011, made it impossible for the Trust to sell the properties, and

frustrated and delayed the performance by the defendants of the Trust's obligations in terms of the agreement.

41.7 Notwithstanding the fact that the plaintiff eventually accepted an offer to purchase in respect of one of the properties, which the Trust received on or about 28 August 2011, the plaintiff's obstructive conduct resulted in the further accrual of interest and the substantial increase of the outstanding amount of the overdraft debt.

[42] The defendants aver that the damages, as set out in their counterclaim, were caused by the plaintiff's breach of contract as set out above.

[43] The plaintiff contends that based on the counterclaim as pleaded, the debt claimed by the defendants arose, at the latest, in the period from June to August 2011, and would have already prescribed when the counterclaim was delivered 6 years later, in August 2017.

[44] The defendants contend in their replying affidavit that inasmuch as they seek a declaratory order in Claim A of their counterclaim, namely that the plaintiff is in *mora creditoris* and is accordingly not entitled to the interest charged for the period from 1 April 2011 to May 2017, it has not prescribed[12]. They go on to say that the relief sought in order to enforce the verbal agreement cannot prescribe, as it flows from the declaratory order and it merely ensures that the defendants are placed in the same position that they would have been had the plaintiff acted in accordance with the declared rights and obligations of the parties.

[12] *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC)

[45] The plaintiff in turn contends that Claim A is self-evidently a claim for specific performance, disguised as a declaratory order. In amplification hereof, the plaintiff submitted that it is trite that where a debtor fails to fulfil any contractual obligation which has fallen due for performance, prescription in respect of the debt for specific performance begins to run from the time of the breach.[13]

[46] In the alternative Claim B, the defendants claim damages for breach of the verbal agreement, which breach they say continues to date and is 'on the increase.' In this regard the defendants claim their contractual damages consist of the interest that has been charged by the plaintiff on a monthly basis from 1 April 2011 to May 2017, together with the amount of R775, 217 which the plaintiff would have written off upon the sale of the properties.

[47] In the further alternative Claim C, the defendants rely on a delictual claim for negligent misrepresentation and are claiming the same damages that they claim in Claim B.

[48] To sum up, the defendants contend that the counterclaims have not prescribed, alternatively that this is not a matter where it can be said that the counterclaims are 'known to have prescribed', and the court cannot, on the facts *in casu,* make such a finding.

[49] In *Minster of Finance v Gore NO*[14] the Supreme Court of Appeal reiterated that:

> '*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. The running of prescription is not*

[13] *MM Loubser: Extinctive Prescription,* at p 68
[14] 2007 (1) SA 111 (A) para 17

postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove its case "comfortably".'

[50] The fact that all investigations have not been finalised and are ongoing does not delay prescription.[15] The plaintiff who really and honestly cannot quantify his claim may seek a declaration of rights.[16]

[51] Prescription will in any event begin to run if that plaintiff could have acquired knowledge of the facts by exercising reasonable care.[17] The plaintiff is deemed to have the requisite knowledge if a reasonable person in his position could deduce, from the facts of which he is aware or should be aware were he to exercise reasonable care, the identity of the debtor and the facts from which the debt arises.[18] A plaintiff exercises reasonable care when he is diligent in the ascertainment of the facts underlying the debt and diligent in the evaluation of those facts.

[52] Having specific regard to the counterclaim which the defendants seek to institute, the following principle is apposite. Prescription begins to run when the initial loss occurs, in respect of that loss and all future potential loss.[19] (my emphasis) The fact that the damage suffered by the plaintiff is only completed later and is thus only quantified at a later date does not mean that prescription does not run in the interim.[20]

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[15] *Harker v Fussell and Another* 2002 (1) SA 170 (T) at 176F-I
[16] *Ibid.* 176J
[17] *Gericke v Sack* 1978 (1) SA 821 A
[18] *Benson v Walters* 1984 (1) SA 73 (A) at 82E
[19] Loubser *Extinctive Prescription* 84, referring to *Kantor v Welldone Upholsterers* 1944 CPD 388
[20] *Harker v Fussell supra;* See also *Burger v Gouws* 1980 (4) SA 583 (W) 587B

[53] The aforementioned principle embodies the so-called 'once and for all rule', which is applied by our courts and in terms of which it has been held that a cause of action accrues once and for all and the fact that there was continuing *damnum* or loss arising out of the same unlawful or wrongful act did not alter this principle. It follows that, once the single cause of action is established, prescription starts to run.[21]

Evaluation

[54] I turn now firstly to deal with the explanation for the two-and-a-half-year delay in the delivery of the counterclaim, and the failure by the defendants to apply timeously for an order condoning such delay in the delivery thereof.

