THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between

Appeal Case No: A314/2013

Trial Case No: 6045/2008

SHABEER LATIB **APPELLANT**

And

BONITAS MEDICAL FUND **RESPONDENT**

Coram: ALLIE, STEYN & ROGERS JJ

Heard: **26 JANUARY 2015**

Delivered: **4 FEBRUARY 2015**

JUDGMENT

ROGERS J (ALLIE & STEYN JJ concurring):

[1] I shall refer to the appellant and respondent as they were in the court a quo, namely plaintiff and defendant.[1] In terms of rule 33(4) the court quo ruled by agreement that a special plea of prescription be determined first in accordance with an agreed statement of facts. The special plea was upheld and the plaintiff's claim dismissed with costs including the costs of two counsel. The trial judge (Binns-Ward J) refused leave to appeal. On petition the Supreme Court of Appeal granted the plaintiff leave to appeal to a full bench.

[2] The factual background as it appears from the pleadings and agreed statement is the following. During 1999 and by way of two related agreements the defendant appointed the plaintiff to render benefit management services and to develop and supply software in respect of managed care. For reasons that will become apparent, the precise terms of the 1999 agreements are not relevant to the prescription defence.

[3] The plaintiff rendered services and supplied the software for several years. During August 2002 the defendant purported to terminate the agreements. The plaintiff disputed the defendant's right to do so. August 2002 was the last month during which he actually rendered services though he tendered to continue rendering services. He issued invoices dated 30 June 2002 and 31 July 2002 for the services actually rendered during those months (R63 840 each). He also issued invoices for subsequent months.

[4] By the time of the meeting of the defendant's board of trustees on 13 December 2002 the plaintiff had made a claim for R4 248 000, presumably being his view of his full contractual entitlement. The defendant wrote to him on 17 January 2003 stating that it would oppose any such claim.

[5] During April 2003 Diamond Computer Systems (Pty) Ltd ('Diamond'), of which the plaintiff was once a director, issued summons against the defendant claiming license fees for computer equipment allegedly supplied in respect of the

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[1] The defendant as initially was Pro Sano Medical Aid Scheme. Its business was amalgamated into Bonitas Medical Fund with effect from 1 February 2013 and the latter was substituted as the defendant/respondent. Reference to the defendant should thus be read as referring to Pro Sano Medical Aid Scheme in respect of the period prior to 1 February 2013.

defendant's managed care system and for maintenance services. Diamond's claim covered some of the services for which the plaintiff was claiming. It seems that Diamond alleged that the contract for those services was concluded with it, not the plaintiff.

[6] Although the defendant had disputed the plaintiff's claim in January 2003, the minutes of its meetings reflect a view that the defendant would be obliged to pay the plaintiff something. Matters came to a head at a meeting between the defendant, the plaintiff and the latter's attorney on 27 October 2004. The minutes reflect inter alia that the defendant considered that it could not responsibly pay the plaintiff in respect of services for which it might subsequently be found liable to Diamond.

[7] The plaintiff alleged in his particulars of claim[2] that an oral agreement was reached at the meeting of 27 October 2004 which was a novation of his earlier agreements with the defendant. For purposes of the prescription defence only, the defendant accepted that the novated agreement had been concluded as alleged. In his particulars of claim the plaintiff alleged that he was informed at the meeting that the defendant had resolved to pay R5,5 million in settlement of his claim. The defendant's representative proposed that payment be conditional upon the plaintiff assisting the defendant in its defence of Diamond's claim and upon the defendant being found not liable to Diamond. The particulars of claim continue thus:

'53. Plaintiff agreed that the debts due by Defendant would only become payable once the claim instituted by Diamond had been resolved, but rejected the offer of R5,5 million in settlement of his claims.

