

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 44726/18

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 3 January 2022 E van der Schyff

In the matter between:

WILLOW INVESTMENTS (PTY) LTD

PLAINTIFF

and

SANLAM PRIVATE WEALTH (PTY) LTD

FIRST DEFENDANT

CONSTANTIA LIFE LTD

SECOND RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] The plaintiff issued summons in June 2018 seeking the following relief:

- i. A declarator that the transfer of R2 043 865.19 by the first defendant from an investment account held by Shaneil Financial Management CC (Shaneil) to an investment account held by Goodall & Bourne Assurance (Pty) Ltd (Goodall) to be unauthorised;
- ii. An order directing the first defendant to reverse the said transfer;
- iii. Payment of the sum of R2 043 865.19 calculated at the interest rate applicable to cash investments held by the first defendant calculated from 1 October 2011 to date of final payment, and
- iv. Costs of suit.

[2] The summons was served on the first defendant on 4 July 2018.

[3] An interesting feature of this litigation is that the first defendant did not lead any evidence but relied extensively on three judgments handed down respectively by the Gauteng High Court and the Supreme Court of Appeal in the sequestration application of Mr. Gungudoo's joint estate, as well as a report filed by Deloitte that was submitted in evidence in the said sequestration application. Mr. Gungudoo was the sole member of Shaneil and is the sole shareholder of the plaintiff (Willows). Counsel for the plaintiff stated that the plaintiff accepts that Mr. Gungudoo gave his version regarding the events that preceded and led to the sequestration application in the affidavits filed in that application, and that the courts rejected his version. A question arising from the first defendant's reliance on the previous judgments and findings of fact made by the courts concerned, is whether these judgments have evidentiary value in these proceedings. This question will be addressed below to the extent that it is necessary.

The facts

[4] The core facts underpinning this litigation are common cause. The evidence of Mr. Gungudoo and Mr. Mohammed was led on behalf of the plaintiff. No evidence was led by the first defendant (SPW). The second defendant, previously Goodall, did not enter the fray.

- [5] As stated above, Mr. Gungudoo is the sole shareholder of the plaintiff and he was the sole member of Shaneil. Shaneil had a broker account with Sanlam Private Investment, now Sanlam Private Wealth (SPW). Mr. Gungudoo was also the investment manager of Hannover Group Reinsurance (Pty) Ltd and Hannover Reinsurance Africa Ltd (Hannover). Goodall was a subsidiary of Hannover.
- [6] During August 2009, Mr. Gungudoo resigned as the investment manager of Hannover. Hannover commenced with an application to sequester Mr. Gungudoo's joint estate. From the three judgments relied on by SPW, it is apparent that Hannover alleged that Mr. Gungudoo, amongst others, engaged in fraudulent unauthorised trading activities as a result of which it suffered losses. Shaneil was utilised as the vehicle through which these transactions were conducted. Since Mr. Gungudoo's resignation, trading activities on the Shaneil account ceased. Mr. Gungudoo testified that by August 2009 all Shaneil's shares were sold, all collateral repaid and the account reflected a balance of R1 803 326.16 to Shaneil's credit.
- [7] Mr. Gungudoo's joint estate was provisionally sequestered on 31 August 2010 and finally sequestered on 21 April 2011. Tsoka J, when he granted the order for Mr. Gungudoo's sequestration, held that Mr. Gungudoo traded on behalf of his alter ego, Shaneil. Certain shares, held by Hannover were transferred to Shaneil on Mr. Gungudoo's instructions. This, the learned judge found, amounted to a misappropriation of the shares. In addition, the court found that Mr. Gungudoo competed with his employers through Shaneil and that he was:

‘unafraid to change documents to misrepresent that Shaneil not only is a close corporation but also that it is a public company, and that it is a subsidiary of the First Applicant [Hannover Reinsurance Group Africa (Pty) Ltd].’

