



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO. CA 98/2025

In the matter between:

METCALF & Co

APPELLANT

and

CRADOCK PORTFOLIO INVESTMENTS CC

RESPONDENT

ORDER

On appeal from: The Eastern Cape Division of the High Court, Makhanda
(Lowe J sitting as the court of first instance):

The appeal is dismissed with costs on scale B.

JUDGMENT ON APPEAL

Rugunanan J (Malusi J and Ngoqo AJ concurring):

[1] Prompted by an order dismissing a special plea of prescription with costs, the appellant, with the leave of the trial judge, appeals against the dismissal order.

[2] On 23 April 2012 summons was served on the appellant (as defendant), in which it was suited in an action for damages in the amount of R2 142 708.26 claimed by the respondent (as plaintiff), due to the appellant's negligent breach, of mandate through Mr Moolman, an attorney, partner and director, to act as conveyancer in relation to several erven in a property development (the Riverside development) initiated by the respondent in Cradock (now Nxuba).

[3] The respondent's grievance through its Mr Joubert, a fifty percent partner/shareholder, is that there were protracted delays in the series of batch transfers of the development erven identified for registration in the Deeds Office, Cape Town with consequent loss due to failure by Mr Moolman to utilise a more expeditious transfer process, the so-called counter-cover process, of which he was unaware since inception of his mandate during mid-2006. The first batch involving twenty-nine erven were registered on 28 July 2008, and the second batch of seven erven were registered on 17 April 2009.

[4] The loss, claimed as damages, represents interest calculated at 12,5 % per annum on the sum of R9 350 000 being the total amount of the purchase price

of the erven sold and transferred to individual purchasers which the respondent alleges it could have earned over a period of 22 months from 27 June 2007 (when all transfers ought to have been completed if the counter-cover process was utilised) to 28 April 2009, the latter being the date on which the appellant accounted to the respondent.

[5] In its special plea the appellant alleges that the debt claimed by the respondent would have arisen and become due no later than 27 June 2007 and in terms of the Prescription Act 68 of 1969 (the Act), the debt would have prescribed on 26 June 2010 prior to the service of summons on 23 April 2012.

[6] In the alternative, the special plea alleges that the parties agreed that the development erven were to be transferred in batches (i.e. phases 1 and 2), and in respect of the first batch that was registered on 28 July 2008, a claim for damages would have prescribed on 27 July 2011; and regarding the second batch registered on 17 April 2009, the claim would have prescribed on 16 April 2012 – the claims in both instances became prescribed before summons was served on 23 April 2012.

[7] In its replication, the respondent pleaded that:

- 7.1 the appellant throughout the exercise of its mandate advised that the transfer process must occur in batches and that the process was proceeding normally;
- 7.2 such advice was accepted as correct having regard to the appellant's professional standing;
- 7.3 as a consequence of the advice which the appellant knew or ought to have known the respondent would accept as correct, the respondent did not

know of the identity of the debtor or of the facts from which the debt arose as envisaged in s 12(3) of the Act, such knowledge having been obtained at the earliest on 20 July 2009 after consulting with an independent attorney, Mr Gerald Friedman.

[8] On 8 October 2024, prior to the commencement of the trial the appellant conceded that it acted negligently as alleged, and that such negligence is causally linked to the respondent's agreed/proven damages.¹ In the conduct of the trial, which commenced on 28 October 2024, the appellant conceded the existence of a counter-cover procedure in the Deeds Office in Cape Town, which procedure could and should have been utilised.² The concession arose upon delivery by respondent of an expert report by Ms Jean Herbert, a conveyancer, in which she set out the counter-cover process including the deeds office procedures that should have been utilised by Mr Moolman. The report noted various omissions and delays that were caused due to inobservance of the process detailed. Ms Herbert having expressed the opinion that such delays and omissions could have been avoided by a prudent conveyancer.

