

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No: HC-MD-CIV-ACT-DEL-2017/02947

In the matter between:

**OMARURU MUNICIPALITY COUNCIL**

**PLAINTIFF**

and

**PAUL E GANASEB**

**DEFENDANT**

**Neutral citation:** *Omaruru Municipality Council v Ganaseb* (HC-MD-CIV- ACT-DEL 2017/02947) [2020] NAHCMD 22 (16 January 2020)

Coram: **PRINSLOO J**

Heard: 6 - 10 May 2019; 19 June 2019 and 16 September 2019

Delivered: 16 January 2020

Reasons: 24 January 2020

**Flynote:** Civil – Local Authorities Act 23 of 1992 – Damages for breach of a fiduciary duty – Whether or not the defendant acted negligently, wrongfully and in

breach of his fiduciary obligations towards the plaintiff arising from contract, statute or the common law

Civil – Special pleas of prescription and limited liability in terms of s 33 of the Local Authorities Act raised and therefor merits not considered

*Prescription* – Defendant claims that plaintiff's claim prescribed in terms of s 11 of the Prescription Act 68 of 1969 – Court held that the 'debt' which formed the basis of the plaintiff's claim became due when the breach of fiduciary duty allegedly giving rise to its claim for damages occurred – Court further held that s 12 (3) of the Prescription Act requires knowledge only of the material facts from which the debt arises for the prescriptive period to begin running – it does not require knowledge of the relevant legal conclusions (i.e. that the known facts constitute negligence) or of the existence of an expert opinion which supports such conclusions

*Limited liability* – Court held that the purpose of s 33 of the Local Authorities Act is to limit the liability of a local authority council, any member of a local authority council or any officer or employee against claims of third persons. The protection was extended to the defendant in the execution of his duties and doing so in good faith, however the limitation does not extend to an employer/employee relationship

**Summary:** The plaintiff is Omaruru Municipality Council and the defendant is Paul Edward Ganaseb, formerly employed by the plaintiff as the Chief Executive Officer. The defendant, in his capacity as Chief Executive Officer, was appointed in terms of s 27 of the Local Authorities Act. In terms of s 27 the defendant was subject to the control and directions of the plaintiff and responsible for carrying out the decisions of the plaintiff and the administration of the affairs of the plaintiff. It is the case of the plaintiff that a fiduciary relationship between the plaintiff and the defendant existed. The plaintiff pleads that during or about 19 December 2012 the defendant, without the plaintiff's knowledge or authorization and contrary to an instruction from the plaintiff to effect payment that was then indebted to Rebirth in the amount of N\$ 86 590.43 for

construction work performed in terms of a project, approved payment or caused payment in the amount of N\$ 1 162 247.50 to be approved in favor of the aforesaid Rebirth and as a result caused payment in the amount of N\$ 962 247.50 to be paid out of the plaintiff's account to Rebirth in respect of the aforementioned project. It is the plaintiff's case that the defendant's conduct was a breach of all, alternatively one or more of his obligations towards the plaintiff and that the defendant is therefore liable to the plaintiff in the amount of N\$ 962 247.50

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### ORDER

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1. The special plea in respect of prescription in terms of the Prescription Act 68 of 1969 is upheld.
2. The special plea in respect of limitation of liability in terms of s 33 of the Local Authorities Act is dismissed.
3. Cost to follow the result.

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### JUDGMENT

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PRINSLOO J:

Introduction:

[1] The parties before me are Omaruru Municipality Council<sup>1</sup>, a juristic person, duly constituted and established under s 6 read with s 2, 3 and other relevant sections of the

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<sup>1</sup> Plaintiff's citation was amended by virtue of an amendment to the particulars of claim effected on 16 September 2010.

Local Authorities Act<sup>2</sup> (the Act) and Paul Edward Ganaseb, an adult male, formerly employed by the plaintiff as the Chief Executive Officer.

[2] The defendant, in his capacity as Chief Executive Officer, was appointed in terms of s 27 of the Act. In terms of s 27 the defendant was subject to the control and directions of the plaintiff and responsible for carrying out the decisions of the plaintiff and the administration of the affairs of the plaintiff.

