REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No.: **A188/05**

In this matter between:

AFRICAN PRODUCTS (PROPRIETARY) LTD Appellant

And

ANNA FRANCINA VENTER N.O. First Respondent
(in her capacity as the liquidator of
JOHN THOMPSON AFRICA (PTY) LTD)

LLOYDS REGISTER ("LLOYDS") Second Respondent

MUTUAL & FEDERAL INSURANCE COMPANY LTD Third Respondent

Coram: Traverso, DJP et Louw, J et Yekiso J

Delivered: 2 August 2006

Summary:
Prescription – Extinctive Prescription – when prescription commences to run
Section 12 of the Prescription Act – prescription commences to run from when the creditor has knowledge or is deemed to have knowledge of "facts from which the debt arises"
Undertaking by debtor to investigate proximate cause of the root problem –

whether such undertaking has an effect of delaying onset of prescription - *in casu,* held that prescription does not commence to run whilst such investigation is in progress

JUDGMENT DELIVERED ON 2 AUGUST 2006

YEKISO, J

[1] African Products (Proprietary) Limited (African Products), as plaintiff, instituted an action out of this Court against John Thompson Africa (Pty) Limited (John Thompson Africa), as the defendant, for recovery of damages allegedly suffered on the ground of alleged breach of contractual obligation by John Thompson Africa. The contractual obligation arise from an oral agreement concluded between African Product and John Thompson Africa at Germiston, in the province of Gauteng, on 24 January 1996. Whilst the action was still pending, John Thompson Africa was wound up. Because of the winding up order issued against John Thompson Africa, Mutual and Federal Insurance Company Limited (Mutual & Federal) was joined as a co-defendant in terms of the provisions of section 156 of the Insolvency Act, 24 of 1936. At all material times prior to the granting of the final order of liquidation against John Thompson Africa, Mutual and Federal was its insurer and was on risk when the incident constituting the cause of action occurred.

[2] Lloyd's Register, described in the pleadings as an association or firm within the meaning of Rule 14 of the Uniform Rules, was appointed as an independent inspection authority in terms of the agreement concluded between African Products and John Thompson Africa. By virtue of this appointment, Lloyd's Register assumed certain responsibilities defined in the agreement concluded between African Products and John Thompson Africa. Lloyd's Register, was cited as the co-defendant in the proceedings in that capacity. John Thompson Africa, Lloyd's Register and Mutual & Federal were cited as first, second and third defendant, respectively, in the court *a quo* and, accordingly, are now cited as first, second and third respondent in this appeal. I shall hereafter refer to African Products as the appellant and John Thompson Africa as the first respondent as and when a need arise to specifically refer to these parties. Whenever a reference is made to an agreement between the appellant and the first respondent, unless the context clearly indicates otherwise, such reference shall be to the oral agreement concluded between the appellant and the first respondent at Germiston, in the Province of Gauteng, on 24 January 1996.

[3] In terms of the agreement concluded between the appellant and the first respondent, the first respondent undertook to manufacture and supply a new

tube bundle to be supplied to the appellant for use in the gluten drier at the appellant's Germiston mill. The appellant's claim against the first respondent is based on an allegation in its particulars of claim that the first respondent, contrary to its contractual obligation to manufacture a new tube bundle using proper materials and proper workmanship, the first respondent supplied the appellant with a defective tube bundle. The summons commencing action was served on the first respondent on 18 September 2001, whilst service on the second respondent was effected on 21 September 2001. No service was effected on the third respondent as the third respondent was joined in the action after the final liquidation order was issued against the first respondent.

[4] After service of summons, the first, second and the third respondent raised a special plea of prescription. The special plea is premised on a contention that at the time the summons was served on each of those respondents on whom summons was served, a period of three years had already elapsed since the appellant's claim became due.