[9] The appellant's concession renders it unnecessary to elucidate the extensive evidence as to exactly how the transfers were handled and is of no relevance to the prescription issue. However, noteworthy to mention is that on 20 July 2009, Mr Friedman wrote to the respondent stating: 'My prima facie view is that there is a claim for damages. The extent of the claim is completely unknown.' More than that Mr Friedman stated: 'The advice given to delay registration of phases 1 and 2, clearly have no merit.' Accordingly, taking into consideration the concessions on causal negligence and the existence of the counter-cover procedure, the trial proceeded solely on the special plea, the question of the quantification of damages having stood over for adjudication in due course.

¹ This was incorporated in an order taken before Lowe J on 8 October 2024.

² Judgment, Lowe J para 6.

[10] Tritely, prescription shall commence to run as soon as a debt is due. Relevant for present purposes is s 12(3) of the Act which states 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.’³

[11] A conspicuous feature of s 12(3) is that prescription generally runs against a creditor when there is either knowledge or awareness of the debt. Knowledge and awareness may have different meanings but in the context of the section, they are generally applicable to the same thing i.e. the identity of the debtor and the facts from which the debt arises.⁴ The knowledge that s 12(3) contemplates could either be actual or deemed. Actual knowledge relates to the subjective knowledge that a creditor acquires, while deemed knowledge, which is contemplated in the proviso to the section, is that which a creditor could have acquired by exercising reasonable care.⁵

[12] In *Le Roux and Another v Johannes G Coetzee and Seuns and Another*⁶ (*Le Roux CC*), now a leading authority on when prescription begins to run in claims against legal practitioners for professional negligence, the Constitutional Court considered whether ‘the facts’ may include knowledge of a legal conclusion (wrongfulness, fault or negligence) if such legal conclusion forms part of the cause of action or minimum facts for enforcing payment of a debt. Put another way, if a legal conclusion is the only way in which a creditor can obtain knowledge that a legal practitioner had given incorrect legal advice, or had not professionally discharged a mandate, the question is whether that

³ In *Rademeyer v Ferreira* [2024] ZACC para 59 Majiedt J said, ‘Prescription of a debt starts running as soon as the debt becomes due, or when knowledge of the debt becoming due can reasonably be expected of a creditor. Prescription is judicially interrupted when process initiating lawsuit for a recovery for that particular debt is issued and served on the debtor.’

⁴ *Le Roux and Another v Johannes G Coetzee and Seuns and Another (Le Roux CC)* (CCT117/22) [2023] ZACC 46 para 39.

⁵ *Le Roux CC supra* para 40.

⁶ *Le Roux CC supra* para 41.

constitutes knowledge of a fact which s 12(3) contemplates, or knowledge of a legal conclusion.⁷ The majority in *Le Roux CC* opined that for purposes of s 12(3), in professional negligence claims against legal practitioners, the facts from which the debt arises may include a legal conclusion,⁸ and only when such is known then does prescription begin to run. This is a limited exception to the general rule that legal conclusions are not primary facts, and therefore knowledge of such conclusions is not a requirement in s 12(3) to trigger the running of prescription.⁹

[13] The exception applies only in the instance of professional negligence claims against legal practitioners. Its rationale is that a client is entitled to rely on the correctness of legal advice received from a legal practitioner but may due to a lack of expert legal knowledge be unable to discern that an actionable act or omission (something wrong) occurred without having first obtained an opinion from a legal practitioner or specialist.¹⁰ *Le Roux CC* made it clear that the exception is limited to ‘... those who seek and obtain legal advice or give a mandate only to later discover that the advice was incorrect or that the mandate not discharged in the manner required by the law.’

[14] Accordingly, *Le Roux CC* suggests that in the context of claims against legal practitioners prescription only begins to run once the creditor (i.e. the client) had knowledge or could have acquired knowledge through the exercise of reasonable care that the legal advice given or the execution of the legal mandate was incorrect and that a claim against the practitioner existed. Referring to precedent, *Le Roux CC* appears to have accepted that whether

⁷ *Le Roux CC supra* para 66.

⁸ *Le Roux CC supra* para 79.