54. At the conclusion of the said meeting of 27 October 2004, it was agreed between the parties that the indebtedness of Defendant to Plaintiff was orally novated as follows:

> 54.1 Defendant would make payment to Plaintiff in an amount to be agreed upon between Plaintiff and Defendant, or otherwise determined by a Court, in respect of Plaintiff's claims against Defendant for the services based on –
>
> (a) the Defendant's liability to the Plaintiff in respect of consulting services at R456,00 per hour for an average of 140 hours per month from September 2002 with annual

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[2] As amended on 16 September 2009. The original particulars of claim of April 2008 are not in the record. The original particulars were amended in June 2008. The latter version attracted an exception which gave rise to the particulars of 16 September 2008.

escalations in accordance with industry standards to date of due termination of this agreement, which has not yet occurred;

(b) the Defendant's liability to the Plaintiff in respect of the managed care system at the rate of R4,92 plus VAT, per member per month, with annual escalations in accordance with industry standards from 1 May 2001.

54.2 Payment of the said amount to be determined was conditional upon –

(a) Plaintiff agreeing to assist Defendant in its defence of Diamond's claim;

(b) Plaintiff's claim being adjusted by any amount which the Court may determine that defendant was liable to pay to Diamond in respect of amounts claimed by Plaintiff.

55. In the premises, the amount of Plaintiff's claim in terms of the novated agreement, as aforesaid, would not become due and payable to Plaintiff until Diamond's claim against Defendant, as aforesaid, had been resolved.'

[8] On 3 November 2004 the plaintiff's attorney ('Nacerodien') wrote to the defendant's attorney ('Dawson') with a settlement proposal. The proposal was that the defendant immediately pay the plaintiff R9 271 721,78 in respect of capital and interest on his claim on the basis that Nacerodien would hold R3 million thereof in trust pending the outcome of the Diamond case. Alternatively, the defendant could hold back R3 million.

[9] This proposal was considered by the defendant's trustees at a meeting on 19 November 2004. They decided that nothing would be paid to the plaintiff until the Diamond case had been finalised, after which 'the quantum will be decided upon by the [trustees] and [the plaintiff's] claim will be looked at to see if he is entitled to it'. However, the principal officer would investigate whether funds should be released to the plaintiff in respect of the services actually rendered by him in June and July 2002.

[10] The outcome of the meeting was not initially communicated to the plaintiff. On 22 November 2004 Nacerodien wrote to Dawson, stating that the plaintiff's offer of settlement in the letter of 3 November 2004 had lapsed. He made enquiries regarding preparations for the Diamond case, urging Dawson to ensure there were no postponements. He said the plaintiff would be prejudiced by a postponement

‘due to the fact that it is now patently clear that your client is not willing to negotiate a settlement until the [Diamond] matter has been finally disposed of.’

[11] The plaintiff and his attorney met with Dawson and representatives of the defendant on 14 April 2005. At that meeting the defendant’s principal officer delivered a letter dated 5 April 2005, notifying the plaintiff of the decision taken at the meeting of 19 November 2004. Pursuant to the meeting of 14 April 2005, Nacerodien wrote to Dawson on 20 April 2005 regarding the defendant’s letter, expressing his amazement at this development, given that the plaintiff and he had understood the purpose of the meeting as being to discuss the quantum of the plaintiff’s claim. Nacerodien withdrew an earlier offer of settlement and made a new proposal.

[12] On 16 September 2005 the defendant paid the plaintiff’s June 2002 invoice under cover of a letter recording that the July 2002 invoice had not yet been approved for payment. On 20 October 2005 the defendant wrote to the plaintiff stating that the board had now investigated the July 2002 invoice and agreed to pay it in full settlement of the services rendered by him during that period. Payment was made at about that time.

[13] Nacerodien wrote to Dawson on 12 December 2005 regarding the two recent payments, stating that the plaintiff was uncertain what debts were being reduced thereby and setting out the plaintiff’s version as to his current claim as fully quantified.

[14] On 30 January 2006 the plaintiff wrote to the defendant, reiterating that his position was set out as in his attorney’s letter of 12 December 2005.

[15] On 31 March 2006 the defendant’s new attorneys, Mallinicks, wrote to Nacerodien, stating that during October 2005 the defendant had paid the plaintiff all outstanding amounts which might have been owing to him.

