REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number:613/05
Reportable

In the matter between:

UNILEVER BESTFOODS ROBERTSONS (PTY) LTD	**FIRST APPELLANT**
UNIFOODS (PTY) LTD	**SECOND APPELLANT**
SP DU PREEZ	**THIRD APPELLANT**
DRD MULLER	**FOURTH APPELLANT**
R LECOLLE-BROWN	**FIFTH APPELLANT**
TIGER OATS LTD	**SIXTH APPELLANT**
UNIVERSAL GROUP LTD	**SEVENTH APPELLANT**
H McBAIN	**EIGHTH APPELLANT**
B KAPLAN	**NINTH APPELLANT**

and

IM SOOMAR	**FIRST RESPONDENT**
CISKEI OIL & CAKE MILLS (PTY) LTD	**SECOND RESPONDENT**

CORAM: FARLAM, BRAND, NUGENT, MLAMBO JJA et CACHALIA AJA

HEARD: 1 NOVEMBER 2006

DELIVERED: 1 DECEMBER 2006

SUMMARY: Prescription – when claim based on acts committed pursuant to a conspiracy prescribes.

Neutral citation: This judgment may be referred to as *Unilever Bestfoods Robertsons v Soomar* [2006] SCA 172 (RSA).

JUDGMENT

FARLAM JA

INTRODUCTION

[1] This is an appeal against a judgment given by JH Combrink J, sitting in the Durban High Court, dismissing with costs special pleas of prescription filed on behalf of the appellants.

[2] The first respondent, a business resident in Durban, and the second respondent, a company, which conducted the business of refining, bottling and selling edible oils in Ciskei, instituted action in the Durban High Court in October, 2001, against the appellants, four companies and five individuals, claiming judgment against them jointly and severally, for payment of damages of R1 476 000.00 to the first respondent and R46 633 000.00 to the second respondent. In what follows I shall refer to the parties as they were in the court *a quo.*

ALLEGATIONS IN THE PLAINTIFFS' PARTICULARS OF CLAIM

[3] The learned judge in the court *a quo* has provided the following summary of the allegations in the plaintiffs' particulars of claim, which I gratefully adopt:

'In their comprehensive particulars of claim the plaintiffs allege that the second plaintiff conducted the business of refining, bottling and selling edible oils at Mdantsane in the Ciskei. To that end and at all material times during the period 18 July 1991 to 6 March 1993 the second plaintiff imported crude edible oil for refinement and bottled it at its factory at Mdantsane; sold some of the refined and bottled oil for export to Ludwig and Sangudia of Lubumbashe, Zaire, and was consequently entitled to claim import duty rebates in respect of the crude oil which was refined and manufactured to become the exported oil by virtue of item 470.04 of the Schedule to the Customs and Excise Act of Ciskei, alternatively, second plaintiff claims that it was never obliged to pay import duty on the imported oil because such duty was payable in terms of the Customs Union Agreement purporting to bind in South Africa, Botswana, Lesotho, Swaziland and Ciskei, which agreement was only signed by South Africa and Ciskei, the other intended signatories refusing to recognise Ciskei as party or to sign the common Customs Union Agreement with the inclusion of the Ciskei. Consequently, so it is alleged, the second plaintiff was not obliged to pay VAT on the exported oil. The second plaintiff continues to allege that it duly claimed the customs rebate on the exported oil and did not pay VAT on the exported oil, all of which was within its entitlement to do.

The first defendant (Unilever) and the sixth defendant (Tiger Oats), so the plaintiffs allege, were also engaged in the manufacture and sale of edible oils and, accordingly, were direct trade competitors of the second plaintiff in the marketing of edible oils in the Republic of South Africa and abroad. Central to the plaintiffs' cause of action lies an elaborate conspiracy entered into

between all the defendants, according to the plaintiffs, which existed during the period June 1993 up to April 2001 and which had as its aim to damage or destroy the plaintiffs' business operations in the manufacture and sale of edible oils; to damage the plaintiffs in their patrimony generally and in their good name and reputation.

In execution of the objects of the conspiracy the defendants, on a date or dates to the plaintiffs unknown, secured the services of Dutton, Botha and Gamble, who conducted the business of Private Investigators under the style of Hamilton-Whitton SA (Hamilton-Whitton) at Durban. Dutton, Botha, Gamble and Hamilton-Whitton were at all material times the agents of all the defendants, alternatively of Unilever and Tiger Oats, and acted with the knowledge, consent and approval of the defendants whom they represented in return for remuneration.

