

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: **84792/2014**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
31 July 2024

In the matter between:

WYNAND MARÉ BOTHA

Plaintiff

and

J[...] D[...] M[...]

Defendant

***Delivered:** This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines.*

JUDGMENT

JANSE VAN NIEUWENHUIZEN, J

Introduction

[1] The plaintiff's claim is based on an alleged breach of mandate, in that the defendant granted, on behalf of the plaintiff, consent for an amount of R 750 000 to be paid to a third party without ensuring that the plaintiff had the required security.

[2] In the result, the plaintiff could not retrieve the money and suffered damages in the amount of R 750 000. The claim is for payment of the R 750 000 with interest and costs.

Pleadings

[3] It is common cause between the parties that the defendant was, at all relevant times, practicing as an attorney under the name and style of Jaco Matthee Attorneys and that the plaintiff, on or about 26 September 2013, enlisted the services of the defendant in his capacity as such.

[4] The plaintiff pleaded that the terms of the mandate were as follows:

“9.4 The Defendant was mandated by the Plaintiff to provide on behalf of the Plaintiff consent to attorney Johan le Grange to release Plaintiff’s R 750 000, 00 to be applied for, or for the direct or indirect benefit of the clients of attorney Johan le Grange, but subject to the condition that before the Defendant would so grant permission on behalf of the Plaintiff for the release of the aforesaid R 750 000, 00, the Defendant shall first ensure that the Plaintiff enjoys an instrument which will entitle the Plaintiff to either make an effective and successful recovery of all the Plaintiff’s capital and interest, alternatively that the Plaintiff be enabled to acquire a substitute with at least the value equivalent to the Plaintiff’s capital and interest (“the security”).”

[5] I pause to mention that the “*clients*” referred to *supra* were a certain J[...] M[...] (“M[...]”) and the Johré Trust (“the Trust”) of which M[...] was a trustee.

[6] It is common cause between the parties that:

6.1 the defendant granted the aforesaid consent on behalf of the plaintiff to attorney Johan Le Grange (“Le Grange”) in terms of a letter dated 18 October 2013;

6.2 Le Grange paid the R 750 000 to ABSA Bank Limited for the benefit of the Trust;

6.3 the Trust was finally sequestrated on 15 June 2015; and

6.4 the plaintiff was unable to recover his capital and interest from either M[...] or the Trust.

[7] The plaintiff alleges that the defendant breached the terms of the mandate in that he failed to ensure that the plaintiff had the required security when he consented to the release of the R 750 000.

[8] The defendant filed a special plea of prescription and a plea over. In his plea over, the defendant denied the terms of the mandate alleged in the particulars of claim and pleaded the terms to be as follows:

“3.2.3 on **25 September 2013**, Defendant was telephonically informed by Plaintiff that:

3.2.3.1 Plaintiff intends to lend and advance an amount of R 750 000, 00 to his friend, J[...] M[...], with whom he participated in a prayer group;

3.2.3.2 J[...] M[...] urgently required the aforementioned financial assistance in order to alleviate pressure put on him by Absa Bank Limited;

3.2.3.3 J[...] M[...] and Plaintiff jointly instructed attorney Johan Le Grange to prepare the necessary loan agreement to facilitate the lending of the amount of R 750 000, 00 by Plaintiff to J[...] M[...];

3.2.3.4 Attorney Johan Le Grange is not attending to the matter with the necessary urgency and that Defendant is required to make contact with attorney Johan Le Grange, to obtain the loan agreement and to advise Plaintiff in respect of the contents thereof;

3.2.4 on **25 September 2013** and during the aforementioned telephone conversation, Defendant accepted the aforementioned mandate to obtain the loan agreement prepared or to be prepared by attorney Johan Le Grange and to advise Plaintiff in respect of the contents thereof;

3.2.5 by means of a letter dated **26 September 2013**, Defendant notified attorney Johan Le Grange that Plaintiff deposited the amount of R 750 000, 00 into attorney Le Grange's trust account on **26 September 2013** and requested that the envisaged loan agreement be made available to Defendant;

3.2.6 on **17 October 2013**, Defendant received a letter from attorney Johan Le Grange together with the proposed loan agreement to be entered into between Plaintiff and J[...] M[...], a copy of which is appended hereto marked annexure "M2";