[5] In a pre-trial conference held in terms of Rule 37(1) the parties agreed that the appellant bears the onus to prove the merits of its claim whilst the respondents accepted that they bear the onus of proof and the duty to begin in

respect of the plea of prescription. The trial in the court *a quo* thus proceeded on the basis that the respondents bear the onus of proof and the duty to begin. Based on this approach, all that we are required to determine in this appeal is whether, on basis of the facts established at trial, the court *a quo* was correct in its finding that the respondents discharged the onus resting on them to prove that the appellant:

[5.1] knew the facts from which the debt arises, by not later than 21 September 1998, being three years before the summons was served;

[5.2] if the appellant did not know the facts from which the debt arose on or before the aforementioned date, whether the appellant should be deemed to have had such knowledge because it could have acquired it by exercise of reasonable care.

[6] In an ensuing trial which commenced on 15 March 2004 before Parker AJ, the court made an order, by consent between the parties, to separate the adjudication of the question of prescription raised in the respondents' pleas. Arising from this order, only the question of prescription had to be adjudicated at trial. At the conclusion of the trial the appellant's claim was dismissed with costs, the learned judge having found that the respondents succeeded to

discharge the onus resting on them that as at the time of the service of the summons on the respondents, the appellant's claim had become prescribed. The appeal against the order dismissing the appellant's claim is with the leave of the court *a quo.*

<u>WIDER ISSUES TO BE DETERMINED</u>

[7] The primary task of the trial court, and indeed of this Court, was to determine if the respondents had acquitted themselves of the onus resting on them that, as at the time of service of summons on them, the appellant's claim had already become prescribed. The trial court determined that the respondents had discharged the onus resting on them, hence the dismissal of the appellant's claim. The issue for determination by this court is, therefore, to determine if the trial court was correct in that finding. To do so, of necessity, will require the consideration and evaluation of evidence tendered at trial with a view to determining if, based on the facts established at trial, the trial court was correct in its finding.

[8] In terms of section 11(d) of the Prescription Act, 68 of 1969, the appellant's claim is subject to a three-year extinctive prescription period. In an

endeavour to avoid the appellant's claim, the respondents rely on the provisions of section 12 of the Prescription Ac which provide as follows:

> "(1) Subject to the provisions of subsection (2) and (3), prescription shall commence as soon as the 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 <u>the facts from which the debt arises</u>; Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care." (Emphasis added)

[9] In the instance of this matter, there is no suggestion that the respondents either prevented the appellant from coming to know of the existence of the debt as contemplated in section 12(2) of the Prescription Act or that the appellant had no knowledge of the identity of the debtor as contemplated in section 12(3) of the Prescription Act. The appellant had had a long business relationship with the first respondent so that there is no question of the identity of the debtor not having been known to the appellant at the time the debt which was the subject of the dispute at trial became due. The crisp issue, therefore, which was the subject of determination at trial, was whether the appellant had knowledge of the

facts from which the debt arises on 16 August 1998 or, if not, whether the appellant should have acquired such knowledge by exercise of reasonable care before 21 September 1998.

[10] The dispute between the parties arises out of an incident which occurred in the early hours of 16 August 1998 when a crack emitting steam in the pressure vessel of the appellant's new germ drier appeared. The crack was located at the idling shaft-to-dished end butt joint. This occurred after a period of somewhat six months after the tube bundle was installed and commissioned. It later transpired on basis of evidence that the root cause of the failure of the tube bundle was a substantial misalignment at the joint between the dished end and the shaft and that this was due to positive mal-performance on the part of the first respondent. After the crack was discovered, it became apparent to all those present on site that the root cause of the crack would require detailed investigation. Based on correspondence on behalf of the appellant addressed to the first respondent, it is clear that the appellant expected the first respondent to do the required investigation and thereafter furnish the appellant with the report. Evidence led on behalf of the respondents was intended to show that if the appellant did not know the root cause of the crack on the day the incident occurred, namely, 16 August 1998, the appellant, by exercise of reasonable

care, ought to have known the root cause of the crack shortly thereafter and, in any event, by not later than 21 September 1998.

<u>FACTS ESTABLISHED ON EVIDENCE TENDERED AT TRIAL</u>

[11] Based on evidence led at trial, there appears to be some facts which are common cause or, alternatively, facts which were not seriously challenged by either of the parties involved in the proceedings. In the paragraphs which follow I shall set out those facts which appear to be common cause or, alternatively, such facts as appear not to have been seriously challenged by each one of the parties.

