IN THE HIGH COURT OF NAMIBIA CASE NO: I 858/2010

In the matter between:

JURGEN WALTER WELLMANN **PLAINTIFF**

and

HOLLARD INSURANCE COMPANY OF NAMIBIA LIMITED **DEFENDANT**

SUMMARY

Principal and Agent – notice to agent – knowledge of -when imputed to principal - general principle re-stated - general knowledge acquired by an agent and not communicated to his principal is imputed to the latter merely by reason of the fact that the agent has acquired such knowledge - provided that the knowledge is acquired in the course of the agent's employment - and further - that there was a duty upon the agent to communicate the information obtained - whether there is a duty depends upon the scope of the authority and the importance or materiality of such knowledge to the principal - the test of materiality is whether the knowledge of the agent is considered to be of such a kind that, in the ordinary course of business, a reasonable person would be expected to impart this knowledge to the person who has delegated to such agent the conduct and control of his or her affairs – Court approving dictum by Davis J in *Standard Bank of South Africa Ltd v Prinsloo & Another (Prinsloo & Another Intervening)* 2000 (3) SA 576 (C) at 589 E/F – H

Principal and Agent – notice to agent – knowledge of - when imputed to principal

- Court accepting that principle arising in three category of cases to which different legal rules applicable –The first category - not being relevant to this case concerns those cases relating to the knowledge which an empowered agent has when he negotiates and enters into, varies, or discharges a contract - the second category of cases relates to the situation " … where an agent is not entering into, varying, or discharging, a contract and where he is not a medium for the transmission of a message from a third person to the principal. … There are four requirements if an agent's knowledge of the kind falling within the limits outlined above for this category of cases is to be imputed to his principal - Firstly, the agent must have actual knowledge - Secondly, the agent's knowledge must be knowledge of a matter falling within the scope of his authority - Thirdly, the agent must have a duty to communicate the knowledge to his principal. Whether there is such a duty depends upon the circumstances; - Fourthly, the agent must have had an opportunity to communicate the information to the principal -The third category of cases contains those concerning notification to a principal through his or her agent and includes those in which an agent is given, for and on behalf of his or her principal, notice of a decision -. If a contract or a special rule of law states how notice to the principal is to be given and it is so given, it is effective even though it does not come to anyone's knowledge - If the contract does not lay down how it is to be given and if no special rule of law is operative, it is effective if it is given to one whose authority, actual or apparent, extends to the receipt of notice - Involvement in a transaction, or the holding of an office which brings certain matters within the range of one's activities, is important in that it normally indicates authority to receive notice concerning the transaction or matter- court accepting that terminology not recognising distinction/categories sufficiently – court accordingly adopting and applying terminology suggested -

Principal and Agent – notice to agent – knowledge of -when imputed to principal - Court accepting that the position is well summed up in §268 of the second edition of the American 'Restatement on Agency': (1) Unless the notifier has notice that the agent has an interest adverse to the principal, a notification given to an agent is notice to the principal if it is given: - to an agent authorized to receive it - to an agent apparently authorized to receive it - to an agent authorized to conduct a transaction, in respect of matters connected with it as to which notice is usually given to such an agent, unless the one giving the notification has notice that the agent is not authorized to receive it - to an agent to whom by the terms of a contract notification is to be given, with reference to matters in connection with the contract; or - to the agent of an unidentified or undisclosed principal with reference to transactions entered into by such agent within his powers, until discovery of the identity of the principal; thereafter as in the case of a disclosed principal. (2) The rules as to the giving of notification to an agent apply to the giving of notification by an agent."

In casu - notice of repudiation of plaintiff's insurance claim given by defendant – the insurer - to insurance broker – plaintiff's agent –

Held – as requirements of the 'third category' of cases satisfied - notification of repudiation considered valid – regardless of whether or not plaintiff had obtained knowledge of repudiation –

Held – plaintiff's cause of action arising at date of communication of repudiation of agreement – such cause of action in the sense that it amounted to a 'debt immediately claimable' constituted a 'debt which was due' within the ambit of Prescription Act 1969 – accordingly applicable prescriptive period commencing to run from date of notification to plaintiff's agent –

Held – as claim not instituted within applicable period – that plaintiff's claim had prescribed -

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and

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CORAM: GEIER, J

Heard: 05 – 06 June 2012; 13 July 2012
Delivered: 15 August 2012

JUDGMENT:

GEIER, J: [1] The plaintiff herein sues the defendant as the insurer of his Opel Corsa Utility 1.4 motor vehicle, the defendant having repudiated the plaintiff's claim for compensation made in this regard.

[2] The facts giving rise to this claim were briefly that the aforesaid Opel Corsa was involved in a motor vehicle collision which occurred on 21 August 2005 in Swakopmund, as a result of which the vehicle was a "write off" and the plaintiff suffered damages in the amount of N$89 976-00.

[3] It must be mentioned that the plaintiff's vehicle was driven by one Bradley Jarman at the time of the collision, who was subsequently charged for driving under the influence of liquor and other charges.

[4] The plaintiff thus lodged a claim with his insurer. After having been informed by word of mouth that his claim would not be successful and after asking what to do about this was referred to Defendant's manager, a Mr Barnard.

[5] In such circumstances the plaintiff and the defendant, so the plaintiff claims – entered into an agreement during or about November 2005, at Windhoek, in terms of which the defendant would hold over the plaintiff's claim until the criminal case against the Jarman "*was heard and judgment given*".

[6] Plaintiff claims further that the defendant thereafter, on 16 December 2009 unlawfully repudiated the claim.

[7] As plaintiff had complied with his obligations – and the case against Jarman had been concluded in Jarman's favour - the defendant became liable to compensate him in the claimed amount.

[8] In opposition to this claim, and in addition to pleading on over the merits, the defendant also raised three special pleas, all of which claim, on various grounds, that the plaintiff's claim has become prescribed.