3.2.7 on receipt of the proposed loan agreement and on **17 October 2013**:

3.2.7.1 Defendant telephonically discussed the proposed loan agreement with Plaintiff and advised him in respect of the contents thereof;

3.2.7.2 Defendant specifically advised Plaintiff that the National Credit Act, 34 of 2005 (as amended) finds application and that the proposed loan agreement does not provide for the applicability of the Act and further that Plaintiff should be registered as a credit provider in terms of the Act;

3.2.7.3 Defendant further advised Plaintiff that the proposed loan agreement does not provide any security for the proposed loan and enquired from Plaintiff as to any arrangement in respect of any available security;

3.2.7.4 Plaintiff in response informed Defendant that J[...] M[...] was involved in a divorce action, had no assets and that the only possible security

would be an immovable property owned by the trustees (which included J[...] M[...]) from time-to-time and for the time being of the Johre Trust in respect of which consent to subdivide was already obtained from the relevant authorities;

- 3.2.7.5 Defendant then advised Plaintiff that because of the lack of available security, Plaintiff should rather consider to enter into a deed of sale with the trustees from time-to-time and for the time being of the aforesaid Trust in order to obtain *quid pro quo* for the amount of R 750 000, 00, which Plaintiff was desirous to make available to J[...] M[...];
- 3.2.7.6 Plaintiff accepted Defendant's aforesaid advice and instructed Defendant to proceed with the drafting of the deed of sale;
- 3.2.7.7 when instructing Defendant to prepare the deed of sale, Plaintiff conveyed to Defendant that Plaintiff was informed that the trustees of the aforementioned Trust is in a position to transfer the immovable property concerned to the purchaser thereof;
- 3.2.8 on **17 October 2013**, Defendant made available to Plaintiff as well as attorney Johan Le Grange, a draft deed of sale for their respective consideration thereof;
- 3.2.9 on **18 October 2013**, the trustees from time-to-time and for the time being of the Johre Trust purported to enter into the deed of sale by signature thereof whereafter attorney Johan Le Grange forwarded a copy of the signed deed of sale to the Plaintiff via Defendant;
- 3.2.10 on receipt of the signed copy of the deed of sale and on **18 October 2013** Plaintiff instructed Defendant to immediately inform attorney Johan Le Grange that the amount of R 750 000, 00 kept on the trust account of the mentioned attorney, may be released to his client(s)."

[9] The defendant pleaded that he duly performed in terms of the aforesaid mandate.

Evidence

[10] In respect of the evidence pertaining to the terms of the mandate, the plaintiff confirmed his relationship with M[...] and the fact that M[...] was under immense financial pressure from Absa Bank. The plaintiff testified that he could not recall if his discussion on 26 September 2013 with the defendant was telephonically or in person and stated that the events happened a long time ago. When asked what his instruction to the defendant was, the plaintiff answered: *“Well, to buy a piece of land...”* Mr Diamond, counsel for the plaintiff, interrupted the plaintiff and wanted the plaintiff to tell the court what precisely he told the defendant. The plaintiff proceeded by testifying that he told the defendant that M[...] had a health spa and that there were financial problems. He further testified that M[...] had a farm which he considered selling in order to relieve the financial pressure. When asked by Mr Diamond whether he informed the defendant of the aforesaid fact during their first discussion, the plaintiff answered that he does not think so and reiterated that his recollection of the events, due to the lapse of time, is vague.

[11] The plaintiff proceeded to testify about his conversation/s with M[...] and the involvement of Le Grange. The plaintiff was, once again, interrupted by Mr Diamond and asked to tell the court: *“What did you instruct the defendant on the 26 September around about?”* The plaintiff answered that they decided that he will buy an erf. He further testified that Le Grange did not attend to the transaction pertaining to the sale of the erf with the necessary urgency and that he requested the defendant to take over the process.