[12] The first such common cause fact or fact not seriously challenged is the discovery of a crack emitting steam in the tube bundle at the appellant's Germiston mills on 16 August 1998. The crack had occurred at the idling shaft-to-dished end butt joint. The crack occurred after a period of somewhat six months since the tube bundle was commissioned. Allistair James Morrison (Morrison), the operational support manager at the appellant's Germiston mills at the time, was alerted of this fact by those on site soon after the crack had occurred. Morrison, in turn, once informed of this fact, immediately contacted

one Jonathan D'Aquilar Kirkman (Kirkman). Kirkman, at the time, was an insurance adjustor in the employ of Crawford-TAG (South Africa) (Pty) Ltd. Kirkman, by way of academic qualification, is the holder of a master's degree in Metallurgy from the University of the Witwatersrand. He is a qualified engineer and generally used to be called upon to investigate claims relating to engineering related machinery breakdown. Kirkman was well-known to Morrison and the two of them attended at the site together. Roy Ernest May (May), a regional contract manager in the employ of first respondent, was also informed of the fact. Peter Keller (Keller), a representative of Indserve cc (Indserve), was also present at the site. Richter Roets (Roets), one of the appellant's engineers, was also present on site. Indserve was proposed by the first respondent as the government approved inspection authority in terms of the agreement of 24 January 1996 concluded between the appellant and the first respondent. Indserve, as the government approved inspection authority, ultimately had to oversee the repair work to the crack. Evidence seems to suggest that it was a representative of the first respondent who suggested that a representative of Indserve be called in.

[13] Whilst the location of the crack was discovered at the site on 16 August 1998, none of the parties present knew what the root cause of the crack was.

Kirkman inspected the damage in the presence of Morrison, Roets, the appellant's engineer and Keller of Indserve. The inspection revealed damage in the form of a long crack, almost a metre in length, running along the edge of the weld connecting the dished end of the tube bundle to the idling shaft. Kirkman expressed the view, amongst those present, that it was a typical fatigue crack. A decision was made that temporary repairs be effected. It was anticipated that the tube would be re-commissioned no later than Monday, 17 August 1998. The first respondent had arranged for the inspection and the re-welding of the crack. In the event, the crack was duly repaired and the appellants were able to re-commence production at 16h00 on Tuesday, 18 August 1998. Up until the stage of the temporary repair to the tube bundle, the first respondent had made no undertaking to investigate the root cause of the crack.

[14] In the meantime, and on Monday, 17 August 1998, Kirkman, the insurance adjustor, composed a letter addressed to TM Insurance Brokers relating to the incident. The letter, in part, reads as follows:

> "Temporary repairs are in progress and the insured hope to recommission the machine by the afternoon of Monday, 17 August. However, a detailed investigation will be required to establish the cause of the cracking and develop a suitable repair

procedure. At this stage, the insured intend to treat the matter as a guarantee claim and will hold John Thomson Africa liable for both the temporary and permanent repairs."

[15] Once the temporary repairs had been effected, a J W Sanetra (Sanetra), the operations manager at the appellant's Germiston mill, composed the following letter, dated 19 August 1998 addressed to the first respondent:

> "We wish to record our appreciation for the speed of response from your Company when the failure of the Germ Drier was notified to you. We are also grateful to you for arranging so promptly and the re-welding of the crack. We managed to recommence production at 16h00 Tuesday, 18 August.
>
> Notwithstanding this appreciation of your endeavours, we have to register the greatest of concerns with you, that after only 8 months of service the Drier has incurred this failure. <u>No doubt a full assessment of the probable cause of the crack will come to be made, and we request that you make the findings available to us.</u> The immediate reaction on the part of African Products is that a failure of this nature can only be attributed to some cause on the part of JTA, for which we have to hold responsible. (sic)
>
> Kindly be in touch so that a permanent solution to the failure may be discussed, and the likely period of time that the temporary repair may be expected to endure. In the

meantime we hold JTA responsible for the damage and loss incurred to date, just as we hold your Company responsible for the permanent repair.