### Background

[3] In order to place the particulars of claim and the subsequent plea and special plea thereto in context it is important to set out the background of the matter and briefly summarize the facts that gave rise to the claim that was leveled against the defendant:

- (a) Telios Namibia Consulting Engineers ("Telios"), an engineering company, was appointed by the Ministry of Regional and Local Government, Housing and Rural Development on 21 May 2012 to design roads, water and sewer works as a project of the Omaruru Municipality.
- (b) The go-ahead to proceed with TIPEEG Project NO. TP 12012OM for the Equipment-based construction of Ozondje suburb streets in Omaruru was given during a meeting which was held between the plaintiff's council and Telios on 7 August 2012.
- (c) The civil design of the project was done by Telios and was advertised for tender twice. For the first tender that was advertised on 17 August 2012 no contractor was appointed because they were all considered to be too expensive. The tender was then re-advertised on 21 September 2012 and a compulsory site visit took place on 27 September 2012 in Omaruru. Tenders were brought by several contractors including Rebirth Investment CC (Rebirth). After the second tender evaluation, Rebirth was recommended by the consultant and approved by the plaintiff and the project was awarded to

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<sup>2</sup> 23 of 1992.

- Rebirth on 7 November 2012 by the Omaruru Local Tender Board. The contract value of the project was N\$ 5 251 601.50.
- (d) Telios, on behalf of the plaintiff, prepared an appointment letter for Rebirth. Rebirth had to provide a letter of acceptance to undertake the project within 24 hours from receiving the appointment letter. In addition thereto the contractor, Rebirth, was required to provide the Program of Works and a 10% Performance Guarantee.
- (e) On 9 November 2012 at Telios' Office in Windhoek the plaintiff, represented by the defendant, concluded a written contract of agreement, TIPEEG Project NO TP 12012OM with Rebirth.
- (f) Rebirth had to provide the Program of Works and the 10% Performance Guarantee within 5 working days. Rebirth was unable to comply and requested an extension of time to obtain the Performance Guarantee. Rebirth was allowed to continue with the site establishment while it prepared the Program of Works and while awaiting feedback from the financial institution to which it applied for the contract guarantee.
- (g) The initial work of the site establishment was deemed to have started the day of signing the contract, which was the 9<sup>th</sup> of November 2012, but this apparently did not happen. The contractor, Rebirth, started with the work a week later.
- (h) Rebirth failed to provide the 10% Performance Guarantee and the Program of Works as agreed and was instructed to have the program ready during the official site handover on 22 November 2012, which it failed to do yet again but eventually managed to produce the Program of Works and handed it over to Telios. On 22 November 2012 no site establishment was done yet and by 13 December 2012 only the clearing and grubbing of the site was done.
- (i) The relevant terms of the agreement between the plaintiff and Rebirth provided that (in summary):
- i. in consideration for the payment to be made by the plaintiff to Rebirth, the latter will complete and maintain the works in conformity with the stipulations of the contract;

- ii. the contract price will be paid at the times and in the manner prescribed by the contract. The amount to be paid to Rebirth for the due performance of the work shall be a sum to be determined from the quantity of work actually carried out at the rate and sums shown in the Schedule of Quantities;
  - iii. all payments in terms of the tender notice and the schedule of quantities in respect of the contract shall be issued directly to Telios on behalf of the plaintiff;
  - iv. all invoices were to originate from Rebirth and submitted to the consultant, Telios, who would verify the correctness of the invoices and approve or disapprove the said invoices. If approved then the invoice is sent by the consultant to the client, plaintiff, for payment.
- (j) On 19 December 2012 the defendant authorized payment in the amount of N\$ 1 162 247.50 in favor of Rebirth and payment in the amount of N\$ 962 247.50 was duly effected in favour of Rebirth on 29 December 2012.
- (k) The contract with Rebirth was subsequently terminated on 5 March 2013 after the council of the plaintiff agreed thereto and the plaintiff took over the execution of the project, which was finalized in November 2013.
- (l) A ministerial investigation was conducted regarding the payment to Rebirth (and other various matters) during the period 28 April 2013 to 11 May 2013. A report was made available to the Minister and then to the council through a letter during June 2013. In a further letter by the Minister the council was directed to table the said report on or before 12 August 2013.
- (m) The defendant was suspended on 24 December 2013.
- (n) The plaintiff instituted disciplinary proceedings against the defendant on 4 November 2015. This disciplinary hearing was conducted between 18 January 2016 and 29 June 2016. On 4 April 2017 the defendant was found guilty of eight of the ten charges levelled against him. On 12 April 2017 the Chairperson of the Disciplinary Committee recommended that dismissal would be the appropriate sanction in respect of some of the charges and a

- final warnings in respect of others. However, at the time of the recommendation the defendant's contract with the plaintiff already came to an end. The recommendation to dismiss the defendant was however confirmed by the plaintiff's council on 27 April 2017.
- (o) No civil action was instituted by the plaintiff against Rebirth in respect of payment of the amount of N\$ 962 247.50, apparently by choice of the plaintiff.
  - (p) The proceedings *in casu* were instituted against the defendant on 16 August 2017.

