IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

Case No: 06/21491

In the matter between:

FREISLICH VAN DER WESTHUIZEN Plaintiff

and

HOLLARD LIFE ASSURANCE COMPANY LIMITED Defendant

MEYER, J

[1] The plaintiff instituted action against the defendant for payment of a dread disease benefit under a life assurance policy. The defendant raised a special plea of prescription. The parties, by agreement, made application for the separate adjudication of the special plea, and such separation was ordered in terms of Uniform Rule 33(4) at the commencement of the proceedings. The sole issue concerns the time at which prescription commenced to run in respect of the plaintiff's claim for payment of the dread disease benefit under the policy.

[2] For the purpose of the adjudication of the special plea, the facts averred in the plaintiff's particulars of claim and replication, as amplified by his trial particulars, were taken to be admitted.

[3] The parties entered into the written agreement of insurance on 15 November 2001. The policy provides for the payment of death, disability and dread disease benefits. The relevant provisions of the policy relating to dread disease benefits are the following:

(a) Payment of claims

> 'In order to claim on the policy, Hollard Life must receive a signed and completed claim form, together with any additional information that Hollard Life may require in order to assess the claim. Production and surrender to Hollard Life of this policy document is also required.
> Hollard Life must be satisfied that the claim is valid, that the person making the claim is entitled to receive the amount payable and that the date of birth stated in the proposal is correct. Hollard Life shall also be entitled to access all medical and hospital records of the insured person.'

(b) Benefit

> 'The benefit as specified in the schedule plus any benefit increase occasioned by the premium escalation, shall be payable if the life insured suffers one of the conditions described hereunder.
> The claim must be proved to Hollard Life's satisfaction within 3 months of the injury or onset of the illness or disease.'

(c) Definition and Conditions of Contingent Events

> 'The benefit shall be payable on the confirmed diagnosis to the satisfaction of Hollard Life of:
> …
> Coma
> 'State of unconsciousness with no reaction to external stimuli or internal needs, persisting continuously with the use of a life support system for a period of at least 96 hours which, in the opinion of Hollard Life results in a neurological deficit of a permanent nature.'

[4] The following averments are *inter alia* made in the plaintiff's particulars of claim:

‘5. On 25 April 2003 the Plaintiff was involved in a motor vehicle accident in which he sustained *inter alia* a traumatic brain injury, which resulted in the Plaintiff being hospitalized where he was in a coma for longer than 96 hours and developed neurological deficits of a permanent nature (hereinafter referred to as the “Occurrence”).

6. The plaintiff has duly notified the Defendant of the Occurrence and has, in all other respects, complied with his obligations under the contract.

7. In the premises the Defendant is indebted to the Plaintiff in the amount of R300,000.00, which amount or any part thereof, the Defendant has, notwithstanding demand, failed and or refused to pay.’

[5] It is common cause that the ‘occurrence’ or ‘condition’ occurred on 25 April 2003 or no later than 25 September 2003. The plaintiff’s trial particulars state that Dr Fingleson completed and signed a dread disease benefit claim on 19 September 2003, and the plaintiff signed a dread disease benefit claim form on 25 September 2003. Such claim form was submitted in respect of a dread disease benefit arising from a ‘coma’ as defined in the agreement of insurance, and, in terms of the claim form the onset of the illness or injury which led to the plaintiff’s claim was identified as 25 April 2003. The defendant conditionally repudiated the plaintiff’s claim on 13 October 2003, and finally on 18 November 2003. The plaintiff’s summons and particulars of claim were served on the defendant on 29 September 2006.

[6] In its special plea of prescription the defendant avers that the plaintiff’s claim has become prescribed in terms of s 11 of the Prescription Act 68 of 1969 since the plaintiff’s claim arose when the condition occurred on 25 April 2003 or no later than 25 September 2003, which was more than three years before the plaintiff’s summons was served on the defendant on 29 September 2006. In his replication the plaintiff avers that his claim as set out in his particulars of claim only arose on 18 November 2008, which is the date on

which the defendant finally repudiated the plaintiff's claim, and such date is less than three years before his summons was served.