[55] In *Mohlomi* the following is stated:[22]

> 'Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.'

[56] In *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd*[23] Majiedt AJA (as he then was) pointed out the following:

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[21] See *Harker v Fussell supra,* and the authorities there cited
[22] *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) (1996 (12) BCLR 1559) para 11

'In general terms the interests of justice play an important role in condonation applications. An applicant for condonation is required to set out fully the explanation for the delay; the explanation must cover the entire period of the delay and must be reasonable.'

[57] In my view there is a paucity of detail in the explanation provided by the defendants for the excessive delay in the delivery of the counterclaim. The defendants, and their attorney who deposed to the affidavits in this matter, displayed a cavalier attitude towards the failure to deliver the counterclaim in terms of the rules.

[58] Falck, who attempted to explain why the counterclaim was not delivered simultaneously with the plea, merely states that only when the matter was resurrected, so to speak, did he realise that it 'might be more appropriate to institute a counter claim and to amend the plea in order to recover the damages suffered by the Defendants.' He does not state what gave rise to this sudden realisation, nor that there was anything preventing him from drafting the counterclaim on behalf of the defendants with the facts which were at his disposal at the time that he drafted the plea.

[59] Falck then seeks to rely on the fact that the defendants, as lay persons, could not take the blame for the fact that the counterclaim was not delivered timeously. He goes so far as to say the defendants are not in law required to provide an explanation for the delay between the filing of the plea and the late filing of the counter claim. This is entirely incorrect and reflects poorly on both the defendants and their legal representative. They are required not only to

[23] 2010 (4) SA 109 (SCA) at para 35 to 39

fully explain such a delay, but to explain the full period of the delay. They have manifestly failed to do so.

[60] The only answer which the defendants appear to seriously pursue in relation to the prescription issue is that at the time of the delivery of the plea, not all damages had set in. This is premised on the contention, as I understood it, that each time the plaintiff debited interest from the Trust's account, a new cause of action arose. It appears from *Harker*, and the other authorities cited above, that a new debt is not created every time the bank debits interest form a parties' account. If this were so then the defendants would arguably still not be in a position to quantify their damages as the plaintiff continues to debit interest from the Trust's account.

[61] With regard to the further information and documentation, relating to interest rates and copies of bank statements of the Trust, which Falck claims was required before he could attend to the drafting of the counterclaim, Falck does not state that he could not have procured such documentation without requesting same from the plaintiff. The interest applicable to the applicable periods arguably would have been readily ascertainable, and the bank statements of the Trust surely would have been either in the possession of or capable of being made available to the defendants as the trustees.

[62] I am accordingly unpersuaded by the defendant's contentions in this regard.
In any event, I need not even decide whether the issue of prescription has merit, particularly in light of the fact that in my view the breach of the court rules is so egregious that it is not even necessary to consider the merits. To the extent that the issues of authority and prescription have been canvassed in some detail in this judgment, this was done for the

purpose of demonstrating that I have not only considered the explanation for delay, but have also weighed the explanation given against the circumstances of the case and the relief which the defendants ultimately seek in their counterclaim.

[63] In the instant case, as in the case of *P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty),* where there has been a flagrant breach of the Rules of this Court in more than one respect, and where in addition there is no acceptable explanation for some periods of delay and, indeed, in respect of other periods of delay, no explanation at all, the application should, in my opinion, not be granted whatever the prospects of success may be[24].

[64] I consider that this matter, like *Rennie v Kamby Farms (Pty) Ltd*[25], is one where the explanation for the delay is 'by itself sufficient to render the application unworthy of consideration; and that this is a case in which the court should refuse the application irrespective of the prospects of success.[26]'

[65] For all the reasons set out above, I am of the view that the counter application is without merit, and accordingly must fail.

[66] I am not persuaded that the defendants should be ordered to pay the plaintiff's costs on a punitive scale, however, there is no reason why the costs, in relation to both the main application and the counter application, should not follow the event.

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[24] *P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799

[25] 1989 (2) SA 124 (A) at 131

[26] cf *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (a) at 687A; *P E J Bosman Transport Works Committee acound Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (a) at 799d - e.)

[67] In the circumstances, the following order is made:

67.1 The counter application is dismissed, with costs;

67.2. The defendants' counterclaim is set aside;

67.3 The defendants are ordered to pay the plaintiff's costs, including the costs occasioned by the rule 30 notice and application.

HOLDERNESS AJ

APPEARANCES

For the Plaintiff :	Adv P Vivier SC
Instructed by:	Sandenbergh Nel Haggard
For the Defendants:	Mr A Walters
Instructed by:	Falck Attorneys