[9] At the commencement of the trial both Mr Grobler, who appeared on behalf of the plaintiff, and Mr Mouton, who appeared on behalf of the defendant, agreed that the only point which should conveniently be decided first was whether or not there was an agreement between the parties that the plaintiff's claim would stand over until the criminal case against Mr Jarman had been

finalised.

[10] They agreed further that this issue should be decided against the backdrop of paragraph 8.1 of the particulars of claim as read with paragraph 10 of the amended plea.[1]

[11] After giving evidence in regard to this confined issue, which evidence was supported by a Mr Gawanab, who testified on his behalf, the plaintiff closed his case.

[12] Mr Mouton on behalf of the defendant then applied for absolution from the instance, which application was dismissed with costs.

[13] The defendant thereafter closed its case.

[14] The question which arose in such circumstances for determination was whether or not the plaintiff had proved the relied upon agreement on a balance of probabilities.

[15] The question can obviously only be determined with reference to the plaintiff's case and the probabilities arising therefrom.

THE PLAINTIFF'S EVIDENCE

[16] The plaintiff, Mr Wellmann, firstly confirmed that his motor vehicle, the abovementioned Opel Corsa, had been insured with the defendant and that such

1 Para 8.1 – *"In/or about November 2005 and at Windhoek the Plaintiff and Defendant entered into an oral agreement in terms of which the Defendant would hold the claim of the Plaintiff over until the Criminal Case – THE STATE v BRADLEY JARMAN and another (Case No SWK-CRM-648/2008) was heard and judgment given."* – Para 10 – *" The allegations therein contained are denied as if specifically traversed and the plaintiff is put to the proof thereof."*

vehicle had been involved in an accident. He contacted Mr Gawanab who worked for the defendant and who completed the requisite claim form for him. As he did not hear from the insurer he went to find out why his claim was not paid. He found out that a letter had apparently been written by defendant to Standard Bank Insurance Brokers, repudiating the claim, which letter he had not received. He was informed by Mr Gawanab that the claim "*was off*" and that the best person to see was a Mr Barnard of the defendant. Mr Gawanab accompanied plaintiff who was introduced to Mr Barnard. In Mr Gawanab's absence a meeting took place at which Mr Barnard confirmed that the plaintiff's claim had been rejected as the driver of plaintiff's vehicle, the said Mr Jarman, at the time, was under the influence. Plaintiff apparently denied this and Mr Barnard is alleged to have suggested to plaintiff that the defendant would pay the plaintiff's claim on condition that plaintiff would charge Mr Jarman with theft of the motor vehicle. The plaintiff however was not prepared to do this. Barnard also told the plaintiff the defendant would "stand over" the plaintiff's claim until the case against Jarman was finalised and that he, 'the plaintiff could then come back and they would see whether they can pay the claim'.

[17] The plaintiff also testified that he personally attended the court proceedings against Jarman, during which Jarman never testified and where Jarman was ultimately discharged in terms of section 174 of the Criminal Procedure Act. Within two weeks of that result, plaintiff went back to the defendant.

[18] The plaintiff then phoned Mr Gawanab and asked him what to do. He was advised to get all the documentation relating to Jarman's acquittal. This was done and the documentation was given to Gawanab who, in turn, handed them to a certain Koos who handled the claim.

[19] After a while, so plaintiff testified further, he was contacted by the defendant's legal practitioners who were looking for additional documents. Plaintiff then sketched the difficulties experienced regarding the obtaining of the additionally required documents and that, shortly thereafter, he received a letter advising him that the defendant was unable to entertain the claim inter alia, as the loss was not covered in terms of the policy. This letter was dated the 16 December 2009.

[20] Plaintiff pointed out that there was nothing in the letter to the effect that the claim had prescribed. He then instituted this action.

[21] Plaintiff was also cross examined at length on the circumstances relating to the repudiation of the claim. He conceded that he could not remember the date on which Mr Gawanab had told him first that his claim had been rejected or when he made the appointment and on which date the meeting with Mr Barnard took place. He conceded that the date, which was referred to in the pleadings, was given to his lawyers by his wife, but that he had written it down in a diary which he unfortunately could not produce.

[22] He testified further that he informed Mr Gawanab of the outcome of the meeting with Mr Barnard.

[23] In regard to Mr Barnard's suggestion that he should charge Jarman with theft in which event the defendant would pay the claim it was put to him that he had refused to do this despite the claim form indicating that he had not given Mr Jarman permission to drive his vehicle. The plaintiff further denied that he had told Mr Barnard that Jarman had driven the vehicle without his consent. When he was then confronted with the 'Motor Vehicle Accident Claim Form' on which it was recorded "*I didn't gave permission to driver to drove vehicle at time of*

accident" he had to concede that this inscription had been made on his instructions. He tried to explain the inscription away by stating that what he had intended to convey was that "*he did not give Jarman permission to drive while under the influence*". He added that the vehicle had been bought for his son's eighteenth birthday and that he had told Jarman not to drive it while under the influence and that it was this that was/should have been reflected on the claim form.

[24] It was pointed out to him that the breathalyzer test reading showed that Jarman was over the legal limit and that this aspect was common cause. It was thus put to him that the agreement - allegedly concluded with Barnard - and relied upon by plaintiff - did not make sense given the provisions of clause 3.2.2 of the insurance contract which provided that a loss or damage would not be covered under the policy, if such loss or damage was incurred whilst the vehicle was driven by any person under the influence - "*irrespective of how it is measured*"- and in terms of it was thus immaterial whether or not Jarman would ultimately be acquitted.

[25] It was then put that Mr Barnard would come and testify that the outcome of the criminal matter was never discussed between them because it had no bearing on the claim and that the issue discussed at their meeting was about whether or not the plaintiff had given permission to Mr Jarman to drive the vehicle and - if no such permission had been given - that would be regarded as theft - for which Jarman should/could have been charged. It was for such reason that Mr Barnard had suggested to plaintiff to charge Jarman.