Pleadings:

[4] It is the case of the plaintiff that a fiduciary relationship between the plaintiff and the defendant existed, the terms of which were, *inter alia*:

- (a) When rendering his services to the plaintiff, the defendant was required to ensure he performed his duties in good faith and that same in no way detract from the relationship of trust that existed between the parties.
- (b) The defendant was under a duty and obligation not to work against the plaintiff's interest.
- (c) The defendant was under the duty and obligation to give priority to the interest of the plaintiff at all times.
- (d) The defendant was under a duty and obligation to follow lawful instructions and directives provided to him by the plaintiff.

[5] The plaintiff pleads that during or about 19 December 2012 the defendant:-

- (a) Without the plaintiff's knowledge or authorization; and
- (b) Contrary to an instruction from the plaintiff to effect payment that was then indebted to Rebirth in the amount of N\$ 86 590.43 for construction work performed in terms of TIPEEG Project No: TP 012012OM;

approved payment or caused payment in the amount of N\$ 1 162 247.50 to be approved in favor of the aforesaid Rebirth and as a result caused payment in the amount of N\$ 962 247.50<sup>3</sup> to be paid out of the plaintiff's account by means of an electronic funds transfer to Rebirth in respect of the aforementioned project.

[6] It is the plaintiff's case that the defendant's conduct was a breach of all, alternatively one or more of his obligations as set out in paragraph 4 supra and that the defendant is therefore liable to the plaintiff in the following terms:

- (a) Payment in the amount of N\$ 962 247.50.
- (b) Interest on the aforesaid amount at the rate of 20% per annum a *tempore morae* to date of final payment thereof.
- (c) Cost of suit; and
- (d) Further and/or alternative relief.

#### *Special pleas raised*

[7] In answer to the claim levelled against the defendant he raised two special pleas, namely one of prescription and one of limited liability in terms of s 33 of the Local Authorities Act

#### Prescription

[8] The defendant pleaded that the plaintiff's claim is an action for damages based on breach of contract that occurred on 19 December 2012 and that the plaintiff became aware of this claim either at the earliest 19 December 2012 when the payment was made or at the latest in May/June 2013 when an investigation report was obtained, therefor the plaintiff's claim fell due on these dates.

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<sup>3</sup> N\$ 1 162 247.50 less N\$200 000 held in retention.



[9] The defendant pleaded that the payment to Rebirth was authorized on 19 December 2012 and that the contract was subsequently terminated on 5 March 2013 after the plaintiff agreed thereto. The plaintiff subsequently took over execution of the project from Rebirth which it finalized in November 2013. The defendant further pleaded that the plaintiff conducted an investigation on the issue of the Rebirth payment during the period 28 April 2013 to 11 May 2013 and obtained a report. The plaintiff however only issued summons on 16 August 2017, which is more than three years after the date upon which the claim arose and therefor the plaintiff's claim prescribed in terms of s 11 of the Prescription Act 68 of 1969<sup>4</sup>.

### Limitation of liability

[10] On the special plea of limited liability the defendant pleaded that he joined the plaintiff on 9 May 2012 in the capacity of Chief Executive Officer for a duration of five years and was thus an employee of the plaintiff at the time of the cause of action and therefore covered by the limitation of liability provision under s 33<sup>5</sup> of the Act. Defendant pleaded that in terms of s 33 of the Act no compensation shall be payable by any officer or employee employed in carrying out the provisions of the Act in respect of any act done in good faith.

### *Defendant's plea on the merits*

[11] The defendant pleads that integral to his general conditions of employment he was accorded the express, alternatively implied authority which vested certain

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<sup>4</sup> **Periods of prescription of debts**

**11.** The periods of prescription of debts shall be the following:

(a) . . . ;

(b) . . . ;

(c) . . . ;

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.