As a result of what Tsoka J described as a ‘deliberate misrepresentation’, Mr. Gungudoo, through Shaneil, was able to engage in short trades to the prejudice of Hannover. When losses occurred it was passed to the Hannover accounts, and when profit was made it was passed to Shaneil's account. Funds were transferred

on Mr. Gungudoo's instructions from the Hannover accounts to the Shaneil account, and the court found that this was a misappropriation of the Hannover entities' assets. The Hannover companies divested themselves in 2005 of one of their subsidiary company known as Goodall and Bourne Assurance (Pty) Ltd, now Constantia Life Ltd, the second defendant. Mr. Gungudoo, however, continued to trade on behalf of the company. Tsoka J found Mr. Gungudoo's explanation that he continued trading on the authority of a representative of SPW is implausible, and *mala fide*. The Supreme Court of Appeal upheld Tsoka J's order.

- [8] Mr. Gungudoo's member's interest in Shaneil was an asset in the joint insolvent estate. The monthly investment reports for the Shaneil account provided by SPW from August 2009 consistently reflected a growing credit balance, as interest was added on a monthly basis. Mr. Gungudoo testified during cross-examination that he was informed after his sequestration that his account with SPW was suspended and frozen. During October 2011 Mr. Gungudoo received Shaneil's monthly investment report for the month ending on 30 September 2011. He noted an entry reflected on the report 'Journal REV OF UNAUTHORISED TRF OF FUNDS'. The report indicated that the amount of R2 043 865.189 was removed from the Shaneil account, and the account reflected a nil balance.
- [9] Mr. Gungudoo testified that he phoned SPW after receipt of the report to enquire about the transfer of the funds. He asked to speak to Ms. Sally Jeeva and assumed the lady he spoke to was Ms. Jeeva. She informed him that the funds were moved from the Shaneil account to a suspense account because he was sequestered. It is, now, common cause between the parties that SPW unilaterally reversed the credit balance from the Shaneil account and credited the Goodall account.
- [10] On 2 March 2015 a special resolution was taken by the trustees of Mr. Gungudoo's insolvent estate for Shaneil to be wound up, and on 21 November 2017 a court order to this effect was granted. Neither Hannover nor Goodall or SPW submitted any claims in the insolvent estates of Mr. Gungudoo or Shaneil.
- [11] During cross-examination it was put to Mr. Mohamed, the plaintiff's attorney who also represented the trustees in his insolvent estate and Shaneil (In Liquidation),

that the trustees of the Gungudoo insolvent estate were informed by email of the fact that the Shaneil account reflected a nil balance on 1 December 2011. Mr. Mohamed denied any knowledge of this email or the content thereof. The same information was not put to Mr. Gungudoo when he testified. This email correspondence forms part of the bundle of discovered documents, and no objection was raised on behalf of the plaintiff regarding the consideration of this email correspondence in evidence. Both counsel dealt with this correspondence during closing argument and in these circumstances it is considered to form part of the body of evidence, particularly because the parties agreed at the commencement of the hearing that all discovered documents are what they purport to be.

- [12] Mr. Mohammed testified that he made enquiries regarding the Shaneil account with SPW from June 2014. He first enquired on behalf of the trustees of Mr. Gungudoo's insolvent estate, and later, during 2015, on behalf of Shaneil (In Liquidation). SPW was slow to respond but he was eventually informed on 2 September 2015 that there is a nil balance on the account. Email correspondence from SPW dated 2 September 2015 reflects that 'all instructions given on/for the account were received from Mr. S. Gungudoo.'

- [13] Shaneil's liquidators refused to pursue a claim against SPW for the reversal of the amount of R2 043 865.19 from the Shaneil account to the Goodall account. Mr. Gungudoo was rehabilitated on 17 January 2018. The claim against SPW was ceded to the plaintiff, who was incorporated on 14 May 2018, with Mr. Gungudoo as its sole shareholder, against payment of R10 000.00, on 28 May 2018.

The parties' general contentions

- [14] The plaintiff claims that SPW was not entitled to make any unauthorised transfers from the Shaneil account. This transfer, it claims, constituted a breach of the provisions of the mandate agreement which entitles Shaneil to a reversal of such transfer and/or to damages and/or to payment of its investment.