[16] The plaintiff’s summons, issued on 9 April 2008, was served on 21 April 2008. If this was the relevant date for interrupting prescription, the plaintiff’s claim

would have prescribed if it fell due on or before 21 April 2005. The plaintiff amended his particulars of claim during June 2008. The defendant excepted to the amended particulars of claim during July 2008. In terms of an agreed order the plaintiff was afforded an opportunity to amend his particulars again. The further amended particulars of claim were delivered on 16 September 2009. If the latter particulars of claim sought to enforce a different debt from the debt which was the subject of the original particulars of claim, the plaintiff's claim as amended would have prescribed if it fell due on or before 16 September 2006.

[17] I have already quoted the key allegations in the particulars of claim regarding the novated agreement. On the strength of the novated agreement, the plaintiff in his further amended particulars claimed the following relief:

'(a) [An order that] Defendant is bound to comply with the terms of the agreement concluded on 27 October 2004 between Plaintiff and Defendant;

(b) An order that the Defendant is liable to make payment to the Plaintiff for services, being –

(i) consulting services at R456,00 per hour for an average of 140 hours per month from September 2002, with annual escalations, to date of due termination of this agreement, which has not yet occurred;

(ii) the managed care system at the rate of R4,92 plus VAT, per month per member, with annual escalations from 1 May 2001;

(iii) interest on the said amounts at the rate of 15,5% per annum from due dates subject to the following deductions:

(aa) the amount of R130 507,20 paid to the Plaintiff by the Defendant in or about September/October 2005 in part payment of the Plaintiff's claims in respect of the novated agreement;

(bb) any amount which the Court may determine that the Defendant is liable to pay to Diamond in respect of amounts claimed by the Plaintiff.

(c) Costs of suit.'

The court a quo's judgment

[18] In its plea the defendant alleged that prescription started to run against the plaintiff on 27 October 2004, alternatively 22 November 2004, alternatively 14 April 2005. The court a quo found that prescription had started to run on 27 October 2004 or, if that was wrong, on 15 April 2005.

[19] As to the earlier prescription date, Binns-Ward J's reasoning can be summarised thus. Compliance with the novated agreement required that the plaintiff should either agree with the defendant the quantification of the amount the defendant was to pay him (subject to adjustment in the light of the outcome of the Diamond litigation) or submit the quantification to judicial determination. The plaintiff could choose either route. Prayer (a) was in the circumstances meaningless. Prayer (b) reflected the plaintiff's choice to submit the quantification to judicial determination. An agreed quantification or a judicial quantification were necessary prerequisites before the plaintiff would have an exigible claim against the defendant. The word 'debt' in the Prescription Act 68 of 1969 was not limited to monetary claims. The novated agreement's requirement for a judicial determination of quantum was analogous to a declaration in terms of s 64 of the Close Corporations Act 69 of 1984 that a person was personally liable for the corporation's debts because of fraudulent or reckless trading. Upon the conclusion of the agreement of 27 October 2004 the plaintiff had an immediate right to approach the court for a judicial determination of quantum. The correlative of this right was an obligation by the defendant to submit to the judicial determination, such obligation being a 'debt' for purposes of the Prescription Act.

[20] As to the alternative date of 14 April 2005, it will be recalled that on this date the plaintiff received the defendant's letter of 5 April 2005 which in turn communicated the trustees' decision of 19 November 2004. This included a decision that once the Diamond litigation had been finalised the quantum would be 'decided upon by the [board of trustees]' and that the plaintiff's claim would then be examined 'to see if he is entitled to it'. Binns-Ward J, after recording a concession by the plaintiff's counsel that prescription would start to run against the plaintiff from the date of a repudiation by the defendant of the novated agreement, examined whether

the letter of 5 April 2005 was a repudiation. He regarded the words I have quoted from the letter as being inconsistent with the novated agreement, because the defendant was (i) asserting a unilateral right to determine the quantum; (ii) stating that the plaintiff might not be entitled to anything at all (ie quite apart from the Diamond litigation).