[12] The plaintiff proceeded with further evidence pertaining to the involvement of Le Grange and was, for the third time, interrupted by Mr Diamond with the following question *“Okay. What specifically did you instruct him to do? To say he must assist you, that is very wide. What specifically did you instruct Mister Matthee to do?”*

[13] The plaintiff answered that he instructed the defendant to draft a contract of sale. When the defendant's version, to wit, that the plaintiff contacted him on 25

September 2013 in regard to a loan agreement, was put to the plaintiff, the plaintiff denied that he ever referred to a loan agreement. When asked what he told the defendant during the conversation, he answered that he told the defendant that he wants to purchase the erf.

[14] With further reference to the defendant's plea and more specifically that the plaintiff wanted the defendant to peruse a loan agreement drafted by Le Grange, the plaintiff, once again, unequivocally denied that a loan was ever mentioned and stated that he, at all times, spoke about his desire to purchase the erf. When confronted with the defendant's pleaded version that there was a discussion between the parties pertaining to the loan agreement received from Le Grange, the plaintiff responded that he could not remember such a discussion. Shortly thereafter, the plaintiff admitted that the defendant mentioned something about the National Credit Act and, as a result of the Act, proper security will not be provided. The plaintiff further admitted that the defendant asked him whether there was any arrangement in respect of available security and admitted that he told the defendant about M[...]s divorce and that M[...] had no assets.

[15] When the defendant's pleaded version, to wit, that the defendant advised the plaintiff to rather consider a deed of sale, was put to the plaintiff, the plaintiff initially agreed. Mr Diamond then asked the plaintiff whether the defendant advised as stated aforesaid or whether he instructed the defendant to assist in the purchase of the erf. The plaintiff changed his version and insisted that he told the defendant that he wanted to purchase the erf. In respect of the deed of sale, the plaintiff stated that he did not have sight of the deed when he instructed the defendant during a telephone conversation on 18 October 2013 to consent to the release of the R 750 000.

[16] The plaintiff was asked to relate the contents of the aforesaid telephonic discussion and he stated that he remembers the discussion very well. According to the plaintiff, the defendant informed him that he is concerned about the transaction. In response, the plaintiff told the defendant to make sure that the money is paid into trust so as to ensure that the money is safe. The defendant's pleaded version, namely that the plaintiff was aware that there was no security available to secure

repayment of the R 750 000 when he gave the instruction for the money to be released, was put to the plaintiff and he admitted the allegation. The plaintiff testified that he knew there was no finances to pay him back, but he was satisfied to buy the erf as security. He expected the erf will be registered in his name.

[17] The defendant's pleaded version, namely that it was not an explicit term of the mandate that the defendant may only consent to the release of the R750 000, upon the required security being furnished was put to the plaintiff. The plaintiff answered as follows: *"I denied, M'Lady, because I specifically said he can release the money. Please make sure and I think I used the words veilig"*. Translated to English "*veilig*" means "*safe*".

[18] During cross-examination, the plaintiff testified that when purchasing a property, he would pay the deposit into an attorney's trust account and the money should only be released upon transfer. According to the plaintiff, this ensures that the money is safe.

[19] The plaintiff was referred to his particulars of claim and it was put to the plaintiff that the pleaded version does not refer to an instruction to the defendant to prepare a deed of sale. The plaintiff could not explain the difference between his pleaded case and his evidence in court. The plaintiff was more specifically referred to paragraph 9.4 of the particulars of claim that contained the terms of the mandate he gave to the defendant. The plaintiff unequivocally stated that the pleaded mandate is incorrect.

[20] In respect of the loan agreement referred to in the defendant's plea, a letter received from Le Grange by the defendant on 17 October 2013 was shown to the plaintiff. Attached to the letter was an acknowledgement of debt ostensibly prepared by Le Grange after a consultation with the plaintiff and M[...]. Confronted with the contents of the letter, the plaintiff stated that there was an acknowledgement of debt prepared by Le Grange but, notwithstanding the contents of the agreement, he did not lend any money to M[...]. According to the plaintiff, the agreement was simply drafted to secure his money in Le Grange's trust account. The plaintiff, thereafter, changed his stance and stated that the conversation between himself and Le Grange

pertained to the purchase of an erf and that Le Grange lied in the letter when he referred to an instruction to prepare an acknowledgement of debt.

