Case No: 623/88
whn

PROTEA INTERNATIONAL (PTY) LTD ..... Appellant

and

PEAT MARWICK MITCHELL & COMPANY ..... Respondent

JOUBERT JA

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

PROTEA INTERNATIONAL (PTY) LTD ..... Appellant

and

PEAT MARWICK MITCHELL & COMPANY ..... Respondent

Coram: JOUBERT, VIVIER, MILNE JJ A et

FRIEDMAN, NIENABER A JJ A

Hearing: 23 February 1990

Delivered: 16 March 1990

J U D G M E N T

JOUBERT JA:

/The .....

The appellant in this matter sued the respondent in the Witwatersrand Local Division for damages arising from breach of contract in an amount of R759 302-00. The respondent was engaged by the appellant to conduct annual audits for its financial years ended 30 June 1982 and 30 June 1983 and to furnish reports as envisaged in terms of section 301 of the Companies Act 61 of 1973. The annual audits were completed on 10 August 1982 and 5 August 1983 respectively. The alleged breaches of contract consisted of the respondent's negligent failure to detect in each annual audit certain irregular transactions which were brought to the knowledge of the appellant during March 1984. It was common cause that the alleged breaches of contract occurred at the latest on 10 August 1983. On 23 October 1986 the summons was served on the respondent.

In an alternative plea the respondent raised the defence that the appellant's claim had become

prescribed in terms of the provisions of the Prescription Act 68 of 1969 (the "main Act"). When the matter was heard by MORRIS A J the alternative plea was argued in limine as a special plea which he upheld by granting absolution from the instance in respect of the appellant's claim. The appeal is brought with leave of the Court a quo against the judgment of MORRIS A J.

Inasmuch as the appellant's claim is for the payment of a contractual debt the period of extinctive prescription applicable to the debt is 3 years according to the provisions of section 11(d) of the main Act. Section 12 of the main Act deals with the commencement of extinctive prescription. In its original form as enacted the relevant provisions of section 12 read as follows:

> "(1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run 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 which does not arise from contract 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."

(My underlining).

Subject to certain exceptions a prescribed debt is in terms of section 10(1) of the main Act extinguished after the lapse of the relevant prescriptive period. Since a prescribed debt is the correlative of the creditor's contractual right of action, the prescription of the debt necessarily extinguishes the right of action. The extinction of a contractual right of action by prescription is accordingly a matter of substantive law and not a procedural matter. See Kuhne & Nagel A G Zurich v A P A Distributors

(Pty) Ltd, 1981(3) SA 536 (W) at p 538 F. This constitutes a radical departure from the position under the old Prescription Act 18 of 1943. The effect of section 3(1) of the latter Act was procedural in character since the lapse of the prescriptive period rendered a contractual right of action unenforceable, whereas the prescribed debt became a natural obligation until the effluxion of 30 years after the contractual right of action had first come into existence (section 3 (5)).

Let us now consider the commencement of extinctive prescription in regard to contractual debts.

In terms of section 12(1) of the main Act prescription begins to run as soon as the contractual debt becomes due i.e. as soon as the creditor's contractual right of action becomes enforceable. Under section 12(2) awareness on the part of the creditor of the fact that the contractual debt has become due is irrelevant unless the debtor wilfully prevented him from becoming aware of the existence of the debt in which

event prescription will not commence to run until he became aware of such existence. See De Wet en Yeats, Kontraktereg en Handelsreg, 4th ed. at p263.

Section 12(3) of the main Act, as originally enacted, expressly excluded from its operation debts arising from contracts. It was intended for other types of debts such as, for instance, delictual debts. It introduced the requirement of knowledge on the part of the creditor of both the identity of the debtor and of the facts from which the debt arose, provided that he would be deemed to have such knowledge if he could have acquired it by exercising reasonable care. This provision was obviously based on an equitable principle. This section was, however, amended by section 1(3) of the Prescription Amendment Act 11 of 1984 (the "amending Act"), which came into operation on 7 March 1984, by the deletion of the phrase "which does not arise from contract." The effect of this amendment

to section 12(3) of the main Act is to place the commencement of prescription concerning contractual debts on a par with that of other debts such as delictual debts.

The question to be decided is whether the appellant's contractual claim against the respondent became prescribed before service of the summons on 23 October 1986. The answer to this question depends on whether the amendment to section 12(3) is applicable to the prescription of contractual claims which commenced to run before such amendment had become operative on 7 March 1984, or whether such amendment's application is to be confined to the prescription of contractual claims which commenced to run on or after 7 March 1984. It should be noted that the provisions of section 12(2) have no bearing on the facts of the present matter. Likewise the proviso to section 12(3) has no application in this appeal.