While this note is, of necessity, somewhat formal in nature, it does not detract from the writer's sincere appreciation of your endeavours to assist us." (once again emphasis added)

[16] The letter in the preceding paragraph was addressed to the first respondent within the context and the background of the first respondent having been notified of the steam emitting crack which occurred in the tube bundle; of the first respondent having arranged for the inspection authority to be called in and of the first respondent having arranged for the prompt repair of the crack.

[17] On 27 August 1998 Roy May (May) of the first respondent requested a copy of a report on the repairs effected on the tube bundle from Indserve. May, under cross-examination, conceded that the first respondent may have requested a report from Indserve because, as the manufacturer and the supplier of the tube bundle, the first respondent may have been concerned about the root cause of the crack in the tube bundle. May further confirmed, under cross examination, that at that stage, neither the appellant nor the first respondent knew what the root cause of the crack was.

[18] The next event of significance was the meeting of 17 September 1998 at the appellant's Germiston mill. That meeting was attended by Morrison of the appellant's firm and May, a Mr Page and Mr Clifford, all of the first respondent. At that meeting the representatives of the first respondent, obviously acting on behalf of the first respondent, agreed to undertake the investigations into the root cause of the mechanical defect in the tube bundle. Actions agreed upon at this meeting involved the following:

- African Products (the appellant) would prepare a report giving a detailed sequence of events surrounding the repairs.
- African Products (the appellant) would provide a set of log readings for the period leading up to the failure.
- African Products (the appellant) would provide X-rays taken of the repairs for review by the first respondent.
- The first respondent would provide a report on the findings of their investigations which would include the cause of the failure of the tube together with the recommendations.

[19] Before the first respondent could determine the root cause of the crack

and before it could furnish the appellant with the report and recommendations arising from such a report as it had undertaken to do at the meeting of 17 September 1998, the second crack in the tube bundle manifested on 26 October 1998. On this occasion Indserve, in its capacity as the inspection authority, was immediately called in by the appellant. On the recommendation of Indserve, a Dr Grobler (Grobler) who it appears is an expert in the field of mechanical failure analysis, was commissioned to investigate the root cause of the further tube bundle failure. On a visual examination, Grobler believed that the second crack had manifested at a stress concentration point, and that there was a significant surface misalignment at the idling shaft-to-dished end butt joint. Approximately a week after being commissioned, Grobler orally reported to the appellant that the likely cause of both cracks was a substantial misalignment at the joint between the dished end and the shaft, and that indications are that the first respondent is responsible for it. This finding was repeated in his written report of 14 November 1998 and later in his final report of July 1999.

[20] The facts set out and summarised in the preceding paragraphs constitute the salient features of the evidence tendered at trial and on basis of which the trial court found that the respondents had discharged the onus resting on them

that the appellant's claim had become prescribed and, on that basis, dismissing the appellant's claim. It is also on the basis of this body of evidence that we have to determine if the trial court was correct in its finding that the respondents had succeeded to discharge the onus resting on them that the appellant:

[20.1] knew the facts from which the debt arises, by not later than 21 September 1998, and if not;

[20.2] whether the appellant should be deemed to have had knowledge of such facts before the aforementioned date because it could have acquired it by exercise of reasonable care.

[21] It appears to be accepted between the parties, and indeed this is what the trial court appears to have found, that as at 16 August 1998, none of the parties present on site had knowledge of the root cause of the mechanical failure of the tube bundle. It also appears to be accepted between the parties that it was not until Grobler had informed the representatives of the appellant, almost a week after the second crack had manifested, of the root cause of the bundle failure. The task facing this court, in the first instance, is to determine if the appellant, in the light of the admitted fact that it first had knowledge of the root cause of the

bundle failure after it had been informed of that fact by Grobler, almost a week after the second crack had manifested, could have acquired that knowledge, by exercise of reasonable care by not later than 21 September 1998. If we do find that the appellant could have acquired that knowledge before the aforementioned date, the next question which we are called upon to determine is whether the trial court was correct in its finding that the appellant's claim, as at the time of the service of summons, had since become prescribed and, consequently, whether it was correct in upholding the special plea of prescription. A finding that a claim has become prescribed should, in the nature of things, be preceded by a finding of when the debt becomes due.

