



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 20832/14

In the matter between:

**FIRST NATIONAL BANK
(A DIVISION OF FIRSTRAND BANK LTD)**

FIRST APPELLANT

THOMAS JOHANNES NAUDE

SECOND APPELLANT

and

SCENEMATIC ONE (PTY) LTD

RESPONDENT

Neutral citation: *First National Bank v Scenematic One (Pty) Ltd* (20832/2014)
ZASCA 60 (14 April 2016)

Coram: Navsa ADP, Majiedt, Mbha and Zondi JJA and Tsoka AJA

Heard: 15 March 2016

Delivered: 14 April 2016

Summary: Prescription – application of ss 11 and 12(3) of the Prescription Act 68 of 1969 – claim to recover sum of money deducted through unauthorised debit order payments – appeals in respect of the special pleas of prescription dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Hiemstra AJ sitting as a court of first instance).

The appeal is dismissed with costs.

JUDGMENT

Mbha JA (Navsa ADP, Majiedt and Zondi JJA and Tsoka AJA concurring):

[1] This appeal concerns the correctness of a decision of the Gauteng Division of the High Court, Pretoria, (Hiemstra AJ), in terms of which it dismissed the special pleas of prescription of the first and second appellants, First National Bank (a division of First Rand Bank Ltd) and Mr Thomas Johannes Naude respectively, and held them liable for financial loss sustained by the respondent. The appeal is before us with the leave of the court below.

[2] The litigation culminating in the present appeal arose as set out hereafter. The first appellant (FNB) was the respondent's banker. The respondent, Scenematic (Pty) Ltd (Scenematic) is a manufacturing company that constructs various steel items and

components. To that end it requires specialist equipment which it purchases using finance provided by Wesbank, also a division of FirstRand Bank Limited. At material times Naude was a director and employee of Scenematic. It is undisputed that on 22 May 2007 Naude entered into an instalment sale agreement (the agreement) in his own name with Wesbank, for the purchase of a Mitsubishi Pajero motor vehicle. It is not in dispute that the actions of Wesbank may be attributed to FNB.

[3] In terms of the agreement, the vehicle would be financed by Wesbank over a period of 46 months commencing on 2 July 2007 and ending on 21 May 2011. A typescript cheque bank account number belonging to Naude was initially reflected on the agreement. Before signature of the agreement, Naude struck out the typescript account number and replaced it with Scenematic's bank account number 62035695917 in manuscript. Thereafter Naude initialled the amendment and then signed the agreement. The purpose for which the bank account number was entered in the agreement was to enable Wesbank to draw the monthly instalment repayment through debit orders from Scenematic's bank account with FNB. It is necessary to record that in the agreement, under the heading 'ERKENNINGS' which translated means 'acknowledgments', the following appears:

'DEBIETORDER ek magtig hiermee onherroeplik dat *my* bankrekening gedebiteer mag word met alle bedrae wat verskuldig is of te eniger tyd in die toekoms verskuldig mag word ten opsigte van my verpligtinge kragtens hierdie ooreenkoms' (my emphasis.)

The translation is as follows:

'DEBIT ORDER I hereby irrevocably grant authority that *my* bank account be debited with all amounts that may be owing now or at any time in the future in respect of my obligations in terms of this agreement.' (my emphasis.)

[4] As a result of the agreement, Scenematic's bank account was debited monthly in the amount of R4 362.23 for the duration of the agreement. The total amount debited against Scenematic's account in that period was R195 661.94. The debit orders were reflected in the monthly bank statements issued by FNB in respect of Scenematic's bank account, which were sent to Scenematic in July 2007 and subsequent months.

[5] As Scenematic's financial year ends on 30 June, the first instalment that was debited against Scenematic's account on 2 July 2007 fell in Scenematic's financial year commencing 1 July 2007 and ending 30 June 2008. During the 2008 audit process, which was carried out during August 2008, Scenematic's auditors requested to be furnished with the substantiating documentation in respect of the specific monthly debit order in the amount set out in para 4 above. At that stage Scenematic had incurred monthly debit orders, totalling approximately R150 000. At least seven of those debit orders related to transactions entered into with Wesbank for the financing of specialist equipment. As Scenematic's staff did not have the documentation required by the auditors, they then made numerous enquiries with Wesbank requesting a copy of the agreement in relation to the amount of R4 362.23, but without success. During November 2008 Naude was dismissed after unrelated disciplinary proceedings were taken against him. However, the monthly instalment for the vehicle continued to be debited against Scenematic's bank account. FNB eventually forwarded a copy of the

agreement to Scenematic in March 2011. It was only then, according to Scenematic, that Mr William Annandale (Annandale), its managing director, became aware of the existence of the agreement for the purchase of the vehicle which led to the institution of the action in the Gauteng Division of the High Court, Pretoria. Summons was served on the appellants on 19 May 2011.