[21] The plaintiff's primary contention before the trial judge was that prescription in respect of his claim against the defendant had not even started to run by the time summons was issued because the claim was conditional upon finalisation of the Diamond litigation, something which had not occurred by the time summons was issued. The trial judge, as will be apparent, rejected that contention and a further contention that the earliest date of repudiation was Mallinick's letter of 31 March 2006. He also rejected an alternative contention by the plaintiff that the payments of September and October 2005 had been admissions of liability which interrupted prescription. The payments, so the court held, reflected no more than an acceptance of the defendant's indebtedness to pay those two invoices for the services actually rendered in June and July 2002.

<u>The appeal</u>

[22] The parties maintained their respective positions in arguing the appeal.

[23] The critical question, so it seems to me, is the true import of the novated agreement pleaded by the plaintiff and the true nature of the relief he claims. On the merits, the defendant in its plea denied the conclusion of a novated agreement. If and when the merits come to be tried, questions may arise whether and to what extent the correspondence which followed the meeting of 27 October 2004 is or is not consistent with the alleged novated agreement. But that is not a question into which we can enter. The parties agreed for purposes of determining prescription that the novated agreement was concluded as alleged.

[24] In determining the true import of the novated agreement, one only has the allegations I have quoted from the particulars of claim, together with such

surrounding circumstances as one can glean from the documentation furnished as part of the agreed statement.

[25] The trial judge's premise was that the consensual or judicial determination contemplated by the novated agreement was something which was to happen immediately and did not need to await the outcome of the Diamond litigation. While that is one possible construction, I do not regard it as the only or the most likely one. Another view, the one I regard as more likely, is that the plaintiff could not enforce any part of the novated agreement until the Diamond litigation had been finalised.

[26] By way of the novated agreement, the parties agreed (i) the rates in accordance with which the plaintiff's entitlement would be quantified; (ii) that the claim so quantified would be adjusted downwards in the light of the Diamond litigation (meaning that the claim could not finally be quantified or enforced until the Diamond litigation was finalised); and (iii) that the plaintiff's entitlement to the adjusted amount was conditional upon his assisting the defendant in its defence of Diamond's claim. For convenience, I shall refer to element (i) as the first quantification step and element (ii) as the second quantification step. Although the reference to a consensual or judicial determination was pleaded as a term only in relation to the first quantification step, the reference to consensual or judicial determination is superfluous because parties with rights can always settle the content of those rights by agreement and can always turn to the courts if they are unable to agree. The second quantification step was also something which the parties could agree or which the plaintiff could ask the court to determine.

[27] Mr van Eeden, who appeared with Ms van Huyssteen for the defendant, submitted, if I understood him correctly, that the first quantification step did not simply involve a decision by the court (if they were disputed) on the annual escalation rates in accordance with industry standards and regarding membership numbers per month. The court, he said, might have to determine the starting rates per hour and per member. He said that para 54.1 alleged only that the first quantification step was to be 'based on' (ie but might differ from) the specified rates per hour and per member. I do not regard that as a plausible reading of the particulars of claim. The plaintiff does not allege in his particulars that the court was

required to determine starting rates in accordance with a contractual standard. Unless the starting rates alleged by the plaintiff in para 54.1 are understood as the starting rates agreed upon by the parties in terms of the novated agreement, there would be no basis for the court to make a determination at all. The court cannot make a contract for the parties. The contract would be void for vagueness. The ordinary meaning of para 54.1, in relation to the first quantification step, is that the parties agreed upon the starting rates and agreed upon an objective standard for escalations. The court's role would thus be the conventional one of quantifying the claim by reference to the terms of the contract.

[28] The novated agreement was one which was expected to result in payment of a single sum to the plaintiff. Any part of the agreement might become contentious. In regard to the first quantification step, there might be a dispute as to the annual escalation rates, requiring expert evidence about industry standards, as to the number of members at any given time and as to when the plaintiff's appointment was terminated. As to the second quantification step, there might be a dispute as to the extent of the overlap between the plaintiff's claim and any part of Diamond's claim which succeeded. There might be a dispute as to whether the plaintiff had properly assisted the defendant in its defence of Diamond's claim. The defendant's approach, which the trial judge accepted, requires one to find that the parties intended, by way of the novated agreement, that various aspects of their agreement, if contentious, would have to be dealt with in stages by way of different proceedings. Since the novated agreement envisaged a single net payment to the plaintiff, the more natural understanding of the novated agreement as pleaded is that the agreement had no exigible content until the conditions (finalisation of the Diamond litigation and the plaintiff's rendering of assistance in such litigation) were fulfilled. At that point each side could take their own view as to the amount, if any, payable to the plaintiff and the plaintiff would be able to sue for payment if the defendant did not agree with his view of the claim.