Mr Plewman, on behalf of the appellant, contended that the amendment to section 12(3) introduced on

7 March 1984 an additional requisite of knowledge on the part of the creditor in regard to the facts from which the contractual claim arose. The appellant acquired knowledge of such facts during March 1984 when prescription of its contractual claim commenced to run. Service of the summons on 23 October 1986, however, interrupted the running of the prescription before its completion during March 1987. Hence the appellant's claim had not become prescribed.

The argument advanced by Mr Browde on behalf of the respondent was that the prescriptive period commenced to run at the latest on 10 August 1983, i.e. prior to the coming into operation of the amendment to section 12(3) on 7 March 1984. The prescriptive period was completed on 9 August 1986. The appellant's claim had therefore already become prescribed when the summons was served on 23 October 1986. The amendment to section 12(3) was inapplicable to prescription which had already commenced to run before

the amendment became operative on 7 March 1984.

The soundness or otherwise of these opposing contentions depends upon the applicability, if any, of the amendment to section 12(3) in regard to prescription which had already commenced to run before its operative date on 7 March 1984.

As a general rule of construction, based on Code 1.14.7, the operation of a statute is prospective to apply only after its enactment (in futuro), unless the legislator clearly expressed a contrary intention that the operation should be retrospective to apply prior to its enactment (in praeterito). See the 4th presumption mentioned in Steyn, Uitleg van Wette, 5th ed. p 82 and Maxwell on Interpretation of Statutes, 12th ed. at p 215 sqq. There are, however, exceptions to this general rule of construction which favour retrospectivity. Under the sub-heading: "As die wet 'n eksepsie of vrystelling invoer of afskaf", Steyn, op.cit., p 94

mentions one of the exceptions in favour of retrospectivity for which reliance is placed on Paul Voet, Johannes Voet and Curtis v Johannesburg Municipality, 1906 T.S. 312. I shall deal with these authorities briefly.

Johannes Voet (1647-1713) 1.3.17 describes the exception in favour of retrospectivity as follows:

> 'Vel denique introduceretur nova lege exceptio aut liberatio quaedam; nam et tunc in praeteritis quoque negotiis, quorum obligatio hactenus duravit, habere locum, aequum est; non ad id, ut in praeteritum, sed ut in futurum obligatio exceptione recenter inducta resolvatur. Sic diminuto per legem novam usurarum modo, minores annis sequentibus solvendae sunt, earum quoque sortium intuitu, pro quibus ex juris prioris concessione graviores, ac vi novae legis modum excedentes, fuerant in conventionem deductae. Cod. 4.32.27 pr. Eoque fundamento Ultrajectinis quoque placuit, ut biennii praescriptio in exactione salariorum aut pretii rerum minutim distractarum,

similiumque, ad debita etiam praeterita vim exsereret; sic ut tempore quocunque anteriore contracta, praescriptione biennii, a die novae legis latae computandi, tollerentur, novella decis. Ultrajectina 14 Aprilis 1659 art 21, Paulus Voet, de statutis sect. 8 cap 1 numero 3 except 6 pag. 292.'

(Gane's translation: 'The last case of retrospectivity is when some exception or exemption is brought in by the new law. It is fair that then too the law should have place in past affairs also, the obligation arising from which has lasted up to the present, the effect of the newly introduced exception being to modify the obligation not as to the past but as to the future. Thus if the rate of interest has been cut down by a new law, the lesser rate will have to be paid in following years, and this even in respect of those capital sums on which in accordance with the scope given by the former law a heavier rate in excess of the new law had been agreed

> upon (Code 4. 32.27). On this basis also the people of Utrecht decided that the two years' prescription in regard to the recovery of wages or of the price of things sold by retail or like matters should have effect even as to past debts, so that liabilities contracted at any previous time whatever would be wiped out by a prescription of two years, to be reckoned from the date of the passing of the new law. (New Decision of Utrecht, 14th April, 1659, art 21; Paul Voet, On Statutes, sec 8, ch 1, n 3 exc 6, p 292).'

In this passage Voet mentions two instances in which a new statute (nova lex) by introducing an exception or exemption (exceptio aut liberatio) has retroactive operation. The first instance is where the new statute modifies an existing obligation not in the past but in the future. For this proposition he relies on Code 4.32.27 pr which embodies an imperial decree of Justinian, issued in 529 AD, to Menna, the Praetorian Prefect. This decree reads as follows:

/13.....

