

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A1/12
Appeal No.: A2/12
Appeal No.: A3/12
Appeal No.: A4/12

In the appeals between:-

<u>DULA O LEBELLETSE FUNERAL PARLOUR CC</u>	1 st Appellant
<u>KEGONAME DORAH LEHARE</u>	2 nd Appellant
<u>LESIAMO JAFTA LEHARE</u>	3 rd Appellant
<u>JAFTA & DORA'S CC</u>	4 th Appellant
<u>LEHARE CAFÉ & RESTURANT CC</u>	5 th Appellant

and

<u>MEDPRAK FINANCIAL SERVICES</u>	Respondent
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<u>CORAM:</u>	VAN DER MERWE, J <i>et</i> MOCUMIE, J
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<u>HEARD ON:</u>	4 JUNE 2012
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<u>JUDGMENT BY:</u>	VAN DER MERWE, J
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<u>DELIVERED ON:</u>	14 JUNE 2012
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[1] There are four appeals from the magistrates' court before us.

The same parties feature in each appeal, though not in the same capacities. For convenience the heading only refers to the parties as they are in appeal no. A1/12. The issues in

the appeals are virtually identical and they were argued simultaneously before us. Hence this judgment deals with all four appeals.

[2] On 13 October 2006 the respondent instituted the four actions that are the subjects of the appeals. For convenience I will refer to each of these actions simply by its appeal number, namely A1, A2, A3 and A4. In A1 the first defendant was Dula O Lebelletse Funeral Parlour CC. In A2 the first defendant was Jafta & Dora's CC. In A3 the first defendant was Lehare Café & Restaurant CC and in A4 the first defendant was Mr. Lesiamo Jafta Lehare. The first defendant in each action is the first appellant in each appeal. For ease of reference the first appellant in each appeal will be referred to as the customer. In each action the second to fifth defendants were Mrs. Kegoname Dorah Lehare and those of the customers that were not cited as the first defendant. Mr. and Mrs. Lehare are married to each other and are the members of each close corporation.

[3] In each case the respondent claimed from the defendants a specific amount for professional services rendered at special

instance and request plus interest *a tempore morae* at the prescribed rate. The parties agreed that evidence would be led in A2 only and that that evidence would be applicable to all four actions.

[4] The respondent presented the evidence of two witnesses namely Mr. W.W. van Schalkwyk and Mr. J.M. Lessing. None of the appellants presented any evidence at the trial.

[5] Mr. Lessing testified that he is the sole shareholder and director of the respondent, which is a company that provides accounting services. He testified as to the genesis and terms of the contractual relationships between respondent and each of the customers. He explained, with reference to invoices and other documents, which services were rendered by the respondent to each customer in terms of general and specific mandates, which fees were charged for those services and how the amount claimed in each action is calculated. He said that the respondent is in business for profit and that invoices are issued soon after the work in respect of the particular service is completed. The invoices are reflected on a statement of account for each customer in

the books of the respondent. It appeared from the evidence that after the customers failed to make further payment to the respondent, these accounts were handed over to the respondent's attorneys for collection. In respect of each customer and account the attorneys drafted an acknowledgement of debt by the particular customer in the amount subsequently claimed in the relevant summons, as well as deeds of suretyship in terms of which each of Mrs. Lehare and the other customers bound themselves to the respondent as sureties and co-principal debtors for the liability of the particular customer. Mr. Van Schalkwyk, who then worked as a debt collector, was requested by the respondent to visit Mr. and Mrs. Lehare to *inter alia* have these documents signed.

- [6] Mr. Van Schalkwyk testified that on 27 June 2006 he visited Mr. and Mrs. Lehare at their home and took time to explain the aforesaid documents to them. He testified that Mr. and Mrs. Lehare signed all these documents after reading them. In the case of each close corporation the acknowledgement of debt and deeds of suretyship were signed on its behalf by both Mr. and Mrs. Lehare. They also gave an undertaking to

Mr. Van Schalkwyk to make monthly down-payments in respect of the accounts.

- [7] In each case the magistrate gave judgment against all five defendants in the case, that is all five appellants in each appeal, for the amount and interest claimed, with costs.
- [8] Three points were argued on behalf of the appellants. These are, first, that the magistrate should have found that all or at least some of the respondent's claims had become prescribed before summons was served, second, that the respondent failed to prove that the fees charged were reasonable and third, that the magistrate in any event erred in granting judgment against the parties to an action other than the particular customer, that is the first defendant.
- [9] The argument in respect of prescription cannot be accepted. The onus in respect of prescription was on the appellants. That onus includes proof of when the running of prescription commenced. The running of prescription commences when the debt is due. A debt is due when it is owing and payable. The appellants presented no evidence in this regard. The

uncontradicted evidence of the respondent is that in terms of its agreement with each customer, the fee in respect of a service becomes owing and payable when the customer is invoiced for that service, but that interest is payable only if payment is not made within 30 days after invoice.