[29] It would not only be inconvenient to have multiple cases about different parts of the novated agreement. A judicial determination of the first quantification step might even turn out to have been altogether unnecessary. This might be the case if, once the Diamond litigation was finalised, it transpired that the plaintiff had not

properly assisted the defendant in defending Diamond's claim. And at least theoretically, there might be a complete overlap between Diamond's entitlement and the amount determined pursuant to the first quantification step, reducing the plaintiff's claim to nil. Furthermore, the parties' attitude to the first quantification step and the resources they would be willing to commit to litigation on that issue might well be affected by whether the Diamond deduction was large or small.

[30] There is another consideration in favour of my interpretation. In terms of the novated agreement, the parties agreed the starting rates at which the plaintiff's claim would be calculated. The novated agreement recorded that there had as yet been no termination of the plaintiff's right to remuneration for rendering benefit management services. The escalation rates would change from year to year. The escalation rates applicable, for example, in 2005 or 2006 could not have been judicially determined on 27 October 2004. And unless one knew the period of the calculation (the terminal date of which, as at 27 October 2004, lay in the future), one could not determine the amount contemplated in the first quantification step.

[31] In para 54.2(b) of the particulars of claim the novated agreement was said to be conditional upon the plaintiff's claim being adjusted 'by any amount which the Court may determine that Defendant was liable to pay to Diamond in respect of amount claimed by Plaintiff'. Up to now I have assumed that the contemplated judicial determination was only specifically pleaded in relation to the first quantification step. However, if the word 'Court' in para 54.2(b) of the particulars of claim refers to the court hearing the plaintiff's claim against the defendant rather than the court hearing Diamond's claim against the defendant, it would strengthen the conclusion that, in the absence of agreement, a single judicial determination of all disputed aspects of the plaintiff's claim under the novated agreement was envisaged. In any event, and regardless of what 'Court' the plaintiff was referring to in para 54.2(b), the fact is that even though the defendant's liability to Diamond would be determined by another court in separate proceedings, only the court hearing the present action could determine how much of the sum awarded to Diamond overlapped with the plaintiff's claim against the defendant (ie how much thereof was 'in respect of amounts claimed by Plaintiff' – see para 54.2(b) of the particulars of claim). So inevitably (in the absence of agreement thereon) the court

hearing the plaintiff's claim would have to determine the second quantification step as well as the first.

[32] The assumption made by the trial judge as to the true import of the novated agreement may have been influenced by his view of the relief the plaintiff was claiming. He regarded prayer (a) as meaningless and said that prayer (b) was a claim for the judicial determination of what I have called the first quantification step. If that was a correct understanding of the relief, it might have been a legitimate consideration in construing the true import of the novated agreement as pleaded. A pleading, like any other document, must be read as a whole. I see the force of the view that if a plaintiff claims particular relief one should if possible construe his allegations regarding the foundational agreement as entitling him to that relief.

[33] However, I do not share the trial judge's view of the relief claimed. If the plaintiff had been claiming a judicial determination of the first quantification step, I would have expected him to allege the quantified amount. To do so, he would have needed to make allegations regarding the period of the calculation, the annual escalation rates and membership numbers and then applied those escalation rates and membership numbers to the starting rates specified in the novated agreement for the full period of the calculation, thereby arriving at a lump sum from which, in due course, the Diamond adjustment would be deducted. But this is not what the plaintiff pleaded in the amended particulars of claim. He made no allegations regarding the period for which the calculation was to be made or the escalation rates or membership numbers nor did he state what the result of the first quantification step was. In essence, prayer (b) simply repeats the terms of the novated agreement pleaded in para 54, adding that the defendant will also be entitled to a further deduction arising from the payments of September and October 2005 but omitting the condition as to his assisting the defendant in the Diamond case. (The latter omission must have been an oversight because the particulars of claim expressly aver this condition.)