'De usuris, quarum modum iam statuimus, pravam quorundam interpretationem penitus removentes iubemus etiam eos, qui ante eandem sanctionem ampliores quam statutae sunt usuras stipulati sunt, ad modum eadem sanctione taxatum ex tempore lationis eius suas moderari actiones, illius scilicet temporis, quod ante eandem fluxit legem, pro tenore stipulationis usuras exacturos.'

(Scott's translation: 'For the purpose of disposing of the improper interpretation which certain persons have applied to the law by which we have established the rate of interest, we order that those who have stipulated for a higher rate before the promulgation of the law shall reduce their claims in accordance with the one prescribed by it, from the time when the law was published; but up to that date they shall have the right to collect interest in accordance with the tenor of the stipulation.'
(My underlining both in the Latin text and the translation).

/14.....

According to this decree the contractual rate of interest stipulated by parties in a stipulatio is recoverable until the coming into operation of the new statute's reduced statutory rate of interest. As from the promulgation of the new statute only its reduced statutory rate of interest is recoverable. The new statute operates in futuro and not in praeterito. There is no question of retrospectivity by virtue of the introduction of an exceptio aut liberatio. Compare BUCKLEY L. J. in West v Gwynne, [1911] 2 Ch 1 (C A) at p 12: "If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective."

The second instance mentioned by Voet relates to a Statute enacted by the legislator of the Province of Utrecht on 14 April 1659. The Statute is reproduced in a truncated form by Van Wesel (1635-1680) in his Commentarius ad Novellas Constitutiones Ultrajectinas, 1666, art. 21 at

p 285-286. It reads as follows:

'Dat alle Salarisen van Advocaten, Procureurs, Medicijns, Chirurgijns, betalinghen van Coopmanschap ter slete ghelevert, oock van ghenees kruyden, of waren, inde Apotheque, of ter winckel vercoft, huer van Dienst-boden, loon van Notarisen, Landtmeters, Clercquen, of andere Arbeyders sullen moeten judicielijck geyscht worden, binnen twee jaren, nae dat den dienst is uyt gegaen, of de Coopmanschap ghelevert, nae't verloop van welcken tijdt, de voorsz schulden ghehouden sullen worden voor gequeten: Ten ware daer van een obligatie of schriftelijck bescheyd ware gemaect, in welcken gevalle men sich sal reguleren, als na rechten, dan dat de betalinge van drinck-gelagen binnen den tijdt van ses maenden in rechten geeijscht sal moeten worden, 't zy daer van schriftelijcke obligatie zy, ofte niet, op poene als voren. Ende in regard van diergelijcke schulden, al gereeds gemaect, dat de selve sullen moeten worden geeijscht binnen

/16.....

> den tijdt van twee jaaren, ende binnen ses maenden respective te reeckenen nae de publicatie deses, op poene als vooren.' (My underlining).

(I may add in parentheses that this Statute was probably influenced by the provisions of article 16 of the Eewich Edict of 4 October 1540 in 1 Groot Placaet - Boeck p 319).

The object of the Utrecht statute was to alter, in regard to certain debts, the common law prescription period of 30 years. It provided that the fees of certain professional men, the salaries of labourers, servants and clerks as well as the price of goods sold and delivered by retail merchants had to be claimed judicially within 2 years after they became due. The prescriptive period in regard to debts due to public houses was 6 months. Failure to claim payment of the debts before the expiry of the prescription periods of 2 years or 6 months, respectively, would have, by way of a penalty, the same effect as payment

of the debts, i.e. extinction of the debts themselves (leaving no naturalis obligatio). The statutory prescription introduced by the Utrecht statute was therefore a matter of substantive law and not a procedural matter. I shall refer to the underlined words (supra) of the Utrecht statute as the exceptio which according to Voet had retroactive operation. The exceptio expressly provided that the debts already incurred ("al gereeds gemaect") at the date of its promulgation on 14 April 1659 had to be claimed within 2 years or 6 months, respectively, from that date ("te reeckenen nae de publicatie deses") subject to the same penalty in the event of failure to claim accordingly. The Utrecht statute did not purport to make its period of prescription operative prior to the date of its promulgation. Its entire operation, including its express exceptio was prospective (in futuro) and not retrospective (in praeterito). The mere fact that the exceptio applied to debita praeterita which had been incurred before

its promulgation but had not become prescribed according to the common law period of prescription does not render the exceptio retrospective. The Utrecht statute expressly provided (as I have already stated) that the statutory prescription of the debita praeterita would commence to run after its promulgation.