The allegations continue to assert that the defendants, in concert with and acting through Hamilton-Whitton knowingly, alternatively recklessly, without probable or reasonable cause and in furtherance of the conspiratorial purpose aforementioned, during or about 1993 to 1999, conspired falsely to allege to the Police Services, the Revenue Services and the Customs Authorities that second plaintiff had sold the "exported oil" on the local market and the plaintiff, as a consequence, defrauded the customs service and the revenue authorities by claiming customs rebate and failing to pay VAT on the exported oil.

Pursuant to the aforegoing the ninth defendant (Kaplan) deposed to a sworn statement dated 9 February 1994 to the effect that the second plaintiff had fraudulently caused "the oil industry" a loss of R63,728 million and to seventh defendant (Universal Group) a loss of R8,7 million by the alleged frauds said to have been committed over a period of time. In so acting and at all material times Kaplan knew that the relevant allegations contained in his said statement were false, alternatively were false in material respects, alternatively that Kaplan had made the allegations recklessly, not caring whether they were false or not.

The allegations continue that, in addition, during the aforementioned period, June 1993 to April 2001, the defendants enlisted the services of a certain Makings, a senior customs official at East London and the services of Botha, the latter acting as liaison with Makings and the services of Hamilton-Whitton and caused Makings on the strength of the aforesaid false allegations:

(a) To serve on the second plaintiff under the provisions of the Customs and Excise Act 91 of 1964 an initial assessment dated 14 June 1993 for customs duties and penalties on the exported oil in the amount of R5,984 million;

(b) To attach in terms of section 114 of the Customs and Excise Act on 18 June 1993 in the port of Durban 475 tons of crude edible oil imported by the second plaintiff by means of a customs lien to secure the assessment aforementioned;

(c) To issue a re-assessment in respect of the customs duties, penalties and interest allegedly due on the imported oil which went into the manufacture of the exported oil in the amount of R19,025 million on 20 September 1993;

(d) To cause the attachment of all the second plaintiff's manufacturing equipment in its factory at Mdantsane in terms of a customs lien purportedly issued to secure the customs assessment; and to actively press and pursue false criminal charges of fraud, forgery and uttering against the plaintiffs; and in addition, to pass confidential information to Hamilton-Whitton regarding second plaintiff's source and costs of the imports of crude oil, which Makings did on 2 December 1996 and 30 January 1997 respectively.

On another front it is alleged that the eighth defendant (McBain), acting on behalf of Tiger Oats, wrote to the Minister of Agriculture on 18 July 1993 a letter, copies whereof were forwarded to the Minister of Trade, Industry and Finance, the Minister of Foreign Affairs, the Director of Trade and Industry, the Chairman of the Oils Seeds Board and the Deputy Director-General, Agriculture, in which scurrilous and false allegations were published to the said addressees relating to the plaintiffs and their business affairs.

Concerning the said letter the allegations continue to assert that such was written by McBain at the telephonic request of the said Botha, which request was made through the said Kaplan on 6 July 1993; that the letter was intended to convey to, and was so understood by those to whom it was addressed, that the plaintiffs were guilty of fraud and corruption by abusing item 470.03 rebate permits, fraudulently claiming that imported crude oil had been exported, whilst in fact they were selling exported oil on the local market; and the letter was intended to harm the plaintiffs in their business operations, their good name and reputation, and was designed to pressurize the addressees to take steps to close down the plaintiffs' business operations.

On yet another front, and in furtherance of the unlawful conspiracy, the defendants secretly secured the services of an attorney, one Opperman of East London to:

(a) Make representations to the Attorney-General of the Ciskei to prosecute the plaintiffs criminally for their alleged frauds;

(b) Draft a charge sheet for the purposes of the prosecution and

(c) To act as prosecutor in the criminal trial to follow.

Opperman's fees and disbursements were paid by the defendants. In addition it is alleged that the defendants had secretly secured the services and paid the professional fees of a chartered accountant, a certain van der Ryst, to furnish a forensic audit report to support the prosecution referred to on the basis of false information place before the said van der Ryst.

The upshot of the aforementioned actions said to have been performed pursuant to the common purpose arising from the alleged conspiracy, the Attorney-General of the Ciskei, under letter dated 23 October 1997 advised the plaintiffs that he had decided to arraign the plaintiffs before the Regional Court sitting at Mdantsane on counts of fraud, forgery, uttering and contravention of sections 80 and 84 of the Customs and Excise Act No. 91 of 1964. To that end the Attorney-General utilised the charge sheet procured by the defendants through the services of the said Opperman. Concerning the conduct of the criminal proceedings, the plaintiffs continue to allege that the defendants during the period 1993 to 2001 constantly exhorted the Police Services, the Attorney-General of the Ciskei, the Customs Authorities and the Revenue Authorities actively to pursue the aforesaid criminal charges.