<sup>5</sup> **Limitation of liability**

**33.** Subject to the provisions of this Act, no compensation shall be payable by a local authority council, any member of a local authority council or any officer or employee employed in carrying out the provisions of this Act in respect of any act done in good faith under this Act.

discretionary powers in him which included making decisions in the circumstances required.

[12] The defendant admitted that he authorized the payment of the amount of N\$ 1 162 247.50 (less N\$ 200 000 held in retention) in favor of Rebirth but denied that he did not possess the authority to approve or cause to approve said amount. The defendant further denies that he received any instructions, either written or oral that the plaintiff was only indebted to Rebirth in the amount of N\$ 86 590.43. The defendant pleaded that at the relevant time he was both the Chief Executive Officer as well as the accounting officer of the plaintiff and he never received an instruction from any council members not to make the relevant payment to Rebirth.

[13] The defendant pleaded that the payment of the amount in issue was effected to Rebirth as a result of an invoice submitted by Rebirth to the Plaintiff. The defendant however denies that in approving the amount of N\$ 962 247.50 and authorizing the transfer to Rebirth he acted negligently, wrongfully or in breach of any or all of his fiduciary duties to the plaintiff, whether arising from contract, statute or common law. The defendant pleaded that he acted within the ambit of the wishes of the then council of the plaintiff but is now targeted due to the non-performance by Rebirth and because there is now a new council for the plaintiff.

[14] In amplification the defendant pleads that during the takeover of the project by the plaintiff in March 2013 the accounts regarding Rebirth were scrutinized and plaintiff settled all monies due to the creditors of Rebirth yet summons was only issued in August 2017.

#### *Replication*

[15] In replication the plaintiff denied that the action against the defendant became prescribed. The plaintiff pleaded that the debt became due in accordance with s 12(1)<sup>6</sup>

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<sup>6</sup> **When prescription begins to run**

of the Prescription Act on 4 April 2017, being the date upon which the finding of the disciplinary inquiry into the defendant's conduct had been made known to the plaintiff.

[16] As for the special plea of limited liability the plaintiff denies that s 33 of the Act finds applicability in the present instance as the *lis* arose from an employment relationship between the parties. The plaintiff denies that the defendant acted in good faith and/or in accordance with the provisions of the Act and that the plaintiff's claim arises from the breach of the fiduciary duty the defendant owed to the plaintiff resultant from his contract of employment. It is the case of the plaintiff that as a result the defendant is personally liable without any limitation of liability or claim being expunged and replaced with an alternative and statutory prescribed claim dispensation and process.

#### Determination of issues

[17] Consequent to the parties' joint pre-trial report dated 17 October 2018 a pre-trial order dated 25 January 2019 was issued by this court and the following issues of law arose for determination:

- (a) Whether or not the plaintiff's action against the defendant has prescribed in terms of s 11 of the Prescription Act;
- (b) Whether or not the defendant is entitled to the protection afforded by s 33 of the Act;
- (c) On the merits, whether or not the defendant acted negligently, wrongfully and in breach of his fiduciary obligations towards the plaintiff, arising from contract, statute or the common law, and more specifically:
  - i. whether or not the defendant was authorized to make the payment to Rebirth;

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**12.** (1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.

- ii. whether or not the defendant acted with the knowledge or authorization of the plaintiff when it authorized the payment to Rebirth; and
- iii. whether or not the defendant acted *bona fide* and in the interest of the plaintiff and within the ambit of the wishes of the plaintiff when he made the payment in question.

[18] I find it appropriate to deal with the special pleas raised first which would dictate whether I will proceed to discuss the merits of the matter or not, especially in light of the fact that the special pleas are extinctive in nature.

#### Arguments advanced in respect of prescription

##### *On behalf of the plaintiff*

[19] On behalf of the plaintiff Mr Muhongo advanced the argument that the payment effected to Rebirth was authorized on 19 December 2012. The plaintiff only acquired the knowledge of the entire set of facts on 4 April 2017 when the defendant was found guilty of misconduct during the disciplinary proceedings (for negligence in respect of the payment) and that over and above the plaintiff took reasonable steps to apprise itself of the facts that gave rise to the particulars of claim.