[6] In its particulars of claim, Scenematic alleged that FNB, as its banker, had undertaken tacitly or impliedly that it would perform its duties towards Scenematic diligently and without negligence. This undertaking included that the bank would not debit Scenematic's account without proper authority. Scenematic claimed that FNB had breached this duty in that it had failed to ensure that it obtained the necessary authority from Scenematic to debit its account. Furthermore, that FNB failed to take the necessary steps to ensure that there was authority from Scenematic for a debit order in relation to the instalment sale agreement referred to above.

[7] With regard to the claim against Naude, Scenematic alleged that it had no knowledge of the agreement signed by him and that it had never authorised Wesbank or either of the appellants to have the instalments flowing from the agreement debited to its bank account with FNB. Scenematic was emphatic that at the time of the conclusion of the agreement Naude had fraudulently, with the intention to deceive Wesbank and/or Scenematic and/or FNB, misrepresented that he had been authorised by Scenematic to have its bank account details (account number 620356917) inserted in the agreement as the account to be debited in relation to payments due under the agreement. It was

alleged further, apparently in the alternative, that Naude fraudulently misrepresented that the account number referred to above was his personal account and that he was authorising debit orders in relation to such account. Scenematic alleged that as a result of Naude's fraud it suffered damages in the total amount of the instalments which had been debited against its account, namely, the amount of R195 661.94.

[8] In response to Scenematic's claim, FNB raised prescription as a special defence. FNB's special plea reads as follows:

'1. The first defendant [FNB] specifically pleads that the plaintiff's [Scenematic] claim, alternatively, a portion thereof prescribed by virtue of the provisions of section 11 of the Prescription Act 69 of 1969. In the aforesaid regard:

1.1. the plaintiff paid monthly instalments to the first defendant since May 2007;

1.2. the plaintiff claims payment of all instalments paid including the instalments paid over the period May 2007 to May 2008;

1.3. a period in excess of three years lapsed in respect of all instalments paid over the period May 2007 to May 2008, in that the plaintiff's summons was only served upon the first defendant during May 2011;

1.4. in the premises the plaintiff's claim for repayment of instalments over the period May 2007 until May 2008 became prescribed.'

Thus, FNB confined its plea of prescription to the period May 2007 to May 2008. In this regard FNB relied on s 11(d) of the Prescription Act 68 of 1969 (the Act), which 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.'

[9] Naude too raised a special plea of prescription, in which he stated:

'The second defendant [Naude] raises a special plea against the plaintiff's [Scenematic] claim:

1. The plaintiff's claim against the second defendant is based on fraudulent misrepresentation with the intent to mislead the plaintiff allegedly committed on or about the 22nd of May 2007, it resulted in the plaintiff's alleged damages.
2. The plaintiff acquired knowledge of the facts from which its claim arose on or about the 22nd of May 2007, alternatively, with the exercise of reasonable care, ought to have acquired knowledge of the facts from which its claim arose more than three years before the date of service of Summons.
3. The plaintiff's summons was only issued on the 9th of May 2011 and was served on the second defendant on the 19th of May 2011.
4. In the premises, plaintiff's claim against the second defendant has become prescribed in terms of section 11 of Act 68 of 1969.'

In respect of what is set out in para 2 of the plea, s 12(3) of the Act is being relied upon.

It provides as follows:

'(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.'

[10] As can be seen, Naude pleaded that Scenematic acquired knowledge of the facts from which its claim arose on or about 22 May 2007 alternatively, that with the

exercise of reasonable care, it ought to have acquired knowledge of the facts from which its claim arose, more than three years before the date of service of the summons.

[11] Hiemstra AJ took the view that evidence was required to decide the special pleas and since the evidence regarding prescription appeared to overlap with the evidence on the merits 'all the evidence should be presented'. The proceedings in the court below were thus conducted on that basis and evidence was led by all the parties.