[21] The following portion of the letter was then read out to the plaintiff: *"The agreement is further that our client would monthly pay interest to your client on the abovementioned amount and that the capital amount would be paid back when the erf concerned is sold."* Confronted with this version, the plaintiff changed his version again and stated that the contents of the letter are correct. The plaintiff was referred to the acknowledgement of debt that was attached to the letter and it was put to him that the defendant discussed the contents of the agreement with him. The plaintiff initially denied this. When the plaintiff was referred to his evidence to the effect that the defendant did mention the National Credit Act and that the transaction will not be safe due to the provisions of the Act, the plaintiff changed his version and stated: *"I can recall that he advised me not to lend money according to the Act."* The plaintiff was referred to the defendant's pleaded version in regard to the acknowledgement of debt and the advice that the defendant gave to the plaintiff in respect of the acknowledgement of debt, and the plaintiff admitted that the version was correct.

[22] The plaintiff further admitted that the purchase of the erf was only discussed after the defendant advised him that the acknowledgement of debt will not provide the necessary security. The plaintiff was referred to the Deed of Sale, which makes provision for transfer of the property only in the following year on 1 December 2014. The plaintiff stated that he was aware of the provision. When asked why, bearing the aforesaid facts in mind, he was prepared to release the R 750 000 without having any form of security, the plaintiff answered that he consented to the release of the money on condition that his money is safe, meaning that there is enough security. A short while later, the plaintiff denied that he knew transfer will only be affected after more than a year.

[23] When the plaintiff was further pressed on the issue of security, the plaintiff testified that the defendant specifically told him that he was uncomfortable to release the money and that *"I said, well, Jaco, then please make sure it is in safe hands.."* When asked what the plaintiff considered to be safe, he testified that the money would be safe if it is paid into the correct account.

[24] The plaintiff was referred to an email sent by him on 4 December 2013 to the offices of the defendant in which he stated that M[...] had paid interest late and that he had to reprimand him. It was put to the plaintiff that he, earlier in his evidence, emphatically denied that any interest was payable by M[...]. The plaintiff answered that he qualified his initial answer by stating that he was not sure. Upon further cross-examination, the plaintiff admitted that he received interest payments from M[...]. When asked why he would receive interest in circumstance where he bought an erf and the deed of sale makes no provision for the payment of interest, the plaintiff answered as follows: *“Because there was a debt agreement stating that he had to pay interest, that will be paid back to him”*. It was put to the plaintiff that his evidence of a *debt agreement* is in stark contrast to his previous evidence that the acknowledgement of debt was never discussed with him. The plaintiff could not give a reasonable explanation for the contradiction. This concluded the plaintiff’s evidence on the terms of the mandate.

[25] Mr Heyns SC, counsel for the defendant, then proceeded to cross-examine the plaintiff in respect of the special plea of prescription. The plaintiff was referred to a letter from the defendant dated 17 March 2014. In the letter, the defendant referred to an email received from the plaintiff on 10 March 2014 from which it appeared that the Trust still owed Absa Bank R 7 340 465. 02. The defendant further stated in the letter that it is highly doubtful that Absa Bank will, in view of the huge debt, consent to the release of the erf from the bond. It was put to the plaintiff that he therefore knew on 17 March 2014 that the defendant breached the terms of the mandate because he did not secure the plaintiff’s position. The plaintiff agreed.

[26] The plaintiff, furthermore, admitted that he was advised on 8 August 2014, that Absa Bank will proceed to obtain a final sequestration order against the Trust. It was put to the plaintiff that he finally knew on 8 August 2014 that the transfer of the erf will not proceed and that he had lost the R 750 000. The plaintiff answered that he already knew this a few weeks prior to 8 August 2014. The plaintiff was referred to notes made by the defendant during a consultation on 11 August 2014, in which the possibility of recovering the R 750 000 from Le Grange was discussed. The plaintiff stated that he cannot recall the consultation, but that he did recall he

enquired from the defendant whether it will be possible to claim the R 750 000 from Le Grange. The plaintiff agreed that his enquiry indicated that he wanted to identify the party he could reclaim his money from.

[27] From the evidence, it appeared that there were negotiations with Absa Bank in an endeavour to save the sale transaction. The plaintiff was referred to a letter dated 22 January 2015 in which Absa Bank stated that the negotiations are at an end and that it will not consent to the release of the erf from the bond. The plaintiff admitted that he was aware of the contents of the letter. From the file notes kept by the defendant, it appeared that the letter was discussed with the plaintiff on 26 January 2015.