- [15] SPW's stance, as put forward by its counsel, is that it was entitled to transfer any funds from the Shaneil account without any instructions based solely on the fact that Tsoka J found that the Shaneil account was used for unauthorised transactions and the misappropriation of other entities' assets.
- [16] SPW raised a special plea of prescription. It claims that the reversal of the unauthorised transactions from the Shaneil account to the Goodall account occurred on or about 30 September 2011. On 31 October 2011, alternatively 1 December 2011, alternatively 3 July 2015, Shaneil (In Liquidation) had knowledge of the facts from which the debt in question arose and of the identity of the debtor involved. The claim was thus due and payable. In the alternative SPW claims that Shaneil could have acquired the knowledge on 31 October 2011, alternatively 1 December 2011, alternatively 3 July 2015 by exercising reasonable care. By virtue of s 12 of the Prescription Act, 68 of 1969, Shaneil is deemed to have such knowledge by that date. The plaintiff's summons was served on SPW on 4 July 2018 more than three years after the date upon which the alleged claim became due, and in the premise SPW claims that the plaintiff's claim prescribed.
- [17] Against this background, the two main issues that need to be determined are: (i) whether the first defendant was entitled to reverse the amount standing to the credit of the Shaneil account during September 2011; and (ii) whether the plaintiff's claim has prescribed. The first defendant's counsel indicated at the onset of the trial that the validity of the cession was no longer in dispute.

Was the first defendant entitled to reverse the amount standing to the credit of the Shaneil account during September 2011?

- [18] Mr. Gungudoo testified that Shaneil, represented by himself, provided SPW, the broker, with a 'non-discretionary mandate'. He did not authorise the transfer of the funds in the Shaneil account. SPW acknowledged in the plea filed, that the Shaneil account reflected a credit balance in the amount of R2 035 635.64 on 26 August 2011. SPW however attributed this credit balance to 'allocations made to the Shaneil account from unauthorised and illegal transactions on the accounts of the second

defendant and Hannover Africa perpetrated by Gungudoo.’ SPW pleaded that it reversed the unauthorised and illegal transactions on the Goodall account by debiting the Shaneil account and crediting the Goodall account, and denied that it required authorisation by Mr. Gungudoo to reverse the unauthorised and illegal transactions.

- [19] Plaintiff’s counsel submitted that it is irrelevant what Mr. Gungudoo might or might not have done as an unauthorised representative on the Goodall or Hannover accounts. Those claims are either claims by Goodall or Hannover against Mr Gungudoo and neither Goodall nor Hanover pursued any claims in the insolvent estates of Mr. Gungudoo or Shaneil. Plaintiff’s counsel submitted that SPW failed to adduce any evidence in this court that any of the transactions in the Shaneil account was in any way unlawful, illegal or unauthorised.
- [20] SPW’s counsel submitted that the plaintiff alleged that a term of its mandate to SPW was that SPW was not entitled to make unauthorised transfers from the Shaneil account and that all unauthorised transfers made from the Shaneil account would be reversed on demand. Counsel submitted that the claim is one for breach of contract, and in particular, for the breach of the transfer term. Although the SPW admitted the express terms of the mandate, it denied the terms alleged in the particulars of claim in so far as they are tacit or implied. The transfer term, is not an express term. The only express term to which Mr. Gungudoo was referred to in his evidence in chief is the term stipulating that the mandate given to SPW is non-discretionary, which means that Shaneil rather than SPW would determine which shares to trade in. In terms of this term, SPW would require Mr. Gungudoo’s instruction before using funds to acquire shares. The transfer of the funds out of the Shaneil account in September 2011 was however not done for the purpose of acquiring shares. It was not a trading transaction and therefore the express term to which Mr. Gungudoo testified is irrelevant. Counsel submitted that SPW was entitled to make a reversal transfer without authorisation if it had reason to believe that the funds were stolen or the proceeds of fraud. This is so, counsel submitted, because it cannot contractually be expected of SPW to make itself an accessory after the fact

by permitting Shaneil to use those funds for trading. Thus the transfer term does not form part of the mandate.