[12] The court below had regard to the evidence of Annandale that in conducting Scenematic's business he was not responsible for scrutinising the company's bank statements and had left that duty to the bookkeeper. According to him, at material times, the company had been in a growth phase and as pointed out earlier, there were several instalment sale agreements with Wesbank and other credit providers, totalling approximately R150 000 per month and that a debit order of R4 362.23, in respect of the agreement, hidden amongst the rest of the debit orders would not necessarily have been an obvious cause for concern. An assumption could quite easily have been made that the debit order was one for specialist equipment for the business. The court below had regard to Annandale's evidence that at the time that Scenematic's auditors raised a query in relation to the debit order of R4 362.23 and sought source documents, his daughter, Ms Candice Annandale, who was employed by Scenematic, requested the information from Wesbank but failed to obtain relevant information until March 2011, when Wesbank furnished the agreement. Annandale's evidence in regard to the query

by the auditor was confirmed by Mr van Dyk, the auditor in question and by his daughter.

[13] In relation to the merits of Scenematic's claim, Naude pleaded that as a director of the respondent he had full signing powers in relation to Scenematic's bank account with FNB and that, in any event, Annandale on behalf of Scenematic had agreed to the vehicle instalments being deducted from Scenematic's account as part of a remuneration agreement.

[14] Hiemstra AJ took into account documentation supplied by Scenematic to FNB which reflected its list of directors, that included Naude, which FNB contended represented to it that he was one of its authorised directors entitled to act on Scenematic's behalf. A resolution in relation to signing powers on Scenematic's FNB account, included Naude as a signatory. That too was in FNB's possession.

[15] It is common cause that on 24 May 2007 Naude requested of Ms Annandale, that she supply him with a document confirming his employment status and salary. This was required to be presented to Wesbank in relation to the agreement. The document was duly supplied.

[16] Annandale disputed Naude's testimony that he had authorised the debit orders in pursuance of a remuneration agreement.

[17] The Wesbank employee who had represented Wesbank in concluding the agreement, Ms Vanessa Downing, was not available to testify and could not be traced. However, it was unchallenged that on behalf of Wesbank she had completed a checklist and had ticked a block indicating 'Agreement signed by authorised signatory and resolution attached'. It is undisputed that no resolution was attached and that none existed. There is nothing on record to suggest that Ms Downing verified Naude's bank details or that she checked that he had authority to cause Scenematic's bank account to be debited in relation to a personal agreement.

[18] In its judgment the court below recognised that Scenematic's claim against FNB was one for damages for pure economic loss in consequence of a negligent act on the latter's part. Hiemstra AJ recorded that conduct causing pure economic loss could only be regarded as wrongful if public or legal policy considerations required that such conduct should attract legal liability. The court below took the view that in the present case FNB had failed in its duty. Hiemstra AJ was persuaded that Ms Downing was negligent by not ascertaining that there was indeed authorisation by Scenematic, and by not checking the account number, particularly since it had been altered in manuscript form. He reasoned that this should have put her on her guard. The court below held that the documentation referred to above, relating to the signing powers of directors, did not extend to an authority to burden Scenematic's account with his liability.

[19] In rejecting the evidence of Naude, the court below said the following (para 31):
'I have no hesitation in rejecting the evidence of the second defendant where it is in conflict with that of Mr Annandale. He was an evasive witness who continuously adapted his version under

cross-examination. Apart from the fact that I find him to be a dishonest witness, his evidence that the alleged motor vehicle benefit had been part of his remuneration is completely discredited by the fact that the instalments continued to be debited to the plaintiff's account long after the termination of his services. His explanation that he had had a loan account to his credit and that he thought that the instalments would be debited to his loan account was another invention conjured up during cross-examination.'

[20] In relation to the question whether Scenematic failed to exercise reasonable care in checking to see whether the debit orders were indeed authorised each time its bank account was debited – a question connected to the provisions of s 12(3) of the Act – the following parts of the judgment of the court below are relevant (paras 17-18):

'I find Mr [Annandale's] explanation for the failure of his staff to establish the origin of the debits as soon as they were reflected on the bank statements plausible. In the context of the huge amounts debited to the account monthly, these debits were relatively insignificant. Although the plaintiff's staff may not be entirely blameless, I cannot find that their failure to investigate the debits was so unreasonable that it can be said that the plaintiff had not exercised reasonable care.

I am, however, not impressed with the explanations of Mr Annandale and Ms Annandale for the plaintiff's failure to find the cause of the debits when the auditor requested them to find the source documents. The efforts of Ms Annandale to establish from Wesbank the origin of the debits were half-hearted to say the least. However, that is irrelevant. The auditor requested the documents during August or September 2008. That is the date from which prescription ran. That is less than three years before summons was issued.'