[28] The plaintiff called attorney Le Grange as a witness and thereafter closed his case. The evidence of Le Grange did not take the matter any further.

[29] The defendant elected not to present evidence and closed his case. In view of the evidence that was presented, I proceed to consider the special plea of prescription.

Special Plea: Prescription

[30] For purposes of the special plea of prescription, it is common cause between the parties that:

- 30.1 the plaintiff's claim is for a debt as envisaged in the Prescription Act, 68 of 1969 ("the Act");
- 30.2 in terms of section 11(d) of the Act, a prescription period of three years is applicable to the debt;
- 30.3 prescription, in terms of section 12(1) of the Act, commences to run when the debt is due; and
- 30.4 summons was served on the defendant on 22 March 2018.

[31] The issue in dispute between the parties is the date on which the plaintiff's claim became due for purposes of the commencement of the running of the three year prescription period.

[32] In this regard, section 12(3) of the Act provides that a debt is due when a creditor has knowledge of the identity of the debtor and of the facts from which the debt arises.

[33] It is evident from the evidence that the plaintiff was at all relevant times aware of the identity of the "*debtor*".

[34] In respect of the facts from which the debt arises, the plaintiff testified that he was informed on 8 August 2014 that Absa refused to consent to the release of the erf from the bond and, furthermore, that Absa is in the process of sequestrating the Trust. The plaintiff testified that he knew even prior to 8 August 2014 that he had lost his money. It is clear that the plaintiff had knowledge of the facts that could give rise to a possible claim when he enquired on or about 11 August 2014 about a right of recourse against Le Grange.

[35] Lastly, the plaintiff conceded during cross-examination that he knew on 26 January 2015, that the defendant had failed to comply with the terms of the mandate.

[36] In the premises, the plaintiff, at the very latest, had knowledge on 26 January 2015 of the facts from which the debt arose.

[37] In the result, the three year prescription period expired on 27 January 2018, some two months prior to service of the summons, and the plaintiff's claim has become prescribed.

Merits

[38] Even if the debt had not prescribed, I am of the view that the plaintiff failed to prove, on a balance of probabilities, the terms of the mandate. The plaintiff's evidence in respect of the terms of the mandate was extremely vague and fraught with contradictions. Mr Diamond prompted the plaintiff, on at least on three

occasions during his evidence in chief, to state what the terms of the mandate were. The plaintiff had difficulty in giving a precise answer and repeatedly stated that he wanted to buy an erf. It is for this purpose that he enlisted the services of the defendant to draft a deed of sale. Insofar as the instruction to consent to the release of the money in trust is concerned, the plaintiff testified that the defendant informed him of his concern in respect of the sale agreement. Notwithstanding the aforesaid, the plaintiff instructed the defendant to consent to the release of the money. Upon some prompting, the plaintiff explained that he gave the aforesaid instruction on condition that his money would be safe. When asked what he considered to be safe in the circumstances, the plaintiff answered that the money had to be paid into the correct account.

[39] The evidence of the plaintiff during the trial is a far cry from the plaintiff's pleaded case. In actual fact, the plaintiff unequivocally confirmed during cross-examination that the terms of the mandate as pleaded in his particulars of claim are incorrect. Notwithstanding the aforesaid, the particulars of claim was not amended.

[40] The plaintiff, furthermore, admitted the terms of the mandate pleaded by the defendant, which terms are in total contradiction to the terms alleged by the plaintiff.

Order

[41] In the premises, I grant the following order:

1. The defendant's special plea of prescription is upheld.
2. The plaintiff's claim is dismissed with costs.

**JANSE VAN NIEUWENHUIZEN N
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

DATES HEARD:

10, 11, 12 & 13 June 2024

DATE RESERVED:

13 June 2024

DATE DELIVERED

31 July 2024

APPEARANCES

For the Plaintiff: Advocate G Diamond

Instructed by: Couzyn Hertzog & Horak Incorporated

For the Defendant's: Advocate GF Heyns SC

Instructed by: Ditsela Incorporated