WHEN DOES THE DEBT BECOME DUE

[22] As has already been stated in paragraph [7] of this judgment, section 12(1) of the Prescription Act provides that prescription shall commence to run as soon as the debt is due. The Prescription Act does not define the concept of "when a debt becomes due". In the absence of the definition of this term, the courts have held in a number of decisions that the term must be given a wide and general meaning. In *The Master v I L Back & Co Ltd* 1983(1) SA 986(A) 1004 F-G it was held that the term "debt is due" in section 12(1) of the

Prescription Act means that there must be a liquidated money obligation presently claimable by the creditor for which an action can be brought against the debtor. The debt must be one in respect of which the debtor is under obligation to pay immediately.

[23] In *Evins v Shield Insurance Co Ltd* 1980(2) SA 814 (A) 838 D-H it was held that a debt is due 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 everything has happened which would entitle the creditor to institute an action, and to pursue his or her claim. (See also *De Loitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991(1) SA 525(A) 532H)

[24] The general consensus arising from a survey of these decisions appears to be that in its broad sense, the concept of a debt in relation to the Prescription Act, refers to an obligation to do something, whether by payment or be delivery of goods and services or not to do something ultimately concluding that the concept of a debt has a proprietary character. (See *The Law of South Africa:*

Ed Joubert first re-issue Vol 21, p55 par 142 and the authorities cited therein). To the requirement that the debt must be one in respect of which the debtor is under an obligation to pay immediately, I might add, in respect of which the debtor has no *bona fide* or valid defence. It has further been held that the debt is only due when the creditor's cause of action is complete.

[25] When can it, therefore, be said, in the instance of this matter, the debt became due in the light of authorities cited in the preceding paragraphs. The costs consequent upon the temporary repairs effected in the tube bundle obviously became known to the appellant soon after the temporary repair were effected. The temporary repairs bear no relationship to the root cause of the problem as it is an admitted fact that these were not known until a report by Grobler. There can be no suggestion that, as at the time the temporary repairs were effected, the appellant had acquired a complete cause of action in the sense of the entire set of facts which the appellant had to prove in order to succeed in its claim. The statement made by Sanetra in the letter addressed to the first respondent dated 19 August 1998 to the effect that the appellant is holding the first respondent liable for the damage and loss incurred, is not based on the factual ingredients of the cause of action but is more a legal conclusion that could be drawn from the facts as and when these become known. The

facts constituting the cause of action were definitely not known at the time the letter was written. The statement in the letter composed by Sanetra and addressed to the first respondent to the effect that the appellant was holding the first respondent responsible for the failure of the tube cannot be construed as indicating knowledge of the root cause of tube bundle failure on the part of the appellant as at the time the said letter was composed and written. (See in this regard *Truter and Another v Deysel* 2006(4) SA 168 (SCA) para 17).

<u>THE FACTS FROM WHICH THE DEBT ARISES</u>

[26] Corollary to the concept of "due debt" is the concept "the facts from which the debt arises". What this in effect means is knowledge on the part of the creditor of the material facts constituting its cause of action. Thus, where a creditor's claim for damages is based on the debtor's defective workmanship, all that is required is knowledge, not only of the defect and the resultant damage, but also the root cause of the defect and the resultant damage. On 16 August 1998 all that the appellant knew was that there had been a failure of the tube bundle. What was not established on 16 August 1998 was the root cause of the crack. There was consensus on all those present on site that the actual cause of the crack warranted further investigation. As we have seen on the

basis of evidence, the envisaged investigation was ultimately carried out by Grobler. It was not until Grobler had carried out his investigation, about a week after the second crack had manifested, that the appellant came to know of the root cause of the crack.

[27] It therefore follows that the appellant had knowledge for the first time of the facts from which the debt arose after the second crack had manifested on 26 October 1998. Whether the appellant could have acquired this knowledge by exercise of reasonable care before then, and, in particular, before 21 September 1998, is the issue next to be determined.