- [21] SPW's counsel explained that the remarkable background to this claim is that Mr, Gungudoo has been found to have committed theft and fraud, using Shaneil as his vehicle for doing so. Through the present action, counsel submitted, Mr. Gungudoo is seeking the court's assistance to gain access to the proceeds of his crimes, using the special-purpose vehicle of Willow. This court cannot legitimately be asked to make such an order because 'no court in this land will allow a person to keep an advantage which he has obtained by fraud.' Counsel contended that the transfer term, if it existed, was unravelled by Mr. Gungudoo's and Shaneil's fraud. Any contractual obligation that SPI might otherwise have had is unenforceable against it 'at the behest of the fraudster'.
- [22] SPW did not lead any evidence to explain why the Goodall account, and not a Hannover account, was credited when the transactions were reversed. Even if the judgment handed down when Mr. Gungudoo's joint estate was finally sequestrated, and the subsequent judgment of the Supreme Court of Appeal, are considered as evidence that establishes that the funds in the Shaneil account were proceeds of unlawful, irregular and unauthorised transactions, an aspect dealt with below, Tsoka J and the Supreme Court of Appeal considered that both the Hannover entities were prejudiced and suffered damages. SPW, however, credited only the Goodall account and failed to provide an explanation for this decision.
- [23] A question to be answered is whether the judgment handed down by Tsoka J has any evidentiary value in these proceedings. Neither counsel addressed this question pertinently although the plaintiff's counsel submitted that 'the first defendant failed to adduce any evidence that any of the transactions in the Shaneil account, i.e. any of the buying and selling in the Shaneil account was in any way unlawful, illegal or unauthorised', while the first defendant's counsel relied heavily on the findings made by the court in the sequestration litigation. In considering this question I had regard to the following:

- i. In *Illinois Steel Co. v Industrial Commission*¹ it was held that a judgment is not evidence of a fact recited in it where no question of *res iudicata* is involved;
- ii. In *Hollington v Hewthorn & Co Ltd*² it was held that a finding of a criminal court did not have any probative value in a subsequent civil action and was inadmissible evidence;
- iii. In *Yusaf v Bailey and Others*³ Vieyra J stated:

'It will be noted that in coming to this conclusion I have not taken into consideration the conviction previously referred to. Counsel submitted that this conviction was *prima facie* evidence of the truth of the allegations set out in the innuendo. For this contention he relied on the statement in Gatley on the *Law of Libel*, 5th ed., para. 1089, and the cases there cited, viz. *In re Crippen*, 1911 P. 108, followed in *Mash v. Durley* (1914) 1 K.B. 1. The leading English case on the matter not however mentioned by Gatley is *Hollington v F. Hewthorn & Co. Ltd.*, 1943 K.B. 587, in which the cases relied upon by counsel were considered and overruled. Reference was also made in the judgment to *Leyman v Latimer*, (1878) 3 Ex. D. 352, in which it was held in a defamation case that, although the Court record was conclusive evidence that the person in question was convicted of being a thief, nevertheless by itself it did not prove that he stole anything. *Hollington's* case, *supra*, is binding on this Court and accordingly I rule that the conviction of the plaintiff in question is not admissible in the present

¹ 290 Ill. 594, 125 N.E. 252 as reference in 1 Austin Abbott & Allan J. Carter, A brief on the Modes of Proving Facts: Most Frequently in Issue or Collaterally in Question on the Trial of Civil or Criminal Cases (4th ed) (1922) 717.

² [1943] 2 All ER 35.

³ 1964 (4) SA 117 (W) 126F – 127A.

proceedings to establish that in fact he is guilty of the fraud alleged so as to support the plea of justification.'

- iv. In *Society of Advocates of South Africa (Witwatersrand Division) v Rottanburg*⁴ the court explained:

'None the less, save for certain well-known exceptions when it has evidential or testimonial value which are not now relevant, a conviction or judgment is inadmissible evidence of the facts upon which it was founded when those facts are directly in issue in subsequent civil proceedings. Its exclusion springs from a combination of the hearsay rule with the rule rejecting certain types of opinion evidence. The conviction or judgment in effect expresses the opinion at which the court arrived on the judicial evidence placed before it which invariably does not include facts perceived by itself. Where a party to the litigation therefore challenges the propriety of the conviction or judgment, the Court in the subsequent trial would have to retry the criminal case to find out what weight ought to be attached to the result. The conviction or judgment is then irrelevant because it expresses an opinion on a matter which the Court in the subsequent trial itself has to decide. See *Hollington v F Hewthorn & Co Ltd* [1943] 2 All ER 35 at 40.'