[26] The plaintiff was then taken through the correspondence. It was pointed out to him, that his evidence to the effect that the insurer had apparently never relied on clause 3.2.2 was misplaced as this clause had been relied upon from

the outset and as far back as 28 November 2005. Plaintiff replied that he only became aware of this after the institution of proceedings. He admitted however that there was a letter written by Mr Gawanab on 28 November 2005 to Standard Insurance Brokers disclosing this ground of repudiation.

[27] The plaintiff was then confronted with a letter written to him with similar content, dated 15 February 2006. This letter was apparently faxed to him on 17 February 2006. It appeared that such letter was faxed to the wrong fax number and the plaintiff therefore denied ever receiving such facsimile

[28] He was then referred to a handwritten inscription appearing on the letter reading:

"*Client signature on receipt of letter date*:
Requested a fax to 230810"

[29] It was thus put to him that he must have furnished the fax number to a certain Christil January who had signed the fax cover sheet which read:

"*Dear Mr Wellmann*
Please find attached the letter requested. I post the original letter via registered mail.
Thank you and kind regards."

[30] Plaintiff could not explain how the inscription with his fax number came about. He conceded that, after being pushed, that he might have asked Christil January to fax the letter but that he had no clear recollection in this regard.

[31] Ultimately the plaintiff conceded that he might have received the letter – (by registered post?) *'… as he gets many letters - and as he has many vehicles there - but as he could not recall - he did not think that he ever saw the letter… ".*

[32] He also confirmed that he did nothing regarding his claim during the period February 2006 to December 2009.

[33] When asked if he would have regarded the letter of 15 February 2006 as a repudiation, if he would have seen it, Mr Wellmann stated firstly that he would then have gone back to Mr Barnard. When asked again, he conceded this aspect.

MR GAWANAB'S EVIDENCE

[34] Mr Gawanab confirmed that he was employed by defendant during 2005 and that he was stationed at the time at Standard Bank Building in Town Square, Windhoek. He confirmed further that he assisted the plaintiff in completing the claim form.

[35] In this regard he testified that he had asked the plaintiff to describe the accident to which the plaintiff replied that he did not give the driver permission to drive at the time of the accident.

[36] After the claim form had been completed and an assessor was appointed a Mr Van Staden was requested to go to the scene. Subsequently a report was received which indicated that the driver of plaintiff's vehicle was under the influence at the relevant time.

[37] When plaintiff phoned to find out what had happened to his claim Mr Gawanab told him that the claim would be rejected. He also confirmed that, as

matter of standard procedure, the defendant would write a letter to this effect to Standard Insurance Broker, who were plaintiff's brokers/agents, who would then inform their client accordingly.

[38] Upon the plaintiff's enquiry a meeting with Mr Barnard was arranged as the plaintiff had indicated that he wanted to discuss the claim with Mr Barnard and that he wanted certain information regarding his claim.

[39] He recalled that the meeting took place during November 2005, that they went in separate vehicles and that he met the plaintiff there where he introduced plaintiff to Mr Barnard. He confirmed further that he was not present during the meeting which ensued. Plaintiff afterwards told him that *' … when the court docs would come through and if they would show that the driver was not under the influence the claim would be reconsidered … '.* Plaintiff apparently reiterated that Barnard had told him that the claim would be paid if the driver was found not to be under the influence. According to Mr Gawanab the plaintiff did however not inform him of Mr Barnard's request to charge the driver Jarman with theft. Finally he added that he also did not discuss the matter at all with Mr Barnard

[40] During cross-examination Mr Gawanab confirmed that he had already, on the instructions of a manager, written the initial letter to Standard Bank Insurance Brokers, exhibit "C", repudiating the plaintiff's claim before plaintiff had come to see him during November 2005, but that he did not tell plaintiff why the claim was rejected as it was standard procedure to inform the broker who, in turn, would have to inform their client.

[41] Mr Gawanab testified further that he did not go back to the brokers to inform them of what the plaintiff had told him after the meeting with Barnard.

[42] When asked whether he was not concerned that Standard Bank Insurance Brokers would nevertheless inform their client that the claim had been rejected Gawanab merely stated that he had discussed nothing with the brokers.

[43] He also testified that he was not aware of the letter written during February 2006, informing the plaintiff that his claim had been repudiated.

ARGUMENT ON BEHALF OF DEFENDANT

[44] Against this backdrop Mr Mouton relied on the two main points for the contention that the court should find in the defendant's favour.

[45] He submitted firstly that, on account of the probabilities, being against the plaintiff, judgment should not be granted in the plaintiff's favour and, secondly, even if the court would find that an agreement to the effect, as contended for, had been concluded, the plaintiff's claim in this regard should be rejected on application of the principles of the law of agency, in terms of which the plaintiff will be imputed to have obtained knowledge of the defendant's repudiation of the agreement, at the time that his brokers where informed of this. Accordingly, and as such knowledge was to be imputed to the plaintiff at the latest by February 2006, the applicable three year prescriptive period had commenced to run from that date. As plaintiff had instituted his claim outside the applicable period his claim had become prescribed.

[46] The argument in respect of the probabilities advanced on behalf of the defendant ran as follows:

> "*The explanation as to whether he gave permission to the driver Bradley Jarman or not but only when Jarman was not under the influence of*

alcohol, is highly improbable especially also since Pieter Gawanab testified that the Plaintiff did not explain to him (Pieter Gawanab who completed Exhibit "B" on behalf of the Plaintiff and on Plaintiff's instructions and especially page 2 thereof) that permission was not given to Bradley Jarman to drive such vehicle while under the influence of alcohol. The evidence of Gawanab is therefore contrary to that of the Plaintiff on this important aspect.