Hiemstra AJ concluded that the plaintiff's claim had not prescribed.

[21] In light of the findings of the court below, set out in the preceding paragraphs, it made the following order:

- '1. Both defendants' special pleas are dismissed with costs;
2. The first and second defendants are ordered to pay to the plaintiff the amount of R195 661.94 jointly and severally, the one paying the other to be absolved.
3. The first and second defendants are to pay the plaintiff's costs, the one paying the other to be absolved.'

[22] It is against those orders and the findings referred to above that the present appeal, with the leave of the court below, is directed.

[23] In my view, the essential reasoning of the court below cannot be faulted. Naude was an unsatisfactory witness and counsel on his behalf did not contend otherwise. The finding of fraud perpetrated by Naude is impeccable. It was submitted on his behalf that the claim had prescribed on the basis that the agreement had been concluded during May 2007 and the summons had been served during May 2011 and that a claim could only be sustained on the basis of the conduct of either Naude or FNB in relation to the conclusion of the agreement rather than in relation to each individual debit order. These submissions are fallacious. There was a fraud perpetrated by Naude in the conclusion of the agreement and it continued for the period during which debit orders were processed against Scenematic's account with FNB. Naude was well aware of the period of the agreement and of his continuing fraud during that period by permitting the debit orders to continue when, to his knowledge, Annandale, and thus Scenematic, was unaware of the true state of affairs. Moreover, given the fact that he was a director and

had intimate knowledge of the workings of the company, Naude must have been aware that the on-going monthly deductions would be lost or hidden within the multiplicity of debit orders related to the purchase of specialist equipment. In any event, in relation to prescription the court below correctly held that it only commenced running from August or September 2008. The summons was served within 3 years of that date.

[24] It was submitted on behalf of FNB that *it* was, as much as Scenematic, a victim of Naude's fraud and it ought, therefore, not to be held liable for the loss occasioned to the latter. That submission too is unsustainable. Wesbank, when faced with the agreement itself, had obvious cause for concern. The manuscript change was suspicious. The account number supplied by Naude was Scenematic's account number. Scenematic was its corporate client. The agreement was a personal one and on the face of it unconnected to Scenematic's business. In the acknowledgement referred to in para 3 above, Naude was verifying *his* personal account details and authorising debit orders in relation thereto. If, however, the acknowledgment was somehow to be construed to relate to a corporate client, a resolution was required which Wesbank did not bother to obtain.

[25] It was contended on behalf of FNB that the documents indicating Naude as a director and the authorisations referred to in para 14 above ought to be viewed as a representation to Wesbank that Naude was authorised by Scenematic to conclude the agreement and consequently authorised the monthly debit orders. This contention is

without merit, both for the reasons supplied by the court below and on the basis of what is set out in the preceding paragraphs.

[26] It was also submitted on behalf of FNB that Scenematic ought to have been put on its guard from the time it received the first bank statement in June/July 2007 reflecting a debit order in respect of the agreement. Its failure to detect the deduction, so it was contended, was not the exercise of reasonable care. Scenematic had an established relationship with FNB. It had no reason to suspect that debit orders reflected in the bank statement were not justified. As pointed out earlier, the debit order in relation to the vehicle, appeared amongst a number of other debit orders. This was a fact that must have been known by Naude and was exploited by him.

[27] Insofar as Scenematic's claim against FNB is concerned, it is so that in considering each case, what must be considered is whether according to the circumstances, there was a legal duty to avoid pure economic loss. It requires the court to exercise 'a value judgment embracing all relevant facts and involving considerations of policy'.¹

[28] In the present case, Scenematic was a client of FNB. Wesbank appears to have regularly financed the acquisition of specialist equipment. There can be no doubt that it must have known or subjectively foresaw that negligence on its part in relation to the manner in which it handled Scenematic's account would have caused it loss and it could

¹ See J Neethling *et al Law of Delict*, 5ed (2006) at 269-270. See also *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A), in respect of the duty of a collecting banker in relation to the true owner of a cheque.

quite easily have taken practical measures to prevent the loss from occurring. It was providing a professional banking service. All these factors point to liability being imposed on FNB. In relation to factors to be taken into account in determining whether liability should be imposed, see *Law of Delict* at 271-274. The court below was correct in dismissing FNB's plea of prescription and also, for the reasons set out above, in holding FNB liable.

[29] Naude acted fraudulently and for the reasons set out above the court below was correct in dismissing his plea of prescription and holding him liable.

[30] The appeal is dismissed with costs.

B H Mbha
Judge of Appeal

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