- [24] In the present matter the reliance placed on the factual findings made in the sequestration proceedings is not for the purpose of *res judicata*, but as evidence and conclusive adjudication of issues that are material to this litigation. I am of the view that that the cases referred to above substantiate a view that an existing judgment cannot be conclusive evidence of the facts or issues common to both matters, even

⁴ 1984 (4) SA 35 (T) 38A.

more where the former was on application while *viva voce* evidence was led in the latter.⁵ Although the judgment handed down by Tsoka J and the findings recorded therein, contains the court's expressed view and finding that Mr. Gungudoo, through Shaneil, at some time conducted unauthorised transactions and that shares were misappropriated, the judgments do not prove on a balance of probabilities that the funds in the Shaneil account at the time that SPW reversed same, were the proceeds of illegal transactions.

- [25] However, even if it is accepted for the moment that this court can find solely based on Tsoka J's judgment that the funds in the Shaneil account were the proceeds of illegal and unauthorised transactions, SPW's counsel did not refer me to any authority on which he based the submission that SPW was entitled not only to freeze or suspend Shaneil's account but to reverse Shaneil's account and to credit the Goodall account. Mothle J held in *Houtbosplaas (Pty) Ltd v Nedbank Ltd*,⁶ albeit in relation to the Financial Intelligence Centre Act 38 of 2001, that:

'A business relationship between a financial institution and a customer does not entitle the former to restrict or freeze access to the account of the latter, even in instances where there is a suspicion the transaction involves unlawful activity. Section 29 of FICA provides for suspicious and unusual transactions. ... The courts have frowned upon the freezing of accounts even in more serious cases where unlawful activities or a suspicion thereof was conducted in those accounts.'

- [26] When one considers the question as to a financial institution's responsibility towards third parties in circumstances where e.g., stolen money is deposited into an account,

⁵ See also G O W Mueller and L H Whinery. Second-Hand Judgments: Reciprocal Use of Judgments in Civil and Criminal Matrimonial Cases (1958) Washington and Lee Law Review 15:1, 44-75.

⁶ (68087/2017) [2019] ZAGPPHC (12 December 2019) para [21].

the recent Supreme Court of Appeal decision in *FirstRand Bank Limited v The Spar Group*⁷ is insightful. In *FirstRand Bank Ltd* the court had to answer two questions:

‘First, can a bank set off the customer’s debts to the bank against amounts standing to the credit of a customer, if the bank knows that a third party has a claim to these funds? If not, what claim does the third party have against the bank? Second, does the bank owe a legal duty to the third party if the bank allows the customer to utilise the money deposited by the third party into the customer’s account, if the bank knows the customer has no valid claim to those funds?’

The second question is relevant for the present proceedings.

[27] The SCA referred to *First National Bank of Southern Africa v Perry NO and Others*⁸ where stolen money was deposited into a Nedbank account:

‘Schutz JA explained that, by operation of law, ownership of this money passed to Nedbank and could not be claimed by way of the *rei vindicatio*. However, the mere fact that the customer’s account had been credited with the stolen money did not mean that the customer (and thief) had a claim against Nedbank for payment of the amount standing to his, ostensible, credit.’

Sutherland and Unterhalter AJJA⁹ explained with reference to *Nissan South Africa (Pty) Ltd v Marnitz NO and Others*¹⁰ that the same position arises when funds are paid into a bank account in error:

⁷ (1334/2019) [2021] ZASCA 20 (18 March 2021).

⁸ 2001 (3) SA 960 (SCA).

⁹ *FirstRand Bank Ltd* par 48.

¹⁰ 2005 (1) SA 441 (SCA) para 25 and 26.