[34] In my view, prayers (a) and (b) are in truth prayers for declaratory orders directed at establishing the existence and terms of the novated agreement. This conclusion flows not only from the particulars of claim as a whole but also from the

circumstances in which the summons was issued. The problem was not that the parties had failed to reach agreement on escalation rates or membership numbers (the only aspects which, apart from the period of the calculation, could have affected the first quantification step). The problem was more fundamental. Mallinicks had stated in their letter of 31 March 2006 that the defendant had finally settled any liability it might have had to the plaintiff. If there was no repudiation prior to that date, this letter certainly was a repudiation. It was irreconcilable with the existence of the novated agreement. And so the plaintiff issued summons to establish the existence and terms of the novated agreement.

[35] The defendant's counsel referred in argument to the form the particulars of claim took prior to the exception. He submitted that the amendments made pursuant to the exception indicated that prayer (b) was a claim for the judicial determination of the first quantification step. He drew our attention, in particular, to the fact that in the earlier version (the first amended particulars of claim) the plaintiff had pleaded that the debts due by the defendant to the plaintiff would only become 'due and payable' once Diamond's claim had been resolved whereas in the further amended version the words 'due and' were omitted. The reason for this alteration is to me obscure. The word 'due' usually has the same meaning as 'payable'. If the plaintiff used the word 'due' not in this sense but as meaning 'owing though not yet payable' (as to which, see *Nel No v Body Corporate of the Seaways Building & Another* 1996 (1) SA 131 (A) at 136G-137E), the deletion of the words 'due and' might suggest that the plaintiff viewed the money as owing though not yet due. That, however, would make no sense in the context of a pleading which specifically alleged that the final amount could only be determined after the finalisation of the Diamond litigation and was only payable if the plaintiff assisted the defendant in its defence of Diamond's claim.

[36] In any event, the words 'due and payable' and later 'payable' were not used by the plaintiff in respect of the determination of the first quantification step but with reference to the net sum which the defendant in due course would or might have to pay the plaintiff. The amendments do not seem to have been made with a view to justifying an immediate judicial determination of the first quantification step. On the contrary, whereas the plaintiff in his original and first amended particulars of claim

indeed quantified his claim, this quantification was deleted pursuant to the exception. In para 68 of the earlier versions of the particulars of claim the plaintiff alleged an entitlement to consulting fees of R5 288 472,97, managed care system fees of R23 380 268,21 and interest of R24 948 273,83. In prayer (b) he sought an order that the defendant was 'bound to make payment' to him of those amounts. In the further amended particulars of claim he deleted this quantification and instead made the claim reflected in the amended prayer (b) I quoted earlier.

[37] This explanation (ie the declaratory nature of the relief sought) also provides the answer to another point which might be raised. At first blush, there might appear to be an inconsistency between (i) a conclusion that the plaintiff was not entitled to sue on any part of the agreement until finalisation of the Diamond litigation, something which had not occurred by the time summons was issued and (ii) the recognition of the plaintiff's action as being properly before the court. The short answer is that the plaintiff's claim is not one for specific performance of the novated agreement but for a declaratory order as to the existence and terms of the novated agreement. In terms of s 19(1)(a)(iii) of the Supreme Court Act 59 of 1959, which was the legislation in force when the summons was issued, and in terms of s 21(1)(c) of the Superior Courts Act 10 of 2013, the High Court has the discretion, at the instance of an interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

[38] Where the existence of a contract is in dispute, a party to the alleged contract may thus approach the court to declare the existence and terms of the contract even though the contract is subject to a suspensive condition or the date for performance has not yet arrived. In such a case prescription will not yet have started to run in respect of the debt created by the contract, because the debt will not yet be 'due' within the meaning of s 12(1) of the Prescription Act.