It is clear from the aforegoing that neither Code 4.32.27 pr nor the exceptio of the Utrecht statute supports the exception mentioned by Voet 1.3.17. Inasmuch as the comments on the exceptio of the Utrecht statute by Van Wesel, op.cit., nr 53 and Paul Voet (1619-1667), De statutis eorumque concursu, sect 8 cap 1 nr 6, are purely factual I do not propose to quote them.

Steyn, loc.cit., also refers to Curtis v Johannesburg Municipality, 1906 T S 312, where the effect of section 14 of Ordinance 4 (Private) of 1904 (T), which provided that all actions against the Johannesburg Municipality

were to be brought within 6 months after the causes of such actions arose, had to be considered upon the action of Curtis. It should be noted that section 14 did not comprise an exceptio aut liberatio as mentioned in Voet 1.13.17. The Ordinance was promulgated on 17 August 1904. The cause of action of Curtis arose on 23 January 1904 while he instituted his action on 27 July 1905. On appeal from the judgment of WESSELS J (reported in 1905 T H 362) the majority of the Court held that the action of Curtis which arose before the promulgation of the Ordinance was prescribed because it was not commenced within 6 months after such promulgation. SMITH J dissented, holding that section 14 was not applicable to causes of action which arose before it came into operation. The ratio decidendi of the majority judgments by INNES C J and MASON J was twofold, viz. :

(1) Section 14 was in effect a statute of limitations and as such portion of the law of procedure which

gave it retrospective operation; and

(2) The application of a principle of Roman-Dutch law worded somewhat differently by INNES C J (p 316) and MASON J (p 327). The substance of this principle was that whenever a statutory period of prescription was introduced without reference to causes of action which arose prior to its promulgation it was also to be applied to such causes of action but the period of prescription was to run from the date of promulgation. Whether there is such a principle of Roman-Dutch law would seem, with respect, in the light of references to Paul Voet and Van Wesel to be extremely doubtful. It is moreover a matter which does not fall to be decided in this appeal.

In the light of the aforegoing observations the editors of Steyn's Uitleg van Wette in editing a new edition thereof would perhaps be well-advised to consider

re-drafting the existing page 94 thereof.

To revert to the proper construction of the amendment to section 12(3). No other provision of the main Act sheds any light on its construction. The wording of section 12(1) of the main Act is clear and unambiguous. The ordinary meaning of its words involves no manifest absurdity, inconsistency or hardship. The clear intention of the legislator is that it should operate prospectively (in futuro) from the date of its commencement on 1 December 1970, subject to the provisions of sub-sections (2) and (3). I have already stressed the inapplicability of sub-section (2) to the facts of the present case. Sub-section (3) prior to its amendment expressly excluded contractual debts. Since the appellant's contractual debt became due at the latest on 10 August 1983, it follows that extinctive prescription then commenced to run in respect of it. Such prescription would have been completed on 9 August 1986. When the amendment

to section 12(3) was introduced on 7 March 1984 the prescription was in the course of running against the appellant's contractual debt. Was it the intention of the legislator that such amendment should apply to contractual debts which had become due before 7 March 1984 and in respect of which prescription was already in the course of running ? If so, was the commencement of such prescription before 7 March 1984 to be entirely ignored and was the prescription to run de novo from March 1984 when the appellant acquired knowledge of the facts from which his contractual claim arose, as contended for by Mr Plewman ? Apart from the illogicality of such an approach without any legal foundation for ignoring prescription which had already commenced to run before 7 March 1984, the intention of the legislator, in my judgment, is in accordance with the general rule of construction that the amendment to section 12(3) is to operate only prospectively (in futuro) since a contrary intention is not indicated by any express words.

The amendment is intended to operate only prospectively in respect of prescription which commences to run on or after 7 March 1984. It was not intended to operate retrospectively (in praeterito) in respect of prescription which commenced to run prior to 7 March 1984. Such a construction obviates the illogicality of having two commencement dates for prescription. I accordingly uphold the contention of Mr Browde that the appellant's claim had already become prescribed on 9 August 1986 prior to the service of his summons on 23 October 1986.

In the result the appeal is dismissed with costs, including the costs of two counsel.

C P JOUBERT JA.

VIVIER JA
MILNE JA Concur.
FRIEDMAN AJA
NIENABER AJA