‘The customer into whose account an amount is paid in error has no entitlement to the funds credited to that account. And an appropriation of the funds by such a customer, with knowledge that they were not entitled to deal with the funds, would amount to theft.’

- [28] The principle confirmed in *FirstRand Bank Ltd* is that money deposited with a bank becomes the property of the bank and persons enjoy personal rights against the bank to the credit balance on account derived from the deposit made. The bank is the owner of the money deposited, and the deposit gives rise to a personal right in respect of the credit that is thereby created in the books of the bank.¹¹ The learned judges continued:

‘[56] Once this distinction is recognised, two questions arise. What is the nature of the personal right against the bank, and enjoyed by whom? In the standard case, the customer deposits money into their account and has a personal right against the bank to be paid the credit reflected on the account (with interest, if agreed) or otherwise to direct the bank as to who should be paid. The personal right is an incident of the contract that subsists between the customer and the bank.

[57] However, as may be observed from the cases to which we have referred, the personal right to claim against the bank may not be enjoyed by the customer. The customer may be the agent of a principal in respect of the account, and the principal will then have the claim. Or the bank, the customer and a third party may have an agreement as to the rights of the third party to the use of the account and the credit balance on account.’

- [29] The SCA in *FirstRand Bank Ltd* in addition held that a bank which is aware that a third party has deposited funds into its client’s bank account and is aware that the

¹¹ *FirstRand Bank Ltd* paras 55 and 56.

client has no legitimate claim to the funds is under a duty to take steps to prevent harm by way of misappropriation of those funds by its client- the bank's failure to prevent harm to the third party renders it a co-wrongdoer with the client for theft.

- [30] In the present matter, even if it is accepted that the funds were reversed because it was the proceeds of illegal transactions, SPW, went further than to take steps to prevent harm coming to a third party. It did not merely place a hold on the funds and allowed the law to take its course, but decided unilaterally to allocate the funds to the Goodall account. This action was taken 4 months after Mr. Gungudoo's joint estate was finally sequestrated. When SPW unilaterally reversed the entry and removed the funds from the Shaneil account, it conducted an act contra its contractual agreement with Shaneil. The difference between freezing or suspending an account and reversing a transaction, is that while the former preserves the status quo, the latter is an action in relation to investment transactions. In terms of the non-discretionary mandate transactions could only be conducted on Shaneil's instructions. In the absence of an instruction, an agreement, or a court order authorising the transfer, SPW took matters into its own hands and seemingly regarded itself as adjudicator in the dispute that arose between Mr. Gungudoo and Hannover and Goodall. The reversal also coincides with the settlement reached between the second defendant, SPW and Hannover in litigation instigated by the second defendant against the latter parties wherein SPW and Hannover each accepted liability for losses suffered in the Goodall account. Neither Mr. Gungudoo nor Shaneil were parties to the litigation. In the present matter the plaintiff claimed in its particulars of claim that SPW transferred the sum of R2 043 865.19 from the Shaneil account to the Goodall account in order to reduce its liability in terms of the settlement agreement reached in the litigation between the second defendant, Hannover and itself. SPW did not deny this claim but pleaded: 'The Plaintiff's main claim as set out in paragraph 4 and further in the particulars of claim, is not stated to be based on the First Defendant's alleged allegations as contained in the paragraphs under reply. The relevance of these allegations for purposes of pleadings are accordingly denied.', and: 'To the extent that the allegations contained in the aforesaid paragraphs of the particulars of claim are quoted from pleadings or documents filed by the First Defendant in other cases, the First Defendant admits

the allegations only to the extent that the allegations are a true and correct reflection of such pleadings or documents. Save as set out above, the remainder of these allegations are denied.'

[31] In the premise the transfer of R2 043 865.19 by SPW from the investment account held by Shaneil to an investment account held by Goodall was unauthorised. This is, however, not the end of the matter.

Has the plaintiff's claim prescribed?

[32] Section 12 of the Prescription Act 68 of 1969 provides as follows:

- '(1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as a debt is due.
- (2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt;
- (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.'