[39] The procedural right to seek declaratory relief in respect of disputed future or contingent rights does not have a debt as its correlative and is not subject to prescription. A party to a disputed contract is not obliged to seek declaratory relief and the court has a discretion whether or not to grant it. The party may prefer to wait

until (on his view of the matter) the debt created by the contract is due and then sue for specific performance. Furthermore, a party will generally not be entitled to approach a court for declaratory relief unless the future or contingent right is disputed. In the present case, for example, the plaintiff could not have been expected to seek declaratory relief on 27 October 2004, the very date on which the novated agreement was concluded, because at that stage (on the facts we must assume for purposes of prescription) the existence and terms of the novated agreement were not in dispute. A dispute in respect of future or contingent rights may, in contracts with a long-term horizon, only come into existence more than three years after the contract was concluded.

[40] The defendant's counsel referred us to *Cape Town Municipality & Another v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C). In that case Howie J (as he then was) held that an action for a declaratory order that the defendant insurer was liable to indemnify the plaintiff for its loss was a process whereby the creditor claimed payment of the debt, even though the plaintiff did not quantify its loss and claim a monetary amount and even though subsequent proceedings would be needed to do so. In that case the debt was already due for purposes of prescription by the time the plaintiff issued summons for declaratory relief. The three-year period expired while the claim for declaratory relief was pending. Nothing decided in that case militates against my conclusions in the present case. In particular, there was no suggestion that the procedural right to claim declaratory relief was itself a right which could prescribe. The question was whether the right to an indemnity under the insurance contract, and the correlative debt owed by the insurer, had or had not prescribed. (It is unnecessary to decide whether the decision in *Cape Town Municipality* would also apply in the present case, given that here the action for declaratory relief was instituted before any debt owed by the defendant to the plaintiff fell due.)

[41] As I have mentioned, the trial judge considered that the judicial determination which the plaintiff was seeking in prayer (b) was akin to a declaration of liability for reckless trading in terms of s 64(1) of the Close Corporations Act. On the question of prescription in relation to the latter type of claim, he cited *Burley Appliances Ltd v Grobbelaar NO & Others* 2004 (1) SA 602 (C). For the proposition that a 'debt' did

not necessarily entail positive performance by a debtor but could include a liability to submit to a judicial determination, he referred to *Duet and Magnum Financial Services CC v Koster* 2010 (4) SA 499 (SCA). *Burley* and *Duet* concerned statutory remedies relating to liability for reckless trading and voidable dispositions. In both cases the point was made that in terms of the relevant statutory provisions a debt in the form of liability to make positive performance (to pay the debts of the company/corporation, to restore property received pursuant to voidable disposition and so forth) only comes into existence upon the making by the court of a declaration that the person is liable for the debts of the company/corporation or of an order setting aside the disposition. Nevertheless, so these cases held, the liquidator/trustee has a claim to seek such a declaration as soon as the circumstances entitling the liquidator or trustee to assert the statutory remedy are in place, the correlative of which claim is the liability of the defendant to have such a declaration made against him. This latter ‘passive’ liability, which in itself calls for no performance by the defendant, is distinct from, and pre-dates, any debt created by the court’s declaration and is a ‘debt’ itself capable of prescribing.

[42] On the view I take of the novated agreement as pleaded, the plaintiff was not seeking a determination of the first quantification step but a declaration of the existence and terms of his conditional contract. Even by analogy, therefore, *Burley* and *Duet* are not relevant. I should add, though, that I do not in any event regard the analogy as sound. In terms of the novated agreement, the first quantification step does not involve the exercise of a judicial power by which a new debt is created. The novated agreement itself created a conditional debt (the liability to pay the final net amount). The first quantification step is simply one stage in determining the net amount of that debt. If, for example, the Diamond litigation had been finalised by the end of 2004, the plaintiff could have issued summons at the beginning of 2005 for the net amount allegedly due to him. In his particulars he would have needed to make allegations regarding the first and second quantification steps and regarding the fulfilment of the condition of providing assistance to the defendant in the Diamond case. The court at the end of the trial would have decided all the issues and ordered a net amount to be paid. It is not an uncommon occurrence in contractual or delictual claims for money that a court will need to decide various steps in the computation process.