⁹ See *Le Roux CC supra* paras 43-49 and the cases referred to in which the distinction between primary or material facts and legal conclusions is elucidated.

¹⁰ See the reference to *Links v Member of the Executive Council, Department of Health, Northern Cape Province* 2016 (4) SA 4514 (CC) in paras 50 and 51 of *Le Roux CC*.

conduct would constitute a failure to take reasonable care would depend on several factors expressed in the following terms:

‘Whether the failure on the part of the creditor to take such steps amounts to a failure to exercise reasonable care within the meaning of the proviso or not depends ... upon a consideration of all the circumstances relevant to the creditor’s conduct, including, in the context of the present case, such factors as the plaintiff’s physical and mental condition, the pain he was suffering, his memory function and the environment in which he then found himself.’¹¹

[15] In summary *Le Roux CC* determined that, as a limited exception to the general rule, facts may include knowledge by a creditor of a legal conclusion if such conclusion forms part of the cause of action or minimum facts for enforcing payment of the debt. A suspicion that conduct would be actionable or wrongful would be a fact but could never constitute a legal conclusion, because a suspicion by its nature is incompatible with a conclusion of law.¹²

[16] The core issue in this appeal, as was in the trial court from which the appeal emanates, is the question whether such knowledge (i.e. knowledge of a legal conclusion, as a fact) could have been established through the exercise of reasonable care to trigger prescription. In addressing the issue, the parties referred to the trial court’s extensive analysis of the judgment in *Le Roux CC*, their arguments, however turning on factual matter pertinent to the proviso in s 12(3) of the Act and directed at whether Mr Joubert’s attainment of factual knowledge, including the legal basis thereof, occurred in circumstances that may be considered reasonable. That is the crux of the matter and is ultimately the issue upon which the appeal turns.

[17] Two witnesses, Mr Moolman and Mr Schulze (both attorneys and directors of the appellant in Cradock), testified for the appellant on the merits of

¹¹ *Brand v Williams supra* at 916.

¹² *Le Roux CC supra* para 48.

the special plea – the appellant, accepting the duty to begin and the onus. Mr Joubert testified for the respondent, and so did Mr Gerald Friedman, an attorney/conveyancer of the firm Friedman Scheckter in Gqeberha (formerly Port Elizabeth). For present purposes, the evidence is dealt with only to the extent as is necessary for the issue to be decided, the trial court having noted that Mr Friedman’s evidence took the matter no further. Indeed, neither of the parties referred to his evidence during argument on appeal.

[18] In the timeline of events since 27 June 2007 to 23 April 2012 being the date respectively when all transfers should have been completed and the date of service of summons, the following occurred: The first batch of transfers was lodged on 19 May 2008, rejected on 27 June 2008, and finally registered on 28 July 2008. A meeting between Mr Schulze and Mr Joubert occurred during August 2008, the evidence indicating at that stage that Mr Joubert was highly stressed due to the delay in transfers and the attendant delay of incoming funds from the sale of development erven obliging the respondent to arrange a bank overdraft to make up for its distressed financial state.

[19] In December 2008 Mr Joubert consulted a friend, Mr Johan Krause, an advocate from Gauteng. Nothing significant turns on the meeting with him. He specialises in criminal law and has no knowledge about conveyancing matters. Mr Joubert was told by him that he could not proffer advice on expected timeframes for effecting transfers.

[20] As events unfolded Mr Joubert’s stress levels intensified. He struggled with a stress induced medical condition for which he was prescribed medication and was at risk of developing a substance addiction.

[21] In January 2009 a second meeting took place. It was attended by Mr Joubert, Mr Schulze, Mr Moolman and a few other persons not relevant to

mention since they were not trial witnesses. At the time of that meeting it is common cause that neither Mr Moolman nor Mr Joubert knew of the counter-cover procedure and that the advice given by Mr Moolman to register the development erven in batches and his positive assurances were misguided. It is appropriate to mention in abridged terms that much of Mr Moolman's evidence was irrelevant to the prescription issue but lengthy in explaining the conveyancing process in the Riverside Development. He admitted unnecessary delays which could have been avoided had the counter-cover procedure been utilised of which he was unaware and remained so until he received the expert report of Ms Herbert in 2016 – it being clear that at no time until then did he believe that he acted negligently and in breach of his mandate.