- [10] The invoices relied upon by the respondent in A1, A3 and A4 are all dated well within a period of three years before service of summons. In A2 several invoices in respect of the outstanding balance on the account are dated outside of a period of three years preceding service of summons. The dates of these invoices commence from 1 January 2001. According to the evidence of the respondent, however, the customer in A2 made part payment on the account and therefore in respect of the outstanding invoices on 25 March 2002 and again within a period of three years on 14 January 2005. On 27 June 2006 the customer unequivocally acknowledged liability for the debt claimed in the summons. In the circumstances and in the absence of evidence to the contrary, each payment must be understood as tacit acknowledgement of liability for the balance of the debt, each therefore resulting in interruption of the running of

prescription in terms of section 14(1) of the Prescription Act 68 of 1969. See **CAPE TOWN MUNICIPALITY v ALLIE NO** 1981 (2) SA 1 (C) at 7 and 11H – 12A. Of course the acknowledgement of liability of 27 June 2006, whilst not relied upon by the respondent as cause of action, presents clear evidence of interruption of prescription. In the result, in terms of section 14(2) of the Prescription Act, the running of prescription in respect of the debt in A2 commenced afresh from 27 June 2006. This of course is in any event also applicable to the debts in A1, A3 and A4.

[11] The second argument is without merit. Mr. Lessing, who is clearly an experienced accountant and in respect of whom a summary of expert evidence was filed, testified that all the relevant fees charged were reasonable and market related. This evidence was not challenged in cross-examination and not gainsaid in evidence and was clearly correctly accepted by the magistrate.

[12] The magistrate based the judgment in each case against the appellants other than the particular customer, on the relevant deeds of suretyship. In my judgment the respondent was in

the particular circumstances of these cases not entitled to rely on the deeds of suretyship. The third point therefor is well taken.

- [13] In the summonses no reference was made to suretyship. The further particulars in each action conveyed no more than that all defendants are liable in terms of the contracts for the provision of accounting services. At no stage was an amendment in this regard applied for. The judgment based on the deeds of suretyship can only be upheld if we are satisfied that the matter was fully canvassed at the trial. It is only then that we can be satisfied that there is no prejudice to the particular appellants. In the present cases the matter cannot be said to have been fully canvassed unless the appellants appreciated at the time that the respondent relies or would rely on the deeds of suretyship as causes of action. Mr. Van Schalkwyk, who testified first, simply introduced the deeds of suretyship into evidence and did not purport to speak on behalf of the respondent in this regard. According to the record it was at no stage made clear to the appellants that reliance is placed on the deeds of suretyship as causes of action. On the contrary, Mr. Lessing not only made no

reference to the deeds of suretyship at all, but could reasonably have been understood as disavowing a claim against any person other than the particular customer, by saying that the services rendered to that customer and account of that customer had nothing to do with any of the other appellants. This may explain why it was put to Mr. Van Schalkwyk on behalf of the appellants that Mr. and Mrs. Lehare signed the documentation without reading them and after having been misled in respect of the contents thereof, but not to Mr. Lessing and why this was not repeated in evidence.

[14] Despite the fact that the appellants did not object to the introduction into evidence of the deeds of suretyship by Mr. Van Schalkwyk, I believe that the appellants could reasonably have held the view that the respondent could or would not rely on the deeds of suretyship as causes of action and conducted their cases accordingly. I am therefore not convinced that the matter was fully canvassed.

[15] It follows that the appeal of the first appellant in each appeal must be dismissed with costs. The appeals of the second to

fifth appellants in each appeal must be upheld. There is no reason to deprive these appellants of their costs of the trial as well as the appeal, if they in fact did incur costs separately or otherwise than in the capacity of first defendant and first appellant. This is however to be determined by the taxing master.

[16] The following orders are issued:

1. The appeal of the first appellant in each appeal is dismissed with costs.
2. The appeals of the second to fifth appellants in each appeal succeed with costs and the judgments granted against them are set aside and replaced with orders that the claims against them are dismissed with costs.

C.H.G. VAN DER MERWE, J

I concur.

B.C. MOCUMIE, J

On behalf of appellants: Mr. N.W. Phalatsi
Instructed by:
N.W. Phalatsi & Partners
BLOEMFONTEIN

On behalf of respondent: Adv. P.J.J. Zietsman
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