[20] The court was referred to *Central Technical Supplies Engineering Services v Khomas Aluminium and Glass*<sup>7</sup> wherein the court made a distinction between when the debt arises and when the debt is due and payable. Mr Muhongo, counsel for the plaintiff, argued that the debt did not arise on 19 December 2012 when the payment was authorized or when the payment was effected but arose on 4 April 2017 when the defendant was found guilty of misconduct. He further submitted that prescription also did not run from the time that the payment was flagged by the investigation conducted,

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<sup>7</sup> (I 2242-2015) [2018] NAHCMD 76 (29 March 2018).

nor did it start to run from the date of the defendant's suspension but only started to run when the plaintiff established the defendant's breach of his fiduciary duties.

[21] Mr Muhongo further argued that the *sui generis* nature of the action renders the ascertainment of the breach by the plaintiff condign before the institution of legal proceedings for the recovery of the losses and or damages suffered. This, having regard to the terms of the employment agreement between the plaintiff and the defendant and the import of the Labour Act<sup>8</sup> the special plea stands to be dismissed.

*On behalf of the defendant*

[22] Mr Kasper, counsel for the defendant, argued that the plaintiff's action is based on a delict<sup>9</sup> which arose on 19 December 2012 regardless of how the plaintiff wishes to tailor its argument. He argued that the proposition advanced on behalf of the plaintiff that it had to wait for the institution and completion of the disciplinary proceedings, despite having the knowledge regarding the payment in question, is absurd.

[23] Mr Kasper argued that the institution of the claim against the defendant could never have been dependant on the institution and finalization of the disciplinary proceedings. Simply put, the civil claim *in casu* is independent of any disciplinary hearing and could run parallel to each other. He further argues that as a matter of fact the plaintiff proceeded to institute criminal proceedings against the defendant without waiting for the finalization of the disciplinary proceedings and the plaintiff instituted the said criminal proceedings with the information it had at its disposal.

[24] Mr Kasper further argued that there are known instances of interrupting the running of prescription in terms of our law and in this regard the court was referred to s 15<sup>10</sup> of the Prescription Act and submitted that as this Act is specific as to the instances

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<sup>8</sup> 11 of 2007.

<sup>9</sup> With reference to the case number under which the claim was filed ie HC-MD-CIV-ACT-DEL-2017/02947. Acronym of DEL in the case number refers to 'delict'.

<sup>10</sup> **Judicial interruption of prescription**

in which prescription will be interrupted, the initiation of disciplinary proceedings is not contemplated nor catered for therein.

[25] Counsel further submitted that in spite of the purported delictual nature of the matter (with reference to the case number) the overwhelming circumstances of the case sees it falling within the parameters of s12 (3)<sup>11</sup> and what is central to the matter is that in terms of this section the creditor shall be deemed to have such knowledge of the identity of the debtor and of the facts from which the debt arises if he could have acquired it by exercising reasonable care. Mr Kasper submitted that the plaintiff became aware of the payment as of 19 December 2012 when the payment was made, but if that proposition does not prevail then the information regarding the payment without knowledge and authorization of the plaintiff would have come to the knowledge of the plaintiff at the latest in May/June 2013 when an investigation report of the Ministerial Investigation Committee was obtained by the plaintiff, calling for an explanation from the plaintiff's council on the expenditure of the amount of N\$ 962 247.50.

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(1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.

(2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.

(3) If the running of prescription is interrupted as contemplated in subsection (1) and the debtor acknowledges liability, and the creditor does not prosecute his claim to final judgment, prescription shall commence to run afresh from the day on which the debtor acknowledges liability or, if at the time when the debtor acknowledges liability or at any time thereafter the parties postpone the due date of the debt, from the day upon which the debt again becomes due.

(4) If the running of prescription is interrupted as contemplated in subsection (1) and the creditor successfully prosecutes his claim under the process in question to final judgment and the interruption does not lapse in terms of subsection (2), prescription shall commence to run afresh on the day on which the judgment of the court becomes executable.

(5) If any person is joined as a defendant on his own application, the process whereby the creditor claims payment of the debt shall be deemed to have been served on such person on the date of such joinder.

(6) For the purposes of this section, "process" includes a petition, a notice of motion, a rule nisi, a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced.

<sup>11</sup> (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.