The policy document of the Defendant and especially paragraph 3.2.2 thereof which by its very nature has no reference to and excludes criminal proceedings but provides that

> *"The following are not covered:*
>
> *3.2 Loss, damage, injury or liability caused, sustained or incurred whilst the vehicle is being used:*
>
> *3.2.2 by any person under the influence of alcohol or drugs where the percentage of alcohol, irrespective of how it has been measured, exceeds the limit according to the measurement;"*
>
> *The aforesaid also and especially since the Plaintiff testified that he knew at the time that the Police Report indicated that the alcohol level in the blood of the said Bradley Jarman exceeded the legal limit as measured at the time of the accident.*

In the light of the aforesaid, it is submitted that it is highly improbable that

the said Barnard would agree to hold the Plaintiff's claim over pending the finalization of the criminal proceedings when by time.

a) *The police report was available and reflected that the said Bradley Jarman's blood exceeded the legal limit permissible.*

b) *The policy document of the Defendant specifically provides for the refusal of a claim when the driver of the motor vehicle in question was under the influence of alcohol .... or while the percentage of alcohol, irrespective of how it was measured, exceeds the legal limit according to the measurement.*

c) *The claim form clearly states that the Plaintiff did not give permission to Bradley Jarman to drive the vehicle.*

On the evidence of the Plaintiff i.e. that he knew at the time when he had discussions with Barnard that the Police Report reflected that the percentage of alcohol in the blood of Bradley Jarman exceeded the legal limit and with regard to the provisions of paragraph 3.2.2 of the Policy Document it would have served no purpose and would be illogical for either Barnard or the Plaintiff to have discussions about the conclusion of criminal proceedings against Jarman when the outcome of such criminal proceedings cannot have any bearing or influence on the Police Report or the requirement as contained in paragraph 3.2.2 of the Policy Document.

The evidence of the Plaintiff is also that he knew about exhibit "D2" and that he requested his agent to forward it to him.
According to the evidence of the Plaintiff he, although he requested exhibit "D2" to be, forwarded to him, never received such letter although he could have received it through the post.

Regardless of the fact that he never received such letter, he stood idle and did nothing to obtain possession of such letter when he should have made an effort to obtain a copy thereof as is the requirement of "reasonable care" provided for in Act 68 of 1969.

Regard to the aforesaid and to the applicable law set out infra, It is submitted that the Plaintiff's claim has prescribed."[2]

[47] In response Mr Grobler submitted:

"*The Plaintiff testified that he discussed the claim with Mr Barnard of the Defendant. Mr Barnard promised the Plaintiff that he would pay his claim immediately if the Plaintiff was prepared to lay criminal charges against the driver, Bradley Jerman.*

The Plaintiff refused to do that and told Mr Barnard that he would not do so because he gave permission to Mr Jerman to drive the vehicle. Thereafter Mr Barnard gave an undertaking to hold the matter over until the criminal case against Mr Bradley Jerman was finalized and the parties entered into an agreement to this effect.

The Plaintiff stuck to his version despite the fact that the Legal Representative of the Defendant cross-examined him at length regarding a statement that he made shortly after the accident in which he stated that the did not give permission to Mr Bradley Jerman to drive the vehicle at the time of the accident.

2 See : Defendant's Heads of Argument

The explanation of the Plaintiff that the meant that he did not give permission to Mr Bradley Jerman to drive the vehicle whilst under the influence of alcohol is plausible, especially in the light of the fact that during his interview with Mr Barnard he refused to lay a charge against Mr Bradley Jerman because he gave him permission to drive the vehicle. I submit that if the Plaintiff was prepared to lie to Mr Barnard that he did not give Mr Bradley Jerman permission to drive his vehicle, he only had to accept the offer of Mr Barnard and his damages would have been paid. This is also a strong indication that his explanation was the truth and that the wording of his declaration dated 14 September 2005 did not reflect his true intentions.

In his Heads of Argument the Defendant argued that is highly improbable that Mr Barnard would have agreed to hold the Plaintiff's claim over pending the finalization of the criminal proceedings against Mr Jerman. There is no evidence to suggest, and nothing was put to the Plaintiff, to deny that Mr Barnard had the authority to make such a decision, which decision I submit was the correct decision. He could not with any certainty claim that Mr Jerman was indeed under the influence of alcohol at the time of the accident. The refusal of the Plaintiff's claim at that stage was purely based on speculation that Mr Jerman would indeed have been found guilty of driving under the influence of alcohol.

This argument holds no water because Mr Barnard failed to testify." [3]

[48] Mr Grobler pointed out further that Mr Barnard was a necessary witness for the defendant and that the defendant was not able to disprove that the plaintiff did not enter into the agreement as claimed with Mr Barnard on behalf of the

3 See : Heads of Argument

defendant, without Mr Barnard giving evidence under oath. The aspect of whether or not he entered into an agreement with the plaintiff falls peculiarly within the knowledge of Mr Barnard and his failure to give evidence casts a very grave suspicion upon the bona fides of the Defendant in resisting the Plaintiff's claim.

[49] He thus forcefully submitted that the testimony of the plaintiff is *prima facie* proof of the agreement that he concluded with Mr Barnard on behalf of the Defendant and that, on the failure of Mr Barnard to testify, such *prima facie* proof became conclusive proof.[4]

WAS THERE AN AGREEMENT TO HOLD OVER THE PLAINITFF'S CLAIM?

[50] I have already indicated herein above that the Defendant's application for absolution from the instance was dismissed. This result always implied that the plaintiff had adduced sufficient evidence on which a court, could or might find for the plaintiff.

[51] In my reasons for that ruling delivered on 6 June 2012 I also expressly found this to be the case.

[52] It does not take much to conclude therefore that the plaintiff had made out a *prima facie* case in this regard.

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4 He relied in this regard on : *Goosen v Stevenson 1932 TPD 223 ON P 226 were it was stated : "If the party, on whom lies the burden of proof, goes as far as he reasonable can in producing evidence 'calls for an answer' then, in such case, he has produced prima facie proof in the absence of an answer from the other side, it becomes conclusive proof and he completely discharges his onus of proof. If a doubtful or unsatisfactory answer is given it is equivalent to no answer and the prima facie proof being undestroyed, again amounts to full proof."*

[53] The question thus remains whether or not the plaintiff was able to convert such *prima facie* case into one, were the relied upon agreement, was conclusively proved on a balance of probabilities.