[43] In *Bester NO & Others v Schmidt Bou Ontwikkelings CC* 2013 (1) SA 83 (SCA) Brand JA doubted (para 14) whether Nugent JA in *Duet* had really intended to extend the meaning of the word 'debt' beyond that which was attributed to the term in cases like *Oertel en Andere NNO v Direkteur van Plaaslike Bestuur & Andere* 1983 (1) SA 354 (A) and *Desai NO v Desai & Others* 1996 (1) SA 141 (A), namely 'an obligation to do something or to refrain from doing something'. At any rate, so he held (para 14), the liability of a person to submit to a judicial determination regarding the rectification of a contract or of a title deed or of a company's register of members was not a liability within the extended meaning given in *Duet*. This shows that not every circumstance in which a person is required to submit to a judicial determination is accompanied by a 'debt' owed by such person within the meaning of the Prescription Act. Caution should thus be shown in applying *Burley* and *Duet* beyond the type of case with which they specifically dealt, namely a statutory remedy available upon the occurrence of certain events but which would not call for positive performance by the person targeted by the remedy in the absence of a court order.

[44] In a general sense, parties to contracts always have a liability to submit to the judicial determination of the issues arising from the contract (I leave aside cases of arbitration and expert determination which displace usual recourse to the courts). However, the fact that some issue relevant to a conditional claim is capable of immediate determination does not mean that there is a presently subsisting and unconditional debt in the form of a passive liability of the parties to submit to an immediate judicial determination of that particular issue. One does not divide up a determination of the various issues which arise in respect of a single claim in this way. No issue which needs to be decided in relation to a single claim can 'prescribe' separately from the single claim and its correlative debt.

[45] Accordingly, even if the novated agreement in the present case *entitled* the plaintiff to seek a judicial determination of the first quantification step prior to the right to payment becoming unconditional, he was not *obliged* to seek such a determination separately from seeking payment of the net amount. His right to have the first quantification step determined as part of the process of ultimately claiming the net amount could not prescribe prior to the claim for the net amount itself.

[46] If the above conclusions are right, the defendant's debt to the plaintiff arising from the novated agreement was not due for purposes of prescription when the summons was issued or when the particulars of claim were further amended in September 2009. (In para 56 of the amended particulars of claim the plaintiff pleaded that Diamond's action against the defendant had not yet come to trial or been settled or resolved 'and, accordingly Plaintiff's claim has not yet become payable'.) The defence of prescription should thus have been dismissed.

[47] The question of repudiation was a red herring. In particular, the concession which the plaintiff's counsel made in the court quo, that prescription started to run on the date of repudiation (which the plaintiff said was on 31 March 2006), was incorrect. Since it was a concession on a legal question, the plaintiff and this court are not bound by it. An unaccepted repudiation has been said to be 'a thing writ in water', having no effect on the rights and obligations of the parties (*Culverwell & Another v Brown* 1990 (1) SA 7 (A) at 28D-F; see also *Comwezi Security Services (Pty) Ltd & Another v Cape Empowerment Trust Ltd* [2014] ZASCA 22 para 11). If a repudiation is accepted and the contract cancelled, the repudiation is part of the aggrieved party's cause of action in respect of rights flowing from the cancellation, though even then prescription runs not from the date of repudiation but from the date of the aggrieved party's election to cancel the contract (*HMBMP Properties Pty Ltd v King* 1981 (1) SA 906 (N); Christie *The Law of Contract in South Africa* 6th Ed at 506).

[48] In the present case, the plaintiff did not accept the repudiation and terminate the novated agreement. He evidently intends to seek specific performance thereof in due course. In the meanwhile, he seeks a declaratory order as to the existence and terms of the novated agreement. The defendant's repudiation has no bearing on the question of prescription. There is thus no need to determine whether the defendant's letter of 5 April 2004 amounted to a repudiation.

[49] In the light of my conclusion, it is likewise unnecessary to decide whether the payments made in September and October 2005 interrupted prescription though I would not have differed from the trial judge on that question.

[50] The following order is thus made:

(a) The appeal succeeds with costs.

(b) The order made in the court quo is set aside and replaced with the following order: 'The special plea of prescription is dismissed with costs.'

ALLIE J

STEYN J

ROGERS J

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