[33] SPW pleaded that the reversal of the unauthorised transactions from the Shaneil account occurred on or about 30 September 2011. It claims that Shaneil had knowledge of the facts from which the debt in question is alleged to arise and the identity of the debtor involved on or about 31 October 2011, alternatively 1 December 2011 alternatively 3 July 2015. In the alternative SPW pleaded that Shaneil could have acquired the knowledge on 31 October 2011, alternatively 1 December 2011, alternatively 3 July 2015 by exercising reasonable care. Summons was served on 4 July 2018, more than three years after the date upon which the alleged claim became due.

[34] SPW's counsel submitted that Mr. Gungudoo's evidence established the special plea of prescription. As indicated above, Mr. Gungudoo testified that he received an

investment report from SPW dated 30 September 2011, during October 2011. This report reflected the reversal of unauthorised funds, leaving a nil balance to the account. After phoning SPW and speaking to Ms. Sally Jeeva he was advised that the funds had been transferred into a suspense account. This evidence accords with what was pleaded by the plaintiff in replication. SPW's counsel submitted that Shaneil and Mr. Gungudoo knew in October 2011 that there had been an unauthorised transfer of funds from the Shaneil account. The present action was, however, instituted in June 2018, almost seven years later. Counsel submitted that the only basis on which the plaintiff sought to avoid prescription was by replicating that SPW wilfully prevented Shaneil from coming to know of the existence of the debt. Counsel submitted that SPW did not wilfully seek to prevent Shaneil from coming to know of the existence of the debt – it sent the investment report dated 30 September 2011 to Shaneil. This report reflects the nil balance and contains the reason for the nil balance.

- [35] Counsel lastly submitted that SPW advised the trustees of Mr. Gungudoo's insolvent estate on 1 December 2011 that the Shaneil account had a nil balance. Plaintiff's counsel during closing argument likewise referred to the email of 1 December 2011 wherein the trustees of Mr. Gungudoo's were informed of the fact that the Shaneil account reflected a nil balance. Plaintiff's counsel submitted that SPW cannot rely on this correspondence to satisfy the onus as to when Shaneil became aware or should have become aware of its claim against SPW. The submission is that:

'There was no demand made by Gungudoo in October 2011. On the contrary, the terms of the mandate had by operation of law changed as the only authorised person who could make demand would have been his duly appointed trustees. No demand was made by the trustees on 28 November 2011, as the letter was merely an enquiry as to whether an account was held by Shaneil with a credit balance which had been frozen upon his sequestration. The response was unequivocal that there was a nil balance. There was no cause for a demand as the enquiry had

been comprehensively answered. The trustee was informed that there was no claim.'

- [36] Mr. Mohamed commenced communication with SPW on behalf of the trustees of Mr. Gungudoo's insolvent estate, enquiring about the Shaneil account, during June 2014. During August 2014, SPW provided Mr. Mohamed with statements of the Shaneil account, the latest statement provided was dated 24 June 2011. On these statements a credit balance was reflected because these statements preceded the reversal of the alleged unauthorised transaction. The trustees of the Gungudoo's estate resolved to wind-up Shaneil, and Shaneil was wound-up by way of special resolution on 2 March 2015.
- [37] Mr. Mohammed, this time representing Shaneil (In Liquidation) again wrote to SPW in August 2015 enquiring about the account. SPW informed that the Shaneil account had a nil balance on 2 September 2015.
- [38] The plaintiff's counsel submitted with reliance placed on *Minister of Finance v Gore N.O*¹² that Shaneil did not possess the necessary knowledge of the facts from which the debt arose by 1 December 2011. In considering this submission, cognisance must be taken that it is the plaintiff's case that SPW breached the contract concluded with Shaneil, by reversing alleged unauthorised transactions. This contract contained a non-discretionary mandate in terms whereof no transactions could be concluded without Mr. Gungudoo's instructions. Mr. Gungudoo, as Shaneil's sole shareholder and representative was informed that Shaneil's account was suspended subsequent to the provisional sequestration of his joint estate. Thereafter he received an investment report, reflecting that a journal entry was made, which entry reversed unauthorised funds on the Shaneil account. By 1 December 2011 the trustees of Mr. Gungudoo's insolvent estate was informed that the Shaneil account reflected a nil balance.
- [39] It is undisputed that Mr. Gungudoo received the investment report whereon the reversal of the funds and the reason for the reversal was reflected. I am of the view

¹² 2007 (1) SA 111 (SCA).

that it is irrelevant whether Mr. Gungudoo was informed that the money was transferred to a suspense account, or to the Goodall account. The fact of the matter is that SPW acted in breach of the contract concluded with Shaneil when the funds were so transferred.