[54] It is indeed so that valid shortcomings in the plaintiff's evidence were exposed during cross-examination, particularly those which relate to the rationale of a senior manager of the defendant entering into a completely non-sensical oral agreement to hold over the plaintiff's claim pending the outcome of criminal proceedings, which - given the clear wording of clause 3.2.2 of the underlying insurance contract – would have no bearing on the matter.

[55] There is also the clear inherent improbability in the plaintiff's denial that Mr Jarman was not authorized to drive plaintiff's Opel Corsa. The plaintiff's testimony that he had actually meant to qualify his consent to the effect that Jarman was just authorized to drive that vehicle while not being under the influence is clearly a cunning afterthought to explain away the consequences of the inscription which had been made - at his own behest - on the claim form by Mr Gawanab. There is also no reason why Mr Gawanab's contrary evidence – that the inscription was correctly made, as per the plaintiff's instructions, at the time – should be rejected on this score, which evidence was in any event also corroborated by the exhibit. It is also of significance here that the plaintiff signed the claim form immediately below that inscription. It would thus have been an easy matter for him to have picked up that 'error' - at the time. It is also clear that any concession in this regard by plaintiff would have materially enhanced the defendant's case, regarding the probabilities of what was actually discussed between him and Barnard, at least on the issue of whether or not Barnard had requested plaintiff to charge Jarman with theft.

[56] On the other hand it cannot be said that the plaintiff did not present his

case to the extent as could reasonably have been expected of him. In addition, the defendant was always at risk, given the dismissal of its application for absolution from the instance, that the plaintiff's evidence, in the absence of any contrary evidence given by Mr Barnard, would become liable to be accepted as being conclusive on the aspect of the relied upon agreement, in respect of which Mr Barnard was indeed a necessary witness as indicated by the issues as defined in the pleadings and as formulated for decision by the parties' legal representatives at the outset of this case.

[57] The plaintiff's evidence also cannot just simply be disregarded or be rejected *in toto* as there is simply no basis on which Mr Gawanab's evidence, which corroborated the plaintiff's evidence in all material aspects, can or should be rejected. The plaintiff's evidence, despite its shortcomings, therefore loudly and clearly 'called for an answer'.

[58] This answer was not forthcoming despite Mr Barnard being available – after all he attended the court proceedings for some time. His silence remains inexplicable in the circumstances – it would have been a simple matter for him to have given his version of the events.

[59] In such circumstances the plaintiff's version must prevail. I therefore find it more probable than not that the agreement as pleaded by the plaintiff in paragraph 8.1 of the particulars of claim was indeed concluded.

HAS THE PLAINTIFF'S CLAIM BECOME PRESCRIBED?

[60] This question is governed in the main by the determination of whether or not Standard Bank Insurance Brokers' knowledge of the defendant's repudiation of the agreement *' … to hold over the plaintiff's claim until the criminal case – the State v Bradley Jarman and Another (Case No SWK-CRM – 648/2008) was heard and judgment given …'* – as evidenced by the facsimile of the 15th of

February 2006 - can be attributed to the plaintiff?

[61] It almost seems superfluous to add, that the initial repudiation, as communicated by Mr Gawanab orally, during November 2005,[5] was superseded by the subsequent abovementioned agreement concluded between plaintiff and Mr Barnard.

[62] Mr Mouton submitted in this regard that 'it was admitted by both the plaintiff and Mr Gawanab that Standard Bank Insurance Brokers were at all times acting as agent for and on behalf of the plaintiff. Knowledge which was acquired by the agent, but not communicated to his principal, will be imputed to the latter simply by reason of the fact that the agent has acquired such knowledge, provided he did so in the course of his employment and was under a duty to communicate it to his principal'.[6]

[63] He consequently submitted that plaintiff knew that his claim was rejected or that he ought to have known (with reasonable care) that his claim was rejected at best for him as at the date of Exhibit "D2".

[64] Furthermore, he submitted that the plaintiff on his own evidence, knew about the rejection of his claim on 15 February 2006 as per annexure "D2" when he himself requested such letter to be forwarded to him. Had he not received it as he wants this Court to believe, such fact does not in any way assist the Plaintiff because:

a) *the Plaintiff on his own evidence on 15 February 2006 knew that his claim was rejected because he had discussions about exhibit "D2" with*

5 And as evidenced in writing by letter – Exhibit 'C' dated 28 November 2005

6 D M Davis, *South African Law of Insurance* - 4th Edition at 153 - *Randbank Bpk v Santam Versekerings Maatskappy* 1965 (4) SA 363 (A) at 368-9

his agent (Standard Bank Insurance Brokers) on that day and requested them to forward such letter to him;

b) *as indicated, knowledge by the agent (Standard Bank Insurance Brokers) will be imputed to the principal (plaintiff);*

c) *the Prescription Act 68 of 1969 clearly provides that prescription begins to run as soon as the debt is due and it Is submitted that the debt in this instance became due when the plaintiff through his agent knew or with reasonable care, ought to have known that his claim was rejected;*[7]

[65] He urged the court further to have regard to the interpretation of section 12(3) of Act 68 of 1969 and in doing so, the following was considered relevant:

> *"what has to be considered is not whether the Plaintiff has sufficient facts at his disposal to prove his case at end thereof but whether he has minimum facts at his disposal to begin with it. What the Act strives for is a golden mean between the inequity on the one hand of a potential debtor suddenly being threatened with Court proceedings an eternity after the occurrence of the events in question and the inequity of a potential creditor forfeiting his claim for relief merely by reason of the passage of time where he, without any fault on his part, did not have the necessary information at his disposal to launch such Court proceedings in the meantime.*
>
> *Bearing all this in mind, there is no compelling reason why a creditor should be fully informed about all aspects of his contemplated litigation before prescription can begin to run against him. The debtor's interest should also be taken into account. What should be considered is not whether the Plaintiff has sufficient facts at his disposal to prove his case at*

7 See: Prescription Act 68 of 1969 Sections 12 (1), (2) thereof

the end thereof but whether he has the minimum facts at his disposal begin with it."[8]

[66] The Plaintiff, having been made aware of the existence of annexure "D2" thus ought to have taken steps at that stage already to prevent prescription from starting to run.