EXERCISE OF REASONABLE CARE

[28] In *Drennan Maud & Partners v Pennington Town Board* 1998(3) SA 200 (SCA) 209 F-G, the requirement in section 12(3) of the Prescription Act that the creditor exercises reasonable care was held to require diligence not only in the ascertainment of the facts underlying the debt, but also in relation to the evaluation of those facts. This means that the creditor is deemed to have the requisite knowledge if a reasonable person in his position, would have deduced the identity of the debtor and the facts from which the debt arises.

[29] It was the appellant's case in the court *a quo*, and still is the appellant's case in this appeal, that it had no knowledge of the facts from which the debt arises until informed of such fact by Grobler almost a week after the second crack had occurred. The respondents contend that the appellant acted unreasonably and that had the appellant acted reasonably it could have acquired knowledge of the requisite facts long before Grobler was commissioned to conduct the investigations, and in any event, by not later than 21 September 1998. The respondents contend that it was unreasonable of the appellant not to carry out its own investigation soon after the first crack had occurred and that had the appellant done so, it probably would have acquired knowledge of the requisite facts from which the debt arose by not later than 21 September 1998. The question which needs to be answered therefore is whether the appellant acted unreasonably by not conducting its own investigation, leaving it rather to the first respondent to investigate the root cause of the tube bundle failure.

[30] What the proviso in section 12(3) of the Prescription Act requires the creditor to do is no more than what could reasonably be expected in the circumstances of a reasonable person. The first point that needs to be considered is the decision to have the crack repaired. None of the witnesses

who testified for the first respondent at trial could say, unequivocally, that the appellant acted unreasonably in having the tube bundle repaired. May, under cross-examination, was constrained to concede that the appellant's decision in this regard was based on the bottom line and even went so far as to say that he would have expected the appellant to repair the bundle and that he would have expected the appellant, as a reasonable organization, to have had the problem fixed.

[31] Professor Robert Bennet Tait (Tait), a professor in the Mechanical Engineering Department at the University of Cape Town and a professional engineering consultant in the field of Fracture Mechanics and Failure Analysis, also testified in the first respondent's case. His evidence was intended to show that had the appellant carried out its own investigation soon after the first crack had occurred, the appellant would have discovered the root cause of the bundle failure, and thus the facts from which the debt arises, within a period of two weeks afterwards, and, in any event by not later than 30 August 1998. However, under cross-examination Tait conceded that the investigation coupled with the production of the required report would depend on the circumstances which come to bear in the course of such investigation, as for an example, the availability of the investigator, the availability of the necessary information and

other matters in regard whereto there is never certainty and there is seldom dependability. He too, could not fault the appellant's decision to have the tube bundle repaired and went so far as to say there would have been a need to have the system repaired as soon as possible and get it back into service. It was the first respondent who secured the attendance of Indserve on site. This obviously was with a view that whatever repairs that would have needed to be done, these would have had to be done as soon as possible to minimise any claim for loss of production in respect of which the first respondent would be exposed to liability.

[32] As to the decision to have the tube bundle repaired, there does not seem to be any basis to fault the appellant's conduct, particularly in the light of the first respondent's exposure to liability arising from potential loss of production.

[33] The next point to consider is whether it was reasonable of the appellant not to carry out its own investigation and its ultimate reliance on the first respondent to undertake the required investigation. The point that needs to be taken into account in as far as this aspect of the matter is concerned is the relationship which existed at the time between the appellant and the first respondent, it being one of manufacturer/supplier and that of consumer/user.

The evidence on record has established that the tube bundle was installed on the appellant's Germiston mills during February 1998. As at the time of the mechanical failure the bundle had been in service for a period of slightly longer than six months. It has further been established on basis of evidence that after the first crack had occurred, it was clear to all those present that a detailed investigation would be required to establish the cause of the crack and possibly develop a repair procedure thereafter. When the appellant indicated to the first respondent that "(n)o doubt a full assessment of the probable cause of the crack will come to be made" coupled with a request that the findings be made available to the appellant, the first respondent did not complain and raise an objection that the expectation and the request made was unreasonable. As a matter of fact, the first respondent went so far as to request for a copy of a report relating to the temporary repairs from Indserve. It was conceded on behalf of the first respondent that the report may have been requested because the first respondent was concerned about the root cause of the crack in the tube bundle.