[22] The second batch of transfers was registered on 17 April 2009. Mr Joubert, on the recommendation of an attorney friend Mr Koustadis, had direct contact with Mr Friedman on 14 July 2009, and was informed by him on 20 July 2009 that prima facie the respondent had a claim but more facts were required for a formal, definitive opinion to be provided.

[23] Although Mr Joubert initially believed that the meeting of August 2008 did not occur, the trial court accepted Mr Schulze's evidence that the meeting took place. The court found that Mr Schulze had no personal knowledge of the mandate or the conveyancing transactions and was not shown in any way to have been unreliable. Overall, in respect of Mr Moolman's assurances to Mr Joubert that matters were under control the trial court accepted that he truly believed his assurances until he was disabused of his view in 2016. Mr Joubert, on the other hand, was observed to have been generally uncertain as to dates in the timeline including, on his reckoning, a further meeting in May 2009 (denied by Mr Schulze and Mr Moolman), the trial court noting that Mr Joubert, though not deliberate in his uncertainty this nonetheless merely due to considerable

pressure affecting his recall and being deeply concerned and upset about the delays that occurred and attendant losses.

[24] Contrary to the submission made by the appellant that Mr Joubert lied in his evidence on the dates in the timeline relevant, this to avoid the effects of prescription, the difficulty is that this intuitive appraisal does not manifest as an objective fact in the record from which it may be concluded that the trial judge erred in failing to have regard thereto. Although the trial judge granted leave to appeal ostensibly on the basis that he might have erred in finding Mr Joubert a credible factual witness, the trial judge was better positioned to assess the credibility of the witnesses and the reliability and honesty of their versions. This advantage is not necessarily confined to the fact-finding process, but may extend also to the inferences to be drawn from the facts.¹³ That being so, it is accepted that a court of appeal will not lightly interfere with the factual findings of a trial court unless there is a demonstrable and material misdirection and/or a finding that is clearly wrong.¹⁴ Having applied the conventional approach to the evidence and the probabilities,¹⁵ and allowing for mistakes that may not entirely affect credibility,¹⁶ the trial court found all the witnesses to be generally honest without inclination of deliberate mendacity. I am unable to hold otherwise.

[25] In argument the appellant laid much emphasis on the meetings of August 2008 and January 2009 at which Mr Joubert, although unclear about dates,

¹³ See *Meintjies v Esterhuizen & Another* [2003] JOL 12335 (E) cited with approval in fn 85 of the dissenting judgment by Pillay AJ in *AK v Minister of Police* (CCT 94/20) [2022] ZACC 14 (5 April 2022). At para 151 Pillay AJ stated: '[F]or an appellate court to overturn the findings of fact and credibility made by the court of first instance is exceptional. The rationale for this general rule is that, being steeped in the trial, the court of first instance would have the opportunity to observe the demeanour, "appearance and whole personality" of witnesses and would thus be better placed than the appeal courts to test and evaluate the evidence against impressions created by witnesses.'

¹⁴ *Mashongwa v PRASA* 2016 (3) SA 528 (CC) para 45.

¹⁵ *National Employers General Insurance Co. Ltd v Jagers* 1984 (4) SA 437 (E) at 440D-G. See too *Mabona & another v Minister of Law and Order & others* 1988 (2) SA 654 (SE) at 662C-F; *Stellenbosch Farmers' Winery Group Ltd & another v Martell et Cie & others* 2003 (1) SA 11 (SCA) para 5; *Dreyer & another NNO v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) para 30.