[26] Mr Kasper argued that in light of these facts it is clear that the plaintiff had knowledge of the payment as far back as May 2013 and that plaintiff was culpably remiss in pursuing its claim against the defendant and as a result the plaintiff's claim prescribed in terms of s 11 of the Prescription Act and the claim of the plaintiff should be dismissed on that basis.

Arguments advanced in respect of limited liability in terms of s 33 of the Act

*On behalf of the plaintiff*

[27] Mr Muhongo's argument in this regard was very brief. He argued that this defence was incorrectly raised as it is not available to the defendant. He argued that the section applies to third parties *vis-à-vis* the plaintiff and not in respect of own employees.

*On behalf of the defendant*

[28] Mr Kasper argued that the defendant does not dispute that he was an employee of the plaintiff at the relevant time in question. It is also not disputed that at the point in time the defendant was acting within the course and scope of his employment with the plaintiff in furthering the interest of the plaintiff.

[29] The defendant has taken the special plea in the context of the limitation afforded in s 33 of the Act. S 33 provides that:

'Subject to the provisions of this Act, no compensation shall be payable by a local authority council, any member of a local authority council or any officer or employee employed in carrying out the provisions of this Act in respect of any act done in good faith under this Act.'

[30] In this regard the defendant contended that he acted in good faith when executing his duties as the Chief Executive Officer and no evidence to the contrary was solicited by the plaintiff. The defendant acquainted himself with the various documents at his disposal, he attended to the site and saw the material and work done by Rebirth and consulted with the plaintiff prior to making the payment.

### Analyses and discussion of the special pleas

#### *Claim based in delict or contract?*

[31] It is apparent from the plaintiff's particulars of claim and how it was formulated that this is a claim for damages due to the breach of fiduciary duties, in spite of the improper classification of the matter in respect of the case number.

#### *Prescription*

[32] Section 10 of the Prescription Act provides that a debt shall be extinguished by prescription after the lapse of the period that applies in respect of the prescription of such debt. Section 11 provides that:

**'11.** The periods of prescription of debts shall be the following –

(a) . . .;

(b) . . .;

(c) . . .;

(d) Save where an Act of Parliament provides otherwise, three years in respect of any other debt.'

[33] Damages suffered as a result of a breach of a fiduciary duty is recognised as a 'debt' for purposes of s 12 of the Prescription Act.



[34] John Saner in *Prescription in South African Law*<sup>12</sup> in his discussion on s 12 of the Prescription Act, stated, as a foot note to the observation, that 'The provision applies to debts arising from contract, delicts or any other source embraced by the provisions of the 1969 Prescription Act.' (My own emphasis) The learned author described 'any other source' to include:

'the breach of a fiduciary duty by a director of a company giving rise to a claim of damages: See *Symington v Pretoria-Oos Privaat Hospitaal Bedryf (Pty) Ltd* 2005 5 SA 550 (SCA)565 C-D'<sup>13</sup>

[35] In *Symington v Pretoria-Oos Privaat Hospitaal Bedryfs (Pty) Ltd*<sup>14</sup> the respondent (plaintiff), an operator of a private hospital, instituted action in the High Court against the appellants (defendants) for an alleged breach of the fiduciary duty the defendants, as former directors, owed to the plaintiff. The alleged claim arose from a contract entered into on 8 November 1996 when the appellants were still shareholders and directors of the respondent. In November 2000 the respondent instituted the action that gave rise to the appeal to the Supreme Court of Appeal. It was based on the allegation that the agreement of 8 November 1996 constituted a breach of the fiduciary duty that the directors owed the respondent at the time.

[36] A number of issues were considered by the court which I will not discuss for purpose of this judgment. What is important is that at para 35 of the judgment Brand JA held as follows:

'[35] In consequence I hold that the 'debt' which formed the basis of the plaintiff's claim became due when the breach of fiduciary duty allegedly giving rise to its claim for damages occurred on 8 November 1996. This means that the three year period of prescription had been completed before the plaintiff's summons was served on the defendants. The appeal must accordingly succeed and the pleas of prescription allowed.'

<sup>12</sup> Service issue 18 dated April 2012 at 3-61.

<sup>13</sup> Footnote 321 in *Prescription in South African Law*.

<sup>14</sup> [2005] 4 All SA 403 (SCA), 2005(5) SA 550 (SCA).

[37] Subject to the provisions of subsections (2) and (3) of section 12 of the Prescription Act, extinctive prescription commences to run as soon as the debt is due.