[34] At a meeting between the parties on 17 September 1998 the first respondent had no problem in undertaking to conduct the investigation and report to the appellant. The first respondent went so far as to request the

appellant to furnish it with such information as would facilitate proper investigation. The first respondent was more than adequately represented at this meeting, having been represented by May, Page and Clifford. That the first respondent took a conscious decision to undertake the investigation was not unreasonable if due regard is had to the business integrity the first respondent had to protect, the expertise the first respondent professed to have had, and the long business relationship which existed between the parties. There is no basis to suggest that the appellant should not have believed the *bona fides* of the first respondent's undertaking to investigate the root cause, more so, that the first respondent was both the manufacturer and the supplier.

[35] I am unable to find, on the basis of the observations I made in paragraphs [33] and [34] of this judgment that the appellant conducted itself unreasonably in allowing the first respondent to undertake the required investigations. There is therefore no justification, in my view, in the circumstances of this matter, for a finding attributing knowledge of the root cause of the bundle failure to the appellant during the period preceding 21 September 1998.

<u>THE RESPONDENTS' SUBMISSIONS</u>

[36] In an attempt to show that the appellant was unreasonable in the approach it took to determine the cause of failure of the tube bundle, the Respondents seek to suggest that had the appellant been diligent in its approach to determine the cause of failure, the appellant would have been in a position, prior to 18 September 1998, to have known precisely what the cause of the failure was. The respondents base their submission on the fact that the appellant, in the first instance, had access to its own team of engineers, its own engineering department and to independent engineering consultants. Because of the availability of these resources, so the respondents contend in their submissions, and with due diligence, the appellant would have been able to determine the cause of failure shortly after the first crack had occurred, and, in any event, prior to 18 September 1998. This submission fails to take into account that the appellant's engineering team was not trained and experienced in the expert field of failure analysis; it fails to take into account that the first respondent accepted, if not by implication, at least prior to 17 September 1998, that it had a duty to investigate the cause of failure and, ultimately, the first respondent's undertaking to investigate the cause of failure and to furnish the appellant with the report and recommendations arising out of such a report.

[37] The respondents also seek to suggest in their submissions that it was

unreasonable of the appellant to rely on the first respondent to investigate the cause of failure. The respondents argue that this approach has, as a consequence, the delay in the onset of prescription and that a creditor cannot escape the consequences of prescription by foisting an onus of investigation onto its debtor. I have already dealt with this argument elsewhere in this judgment but would reiterate that the expectation on the appellant for the first respondent to carry out the required investigation should be seen within the context of the business relationship the parties had at the time, the length of time the tube bundle was installed and commissioned and the integrity the first respondent professed to have had as the manufacturer and the supplier of the equipment.

[38] I have, in the nature of things, taken note of the rest of the submissions made on behalf of the respondents but I am not, in the light of evidence tendered at trial, persuaded that the appellant was in any way unreasonable in conducting itself after the first crack had manifested on 16 August 1998.

[39] Taking all the factors listed in the preceding paragraphs into account, I am unable to find that the appellant conducted itself unreasonably after the first crack had occurred. To suggest otherwise would be no less than adopting the

position of an armchair critic who is only wise after the event. Having said that, I am not persuaded that the appellant was unreasonable in conducting itself after the first crack had manifested and, in particular, in relying on the first respondent's undertaking to investigate the root cause of the crack in its capacity as the manufacturer and the supplier of the defective tube bundle. In particular, I am not persuaded that the respondents succeeded in their endeavour to show, in the circumstances of this matter, that the circumstances are such that the appellant be deemed to have had knowledge of the root cause of the crack prior to 18 September 1998.

[40] It therefore follows, in my view, that the trial court was incorrect in its finding that the respondents succeeded to discharge the onus resting on them that at the time of service of summons on the respondent, the appellant's claim had become prescribed.

[41] In the result I would propose the following order:

[41.1] The appeal succeeds with costs.

[41.2] The order of the trial court is set aside and is substituted with the following order:

"The respondents' special pleas of prescription are dismissed with costs."

……………………..
NJ Yekiso, J

I agree.

……………………...
WJ Louw, J

I agree and it is so ordered.

………………………
JHM Traverso, DJP