[7] The plaintiff's claim under the policy is, in terms of s 11(d) of the Act subject to a three year extinctive prescription period. S 12(1) provides that 'prescription shall commence to run as soon as the debt is due'. This means that the debt must be immediately claimable by the creditor in legal proceedings and be one in respect of which the debtor is under an obligation to perform immediately [see: Benson v Walters 1984 (1) SA 73 (A) at p 82; Uitenhage Municipality v Molloy 1998 (2) SA 735 (SCA)]. In Truter and Another v Deysel 2006 (4) SA 168 (SCA), para 16, Van Heerden JA said this:

> 'For the purposes of the Act, the term 'debt due' means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when every thing has happened which would entitle the creditor to institute action and to pursue his or her claim.'

[8] The claim must be proved to the defendant's satisfaction within three months of the injury or onset of the illness or disease. The defendant must *inter alia* receive a signed and completed claim form and the additional information that might be required in order for it to assess the claim. These terms relate to what must be done if a claim is to be enforced. The plaintiff cannot, however, postpone the running of prescription by his own inaction. A creditor cannot 'rely on his own failure to perform in order to delay the running of prescription.' [Phasha v Southern Metropolitan Local Council of the Greater Johannesburg Metropolitan Council 2000 (2) SA 455 (W) at p 469E-F and at p 472G-H].

'Our Courts have consistently held that a creditor is not able by his own conduct to postpone the commencement of prescription.' [per Van den Heever J in Benson and Another v Walters and Others 1981 (4) SA 42 (C) at p 49G]. In The Master v I L Back & Co Ltd and Others 1983 (1) SA 986 (A), Galgut AJA said this at p 1005G:

> 'If all that is required to be done to render the debt payable is a unilateral act by the creditor, the creditor cannot avoid the incidence of prescription by studiously refraining from performing the act.'

[9] The requirement to submit a completed claim form has, in my view, accordingly no effect upon the commencement of the running of prescription. [Compare: Kotzé v Ongeskiktheidsfonds, Universiteit Stellenbosch 1996 (3) SA 252 (K)].

[10] In terms of the policy, the dread disease benefit 'shall be payable if the life assured suffers one of the conditions described' in it. 'Coma' is one such condition. The debt accordingly became due within the meaning of s 12(1) of the Act once the state of the defendant's unconsciousness persisted for a period of at least 96 hours in accordance with the requirements of the policy and resulted in a neurological deficit of a permanent nature. This, the parties are *ad idem*, occurred by no later than 25 September 2003.

[11] S 12(3) of the Act provides that '[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.' It is for the party raising prescription to allege and prove these dates on which the creditor acquired such knowledge [see: Gericke v

Sack 1978 (1) SA 821 (A); Drennan Maud & Partners v Town Board of the Township of Pennington 1998 (3) SA 200 (SCA)]. Adv R Strydom, who appeared for the plaintiff, submitted that the defendant has failed to allege these dates in its special plea of prescription. It is correct that such averments were not expressly made, but the issues have, however, been traversed in the request for trial particulars and in the trial particulars that were furnished.

[12] It is apparent from the pleadings and the trial particulars that the defendant had actual or deemed knowledge 'of the material facts from which the debt arises for the prescriptive period to begin running' [Truter and Another v Deysel 2006 (4) SA 168 (SCA), at p 175B-C] by 'no later than 25 September 2003', which is the date on which he signed the dread disease benefit claim form that was submitted in respect of his claim for the dread disease benefit arising from his 'coma' as defined in the policy.

[13] In the result the defendant's special plea of prescription is upheld and the plaintiff's action against the defendant is dismissed with costs.

P.A. MEYER
JUDGE OF THE HIGH COURT

10 December 2008