[67] He argued further that even if one would accept that the plaintiff knew nothing about the rejection of his claim as at 15 February 2006 - which is highly improbable - and in any event contrary to the evidence of the plaintiff himself - then the knowledge of his agent i.e. Standard Bank Insurance Brokers ought to be considered as knowledge possessed by the plaintiff. [9]

[68] It was in conclusion submitted that the Plaintiffs claim has prescribed and that his claim be dismissed with costs including costs of one instructing and one instructed counsel.

[69] Mr Grobler on the other hand side – stepped the 'imputation of knowledge argument' by pointing out that there was no evidence before the court indicating when the defendant had advised Standard Insurance Brokers to repudiate the claim.

[70] He submitted that:

a) *"on 28 November 2005, before the agreement was entered into between Mr Barnard and the plaintiff, the defendant addressed a letter to the Insurance Brokers in which they were informed in more or less*

8 *Nedcor Bank Bpk v Regering van die Republiek van Suid Afrika* 2001 (1) SA 987 (SCA) at (Paragraphs [8] - [10] at 995E - 996A/B and 996F - 997A/B.)
9 *Cannock's SA Motor Co Ltd v Sentraal Westelike Ko-Operatiewe Maatskappy BPK* 1964 (2) SA 46 (T) at 53 F-H – and – AJ Kerr, *'The Law of Agency*' – 4th Ed at 235 - 236

identical wording to Exhibit "D2" that the defendant was unable to entertain the claim of the Plaintiff; (annexure HC1 to the plea);

b) *the defendant submitted no proof that at the time (November 2005) the insurance brokers addressed a letter similar to Exhibit "D2" to the plaintiff;*
c) *similarly there was no proof that the defendant addressed a new letter corresponding with Annexure "HC1" to the Insurance Brokers in February 2006;*
d) *the evidence of PIETER GAWANAB, that the plaintiff told him of the agreement with Mr Barnard immediately after the conclusion of his meeting with Mr Barnard, but that he decided not to inform the Insurance Brokers of the agreement must be kept in mind;*
e) *no explanation was given why Exhibit "D2" followed the same wording as Annexure "HC1". Keeping the agreement between Mr Barnard and the plaintiff in mind one would have expected that there would have been some or other indication in Exhibit "D2" that the defendant no longer regarded himself bound by the agreement between Mr Barnard and the plaintiff and for that reason was not prepared to hold the claim of the plaintiff over any longer;*
f) *the only reasonable inference that can be drawn is that Exhibit "D2" is based on Annexure "HCI". For some or other reason that is unknown to the Court and to the plaintiff the Insurance Brokers, who did not know of the agreement between the plaintiff and Mr Barnard delayed informing the Plaintiff of the decision taken by the defendant on 28 November 2005 to 15 February 2006 as per Exhibit "D2";*
g) *to submit that Exhibit "D2" was a new notification to the plaintiff and that his claim therefore had prescribed is based on mere speculation and not on proved facts;*
h) *again Mr Barnard could have assisted the Court to determine whether*

there was indeed a second notification to the plaintiff to inform him that the defendant will not entertain his claim for the reasons as set out in Exhibit "D2". Also in this regard Mr Barnard can be regarded as a necessary witness. But he failed to testify and the only probable inference that can be drawn is that Exhibit "D2" is not a new notice that the claim of the Plaintiff had been rejected, alternatively Exhibit "D2" without supporting evidence is no proof that the claim of the Plaintiff was rejected a second time on 15 February 2006."

i) the Honourable Court should therefore find that the plaintiff's claim was not rejected a second time on 15 February 2006 and that his claim therefore did not prescribe.

DOES ANNEXURE 'D2' CONSTITUTE A FURTHER REPUDIATION

[71] In my view it is immaterial whether or not Exhibit D2 was based on Exhibit 'C' (Annexure "HC1" to the plea) or not. It reads :

"Dear Mr Wellmann

MOTOR CLAIM NO 9940: N2222R OPEL CORSA 1.4

With reference to the above claim we regret to advise that your insurer, Hollard Insurance Namibia, advised that they are unable to entertain the claim inter alia as the loss is not covered in terms of your policy.
Kindly refer to your Stansure policy page 13, General, The following are not covered:

- *3.2 loss, damage, injury or liability caused, sustained or incurred whilst the vehicle is being used:*
- *3-2.2 by any person under the influence of alcohol or drugs*

or where the percentage of alcohol, irrespective of how it has been measured exceeds the legal limit according to the measurement

The insurer confirmed having closed their file.

Yours sincerely

Ingrid van Straten
Standard Insurance Brokers Namibia (Pty) Ltd
Tel: 09264 61 294 2269"

[72] This amounts to a clear and unambiguous communication to the effect that defendant would not entertain the plaintiffs claim.[10] It was simply a refusal not to perform and/or to no longer be bound by the agreement that was communicated under cover of Exhibit 'D2'.