[40] In *Van Staden v Fourie*¹³ the court explained:

‘Artikel 12(3) van die Verjaringswet stel egter nie aanvang van die verjaring uit totdat die skuldeiser die volle omvang van sy regte uitgevind het nie. Die toegewing wat die Verjaringswet in hierdie verband maak, is beperk tot kennis van ‘die feite waaruit die skuld ontstaan’.

Similarly, in *Minister of Finance v Gore, supra*, the court held:

‘the Court has, in a series of decisions, emphasised that time begins to run against a creditor when it has the minimum facts that are necessary to institute action.’

Mr. Gungudoo had knowledge of the minimum facts that were necessary to institute action, namely that SPW transferred funds from the Shaneil account without any instructions from Shaneil, during October 2011. Mr. Gungudoo’s joint estate was however sequestrated by that time. If Mr. Gungudoo’s knowledge cannot be ascribed to the trustees of his insolvent estate, the trustees’ position needs to be considered.

[41] As far as the trustees of his insolvent estate are concerned, the evidence placed before the court by reference to the email correspondence between the trustees and SPW, reflects that the trustees were informed that the Shaneil account reflected a nil balance by 1 December 2011. SPW’s response followed on a query received from Barnard, who wrote in her capacity as trustee of the insolvent estate. Barnard wrote:

¹³ 1989 (3) SA 200 (A) 216D-E.

‘According to our information the insolvent traded under the name of Shaneil Financial Investments. The insolvent advised us that the account had a credit balance and has been frozen upon his sequestration.’

[42] SPW claims that Shaneil could have acquired the knowledge of the facts from which the debt in question is alleged to arise by exercising reasonable care. The plaintiff did not lead any evidence explaining why the trustees did not timeously follow up after being informed on 1 December 2011 that the Shaneil account reflected a nil balance despite being informed by Mr. Gungudoo that the account had a credit balance. They waited until June 2014 before exploring the matter further. I have to agree with SPW’s counsel that Shaneil could have acquired the requisite knowledge soon after 1 December 2011 if reasonable care was exercised. In the result Shaneil is deemed to have had the requisite knowledge that SPW transferred funds from the Shaneil account without being authorised by Shaneil by December 2011.

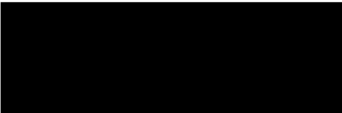
[43] The evidence does not support a finding that SPW wilfully prevented Mr. Gungudoo, or the trustees of Mr. Gungudoo’s insolvent estate, and thus Shaneil, from coming to know of the existence of the debt. The monthly investment reports were sent to Mr. Gungudoo, and his trustees were informed by SPW that the Shaneil account reflected a nil balance as early as December 2011. SPW cannot be blamed for the trustees’ inaction to make further enquiries between December 2011 and June 2014, or the apparent lack of information-flow between the trustees of Mr. Gungudoo’s insolvent estate and their legal representative.

[44] I am of the view that Shaneil’s claim against SPW became prescribed. There is no reason for costs not to follow success.

ORDER

In the result, the following order is made:

1. The plaintiff’s claim has prescribed and is dismissed with costs.



E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date for hand-down is deemed to be 3 January 2022.

Counsel for the plaintiff:	Adv. A.G. South SC
Instructed by:	Vezi and De Beer
For the first respondent:	Adv. E. Fagan SC
Instructed by:	Werkmans
Date of the hearing:	18, 19, 20, 22 October 2021
Date of judgment:	3 January 2022