[38] It is the plaintiff's case that the plaintiff only acquired knowledge of the entire set of facts on 4 April 2017 when the defendant was found guilty of misconduct during the disciplinary proceedings. By implication the plaintiff therefore argues that the complete cause of action only arose when the plaintiff had all the details from which the 'debt' arises.

[39] In *Truter and Another v Deysel*<sup>15</sup> the Supreme Court of Appeal in South Africa dealt with an argument in so far as it was submitted with regard to a medical negligence claim that until the plaintiff had sufficient detail concerning the negligent conduct in the form of an expert medical opinion, the plaintiff in terms of section 12(3)<sup>10</sup> does not have knowledge of the facts from which the debt arises.

[40] At paragraph 19 of the *Truter* judgment, South African Supreme Court of Appeal reiterated the principle of section 12(3). It said:

'Section 12(3) of the Act requires knowledge only of the material facts from which the debt arises for the prescriptive period to begin running – it does not require knowledge of the relevant legal conclusions (i.e. that the known facts constitute negligence) or of the existence of an expert opinion which supports such conclusions.'

[41] Therefore for purposes of prescription, 'cause of action' means:

'...every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved<sup>16</sup>.'

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<sup>15</sup> 2006(4) SA 168 SCA

<sup>16</sup> *Truter v Deysel* *ibid* at para 18; Per Maasdorp JA in *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23, cited with approval by Corbett JA in the *Evins v Shields Insurance Co Ltd* 1980 (2) SA 814 (A) at 838D-F.

[42] The plaintiff waited for the conclusion and findings of the disciplinary hearing before it instituted action against the defendant, a few months shy of 5 years after the defendant's alleged breach of fiduciary duty. A comprehensive investigation was done into the alleged irregularities at the plaintiff including the payment authorized by the defendant in favor of Rebirth in 2013 already and the report was released in May/June 2013. All the facts to enable the plaintiff to institute action against the defendant and or Rebirth was available to the plaintiff at that point in time. As the court held in the *Truter* matter it is not required from the plaintiff to have every piece of evidence necessary to prove every fact.

[43] A further question that begs an answer is that in light of the comprehensive ministerial investigation that was conducted in April/May 2013 why did the plaintiff wait almost 3 years from the date of the alleged breach to institute disciplinary proceedings against the defendant? Then interestingly enough the plaintiff advances an argument that the disciplinary proceedings had to be concluded before the civil claim could be instituted. The disciplinary did not and could not for that matter interrupt the running of prescription as it does not fall within the ambit of s 15 of the Prescription Act. So, from where I am sitting it appears that the plaintiff was the author of its own misfortune.

[44] Nothing prevented the plaintiff to run the civil action concurrently with the disciplinary proceedings in the same way the disciplinary hearing was running concurrently with the criminal proceedings. The plaintiff had three years within which to institute its action but failed to do so.

[45] In line of the *Symington* matter I therefore hold that 'debt' which formed the basis of the plaintiff's claim became due when the breach of fiduciary duty allegedly giving rise to its claim for damages occurred on 19 December 2012 and the claim of the plaintiff therefor prescribed before it issued summons on 16 August 2017.

*Limitation of liability*

[46] From carefully reading s 33 of the Act it is abundantly clear that the purpose of this section is to limit the liability of a local authority council, any member of a local authority council or any officer or employee against claims of third persons. The protection was extended to the defendant in the execution of his duties and doing so in good faith, however the limitation does not extend to an employer/employee relationship. No authority was presented to this court to show otherwise.

[47] The defendant cannot breach his fiduciary duty to the plaintiff and then rely on the limitation of liability clause. The special plea of limitation of liability in terms of s 33 of the Act therefore stands to be rejected.

#### Conclusion

[48] In light of my foregoing discussion and findings therein it would not be necessary to go into the merits of the matter.

[49] My order is therefore as follows:

1. The special plea in respect of prescription in terms of the Prescription Act 68 of 1969 is upheld.
2. The special plea in respect of limitation of liability in terms of s.33 of the Local Authorities Act is dismissed.
3. Cost to follow the result.

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JS Prinsloo  
Judge

APPEARANCES:

PLAINTIFF:

Adv T Muhongo

Instructed by LorentzAngula Inc.

FIRST DEFENDANT:

Mr G Kasper

Of Murorua Kurtz Kasper Incorporated