[73] A repudiation - irrespective of how it came about, or for what reason it was made - before the date of performance constitutes an anticipatory breach of contract which gives the aggrieved party an election : he may treat the words or conduct as a breach of contract and take action immediately, claiming whichever remedies he prefers; or he may elect to let the contract run its course.[11]

[74] If an aggrieved party elects to take action on the anticipatory breach he may, for instance, instead of cancellation and claiming restitution, bring an action for an order of specific performance immediately.[12]

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10 See generally : *'The Principles of the Law of Contract'* - 6th Ed by Prof. AJ Kerr at p575 and 578 – 581 or *' The Law of Contract in South Africa'* - 5th Ed by RH. Christie at p 516 - 518

11 See generally for instance : *'The Principles of the Law of Contract'* 6th Ed by Prof. AJ Kerr at 588 – 590 and at 597

12 See for instance : *'The Principles of the Law of Contract'* 6th Ed by Prof. AJ Kerr at 589

[75] In respect of any one of these causes of action the prescriptive periods commence to run *'as soon as the debt is due'*.[13]

[76] This means that the 'debt' must be immediately claimable by the creditor in legal proceedings,[14] and be one in respect of which the debtor is under an obligation to perform immediately.[15]

[77] In the present case the defendant was under an obligation to hold over the plaintiff's claim until the case against Bradley Jarman had been completed. The 'debt', here in the sense of an obligation to hold over the plaintiff's claim, and to force the defendant – (once the defendant had indicated that it would not 'entertain the claim') - to comply therewith - by way of a claim for specific performance – or to cancel same and seek damages after cancellation - was immediately claimable by way of legal proceedings on 15 February 2006. In this instance plaintiff clearly, by conduct, elected to keep the contract alive – it was this cause of action that thus became enforceable immediately at the time.

[78] Contractual debts are generally subject to a three year prescriptive period.[16] This period here commenced to run from 15 February 2006, unless it can be said that such period did not commence to run as the plaintiff had no knowledge *'of the identity of the debtor and the facts from which the debt arises'*[17] or if by virtue of the deeming provision such knowledge could not be imputed to the plaintiff.[18]

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13 *Deloitte, Haskins & Sells Consultants Pty Ltd v Bowthorpe Hellerman Deutsch Pty Ltd* 1991 (1) SA 525 (A) at 532 G - I
14 See for instance *SANTAM LTD v Ethwar* 1999 (2) SA 244 (SCA) at 252 I - J
15 *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 909D--E; *The Master v I L Back & Co Ltd and Others* 1983 (1) SA 986 (A) at 1004F--G *Uitenhage Municipality v Molloy* 1998 (2) SA 735 (SCA) at 741 A ([1998] 1 All SA 140);
16 Christie*' The Law of Contract in South Africa' at* 485
17 Section 12(3) of The Prescription Act 68 of 1969
18 ie. ' … *He would be deemed to have such knowledge if he could have acquired it by*

WHEN DID PLAINTIFF ACQUIRE 'KNOWLEDGE' AS REQUIRED BY SECTION 12(3) OF THE PRESCRIPTION ACT 1969

[79] It is here that the relationship between plaintiff and Standard Insurance Brokers (Pty) LTD becomes of relevance.

[80] It is indeed so that the relationship between plaintiff and Standard Insurance Brokers (Pty) LTD was one of principal and agent.[19] This was also common cause.

[81] There can also be no doubt that the plaintiff's agent - Standard Insurance Brokers (Pty) LTD - had knowledge of the defendant's repudiation *'not to entertain the claim'*.

[82] The question thus arises as to whether this knowledge can be imputed to plaintiff?

[83] Davis J in *Standard Bank of South Africa Ltd v Prinsloo & Another (Prinsloo & Another Intervening)* 2000 (3) SA 576 (C) formulated the applicable general position as follows :

> *"The general knowledge acquired by an agent and not communicated to his principal is imputed to the latter merely by reason of the fact that the agent has acquired such knowledge, provided that the knowledge is acquired in the course of the agent's employment and further that there was a duty upon the agent to communicate the information obtained.*

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exercising reasonable care …' in terms of Section 12(3) of *The Prescription Act* 68 of 1969

19 See for instance : *Rabinowitz & Another NNO v Ned-Equity Insurance Co Ltd & Another* 1980 (1) SA 403 (W) at 407 H

Whether there is a duty depends upon the scope of the authority and the importance or materiality of such knowledge to the principal. The test of materiality is whether the knowledge of the agent is considered to be of such a kind that, in the ordinary course of business, a reasonable person would be expected to impart this knowledge to the person who has delegated to such agent the conduct and control of his or her affairs. See J M Silke The Law of Agency in South Africa (3rd ed) at 530. Also Lazarus v Gorfinkel 1988 (4) SA 123 (C) at 136D - F."[20]

[84] Professor AJ Kerr in *'The Law of Agency'*[21] however points out that when it comes to the imputation, to the principal, of knowledge of an agent, different (three) categories of cases exist, to which different rules of law apply and in respect of which a distinction should thus be made which should be accommodated and reflected in the terminology used.[22]

[85] The second category[23] of cases relates to the situation :

" … where an agent is not entering into, varying, or discharging a contract and where he is not a medium for the transmission of a message from a third person to the principal. …

There are four requirements if an agent's knowledge of the kind falling within the limits outlined above for this category of cases is to be imputed

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20 At 589 E/F – H – see also *Ellanco International Trading v SA Botswana Hauliers (Pty) Ltd* 1992 (2) SA 299 (W) at 303 -305

21 4th Edition at 228

22 "*There is a difficulty in terminology. A person knows something of which he has been given actual notice. On the other hand a principal may be required to be given, or may be deemed to have, notice of what his agent knows. However, the rules of law for the different categories differ and some attempt must be made to use different terms. It is is suggested that where possible the word "knowledge" should be used in discussion of cases in the second category, above and the word "notice" should be used in discussion of cases in the third category."*

23 The 'first category' not being relevant to this case ie.'*those concerning the knowledge which an empowered agent has when he negotiates and enters into, varies, or discharges a contract…'*

to his principal. Firstly, the agent must have actual knowledge. Secondly, the agent's knowledge must be knowledge of a matter falling within the scope of his authority … Thirdly, the agent must have a duty to communicate the knowledge to his principal. Whether there is such a duty depends upon the circumstances. As Malan J said in the Town Council of Barberton case:[24]

> *' Whether it will be the duty of the agent to communicate will depend upon the scope of his authority and the importance or materiality of such knowledge to the principal. The test of materiality appears to me to be whether the knowledge of the agent is such that in the ordinary course of business a reasonable man would be expected to impart such knowledge to the person who has delegated to him the conduct and control of his affairs.'*