¹⁶ Also known as 'self-contradiction' – see *S v Oosthuizen* 1982 (3) SA 571 (T) at 576D-G.

confirmed the meetings and complained of the late registrations and accused Mr Moolman of causing the respondent to lose money. Relying on Mr Schulze's evidence (similarly repeated in the second meeting) that he informed Mr Joubert that the appellant had insurance cover and told him to see an attorney and to file a claim which would then be sent to the insurers, the appellant in its heads of argument submitted that despite whatever circumstances Mr Joubert had found himself in, he would have been in a position to have consulted Mr Friedman no later than October 2008 and there was accordingly no reason why the claim could not have been instituted by about November or December 2008 before prescription interceded. Alternatively, Mr Joubert could have consulted with Mr Friedman within three months from January 2009 and hence there was no reason why the claim could not have been instituted during April 2009 before it prescribed.

[26] The abovementioned three-month period relied upon in submissions by the appellant stemmed from Mr Joubert's evidence of that timeframe in the ordinary course of a registration process he listened to on a radio station. It had nothing to do with the reasonable period for investigations.

[27] The appellant's contentions overlook the fact that at both these meetings Mr Schultz did not purport to provide legal advice given his lack of direct involvement and knowledge of the mandated transfers. Moreover, Mr Moolman's mandate was incomplete and while the circumstance of delay and financial loss to the respondent (at that stage unquantified) gave rise to irritation and suspicion in Mr Joubert that there was wrongdoing on the part of Mr Moolman, this according to the trial court did no more than warrant further enquiry. As held in *Le Roux CC* prescription would only start to run upon conclusion of that enquiry if that suspicion were confirmed, or upon the expiry

of a reasonable period for investigations – in this matter, at the earliest, before 20 July 2009.

[28] The appellant contended that Mr Joubert should have commenced that enquiry at an earlier time, this being no later than October 2008 or within three months from January 2009. In that regard the arguments pertinent to the meetings of August 2008 and January 2009 were recapitulated. Laying emphasis on the judgment of the trial court, the respondent correctly contended that the appellant who bore the onus, led no evidence as to when that enquiry should reasonably have commenced nor how long such enquiry should reasonably have taken.

[29] At both meetings the evidence indicates that although annoyed by the delays and having assessed the respondent's loss at about R3 million, Mr Joubert was in no position to factually and reliably have had any real view of the minimum facts, including knowledge of the counter-cover procedure as well as negligence as the legal basis for sustaining a claim. This remained the position throughout his meetings with his legal friends and until his first meeting with Mr Friedman who expressed a preliminary view on 20 July 2009, save that he was unable to assess or quantify the debt.

[30] On the facts indications are that none of the parties, Mr Joubert in particular, were in a position by 20 July 2009 to have made a legal assessment that Mr Moolman had indeed been negligent due to being unaware of the counter-cover procedure and that he was negligent in the execution of his mandate, let alone that such negligence was causally linked to the respondent's loss. It was only upon delivery in 2016 of the expert report by Ms Jean Herbert that Mr Moolman comprehended that he failed to execute his mandate

diligently and without negligence – a fact the trial court observed, Mr Moolman accepted honestly and unequivocally.

[31] In that context, the prescription defence is unsustainable and interference with the judgment of the trial court is not warranted. In my view the trial court correctly concluded on the facts that the timeline relevant went well beyond April 2009 for the commencement of the running of prescription.

[32] On costs, the general rule is that they follow the result. Following that rule, the respondent is entitled to its costs. As for the costs of counsel the parties contended for the costs on scale C of uniform rule 67A. This was not meaningfully argued with reference to the applicable factors contained in the rule with emphasis on their relevance to the making of the costs orders contended for. In these circumstances while accepting that counsel competently argued the matter, my approach, without seeking to put in place any hard and fast rule, is that counsel are better positioned to mark fees based on their own assessment of the reasonable value they ascribe to their professional services. That said, scale B must apply.

[33] In the result the appeal is dismissed with costs on scale B.

M. S. RUGUNANAN
JUDGE OF THE HIGH COURT

I agree.

T. MALUSI
JUDGE OF THE HIGH COURT

I agree.

D. NGOQO
ACTING JUDGE OF THE HIGH COURT

Appearances:

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Date heard: 16 March 2026.

Date delivered: 18 August 2026.