Fourthly, the agent must have had an opportunity to communicate the information to the principal. As Lord Macnaughton said in Blackburn, Low &Co v Vigors:[25]

> *'There is nothing unreasonable in imputing to a shipowner who effects an insurance on his vessel all the information with regard to his own property which the agent to whom the management of that property is committed possessed at the time and might in the ordinary course of things have communicated to his employer.*[26]

The third category of cases, above, contains those concerning notification

24 1945 TPD 306
25 (1887) 12 App Cas 531 (HL) at 542
26 See also Lopes J [1886] 17 QPD 553 at 580-581 – It also appears on comparison that these elements overlap with the requirements listed by Davis J in the *Standard Bank of South Africa Ltd v Prinsloo & Another (Prinsloo & Another Intervening) case*

to a principal through his or her agent and includes those in which an agent is given, for and on behalf of his or her principal, notice of a decision, eg a decision to accept an offer or to renew a lease. If a contract or a special rule of law states how notice to the principal is to be given and it is so given, it is effective even though it does not come to anyone's knowledge. If the contract does not lay down how it is to be given and if no special rule of law is operative, it is effective if it is given to one whose authority, actual or apparent, extends to the receipt of notice. Involvement in a transaction, or the holding of an office which brings certain matters within the range of one's activities, is important in that it normally indicates authority to receive notice concerning the transaction or matter…

The position is well summed up in §268 of the second edition of the 'Restatement on Agency'[27]*:*

(1) Unless the notifier has notice that the agent has an interest adverse to the principal, a notification given to an agent is notice to the principal if it is given:

a) *to an agent authorized to receive it;*
b) *to an agent apparently authorized to receive it*
c) *to an agent authorized to conduct a transaction, in respect of matters connected with it as to which notice is usually given to such an agent, unless the one giving the notification has notice that the agent is not authorized to receive it;*
d) *to an agent to whom by the terms of a contract notification is to be given, with reference to matters in connection with the contract; or*

27 *'Restatement of the Law'*, American Law Institute, 2 ed, 1958

e) to the agent of an unidentified or undisclosed principal with reference to transactions entered into by such agent within his powers, until discovery of the identity of the principal; thereafter as in the case of a disclosed principal.

(2) The rules as to the giving of notification to an agent apply to the giving of notification by an agent."[28]

[86] Returning to the matter at hand it would seem that this case concerns the so-called 'third category' of cases, ie. those which relate to the notification of a decision to a principal, through the agent. It seems clear that Exhibit 'D2' constitutes such a notification.

[87] Accepting Professor Kerr's categorisation as correct[29] it would then firstly have to be established whether or not any special rule of law, governing the giving of notice, was applicable in this instance? No such rule of law seems to apply. Counsel also did not refer the court to any such rule.

[88] However given Mr Gawanab's evidence[30] - it appears that the standard business procedure of giving notice was followed in this instance. This, so it becomes apparent, from the applicable principles listed above, constitutes valid notification, to a principal through an agent, if it is given to one whose authority, actual or apparent, extends to the receipt of notice.

[89] There is also no suggestion that Standard Insurance Brokers (Pty) LTD were not authorized to receive such notification. This requirement is therefore met.

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28 '*The Law of Agency'* at pages 228 -231 and the authorities referred to in the footnotes

29 After all this would also be in line with the general underlying principles enunciated by Davis J in the *Standard Bank of South Africa Ltd v Prinsloo* case and the above-cited *'Restatement on Agency'-*

30 ' …that he did not tell plaintiff why the claim was rejected as it was standard procedure to inform the broker who, in turn, would have to inform their client …'

[90] In addition it is further highly relevant in this regard that notification of a repudiation of a claim by an insurer to the insured's agent, the broker, also falls squarely within the range of the activities of an insurance broker and matters connected therewith – Standard Insurance Brokers (Pty) LTD's involvement in this transaction, through the holding of its appointment as insurance broker surely brings with it the empowerment of receiving - and the duty of onward communication - of the all the insurers (defendant's) notifications to its insured, the plaintiff. This range of activities thus – also in this instance – points towards Standard Insurance Brokers (Pty) LTD's authority to receive the defendant's repudiation. The further requirements for the effective receiving of a valid notice are thus also met. It hardly needs mention that Exhibit 'D2' also factually discloses that Standard Insurance Brokers (Pty) LTD did not only have the opportunity, but that they also actually tried to comply with their duty to onwardly communicate the defendant's repudiation.

[91] I therefore find that the notification - given by the defendant to Standard Insurance Brokers (Pty) LTD - as relayed by Exhibit 'D2' - constitutes valid notice to plaintiff of the defendant's repudiation, 'not to entertain the claim'.[31] In such circumstances it becomes immaterial whether or not Exhibit 'D2' was ever received by plaintiff or not.[32]

[92] As Exhibit 'D2' is dated the 15th of February 2006 it follows that the plaintiff's agent had notice of the defendant's repudiation at the latest by that date. The plaintiff's cause of action arose at the latest on that date.

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31 Put in different terminology : knowledge of the defendant's repudiation would – in such circumstances – in any event also have been imputed to plaintiff in accordance with the general principles enunciated by Davis J in *Standard Bank of South Africa Ltd v Prinsloo & Another (Prinsloo & Another Intervening)* - all the requirements set by that case also having been met in this instance-

32 See the above - listed requirements pertaining to the 'third category' of cases

[93] The ‘debt’ for purposes of determining the running of the applicable prescriptive period– similarly arose on that date.

[94] Service of the summons in this case occurred on 13 April 2010 - that was outside the applicable three year period.

[95] It must be concluded therefore that the plaintiff’s claim against defendant has become prescribed.

[96] In the result the plaintiff’s action is dismissed with costs, such costs to include the costs of one instructed- and one instructing counsel.

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GEIER, J

ON BEHALF OF THE PLAINTIFF:	Adv. Z J Grobler Grobler & Company
ON BEHALF OF THE DEFENDANT:	Adv. CJ Mouton
Instructed by:	Francois Erasmus & Partners