On yet another front and during the first half of May 1997 the third defendant (du Preez), acting for Unilever and Tiger Oats persuaded one Wilkinson, attached to the Special Investigations Division of the South African Revenue Services in East London, that the second plaintiff had been guilty of selling the exported oil on the local market and was as a consequence liable to pay VAT on sales of R10,99 million. The allegation that exported oil had been sold on the local market was false, but on the strength thereof Wilkinson issued on 26 May 1997 an estimated VAT assessment in terms of section 31(3) of the Value Added Tax Act No. 89 of 1991 for payment of the amount of R3 753 349,04. Pursuant to the aforementioned VAT assessment Wilkinson, alternatively other officials of the South African Revenue Service, garnished VAT refunds due to the second plaintiff in the sum of R3 752 349,04. The garnishing of the VAT refunds due to the second plaintiff, it is claimed, took place directly as a consequence of the actions of the said Botha and du Preez, representing the Defendants and was intended to and did in fact have the effect of disrupting the business activities of the second plaintiff and removing a substantial portion of its working capital.

The resultant criminal prosecution of the plaintiffs commenced on 24 October 1997, alternatively 4 December 1997, at Mdantsane and was thereafter postponed from time to time. The said Opperman was appointed by the Attorney-General of the Ciskei to prosecute charges on behalf of the State and his fees and disbursements were secretly funded by Unilever and Tiger Oats. In that regard the plaintiffs contend that the prosecution was unlawful, being a mixed private and public one. Before the trial commenced McBain specifically requested a certain Payne, a journalist for a trade publication, “Food and Beverage Magazine” to give publicity to the false allegations made by the plaintiffs at the trial so as to put “political pressure” on the plaintiffs and for that purpose wrongfully and unlawfully furnished the said Payne with a copy of the affidavit of Makings emanating from the police docket. Payne, it is said, did so cause publication of the false allegations in the “Food and Beverage Magazine”.

In the interim and making use of the . . . secret organization named “Duzi O”, du Preez, Kaplan, Dutton, Gamble and Botha met on numerous occasions, inter alia, on 7 June 1995, 27

September 1995 and 7 November 1995 at Johannesburg, such meetings having been convened in furtherance of the conspiracy to prosecute the plaintiffs and to put second plaintiff out business, as alleged.

In addition Le Colle-Brown, Kaplan, Miller and McBain co-operated through Botha and Opperman to persuade the Attorney-General of the Ciskei to continue with the prosecution of the plaintiffs and to accept funding by the defendants of the prosecution by paying Opperman's fees and disbursements. Miller (the fourth defendant), inter alia, made representations to that end by letter dated 23 February 1998 and, in that regard, McBain expressly approved the funding of the said prosecution on behalf of Tiger Oats during or about February 1998.

Subsequently, the plaintiffs allege, they made available to the Director of Public Prosecutions and the South African Revenue Service Authorities, proof establishing lawful export of the exported oil in question. As a consequence thereof the criminal prosecution was withdrawn by the Director of Public Prosecutions on 25 November 1999 and the South African Revenue Services conceded during April 2001, the second plaintiff's appeal against the aforementioned VAT assessment and withdrew the said VAT assessment and refunded to the second plaintiff the VAT refunds garnished as aforementioned. And, finally, the Customs Service withdrew the aforementioned customs assessment and the liens imposed upon the second plaintiff's assets and withdrew the customs action also during April 2001.

The plaintiffs conclude their particulars of claim by alleging that:

(a) As a result of the unlawful actions of the defendants, as aforementioned, the second plaintiff lost its export market and was obliged as from January 1994 to cease exporting oil, and, based on a gross profit of R300 000,00 per month it would have received from oil exports, it is claimed that second plaintiff suffered damages calculated at that rate, from January 1994 to April 2001 in the amount of R26,4 million.

(b) As a result of the criminal prosecution, the customs action, the VAT assessment and the garnishing of the second plaintiff's VAT refunds, the second plaintiff's auditors qualified its financial statements, resulting therein that the second plaintiff's bankers refused to extend further credit to the second plaintiff and called up the latter's overdraft, thus obliging second plaintiff to close its factory and cease business operations during the period January 1998 to April 2001 and which business customarily realized a gross profit (excluding exports) from such operations in the sum of R500 000,00 per month, causing a loss to the second plaintiff of R19,5 million.

(c) As a further result the first plaintiff was injured in his good name and business reputation and suffered damages to the extent of R1 million; the plaintiffs' legal expenses in defence of the criminal prosecution and in pursuing their appeal against the VAT assessment and

the customs action in the amount of R476 000,00 and R233 000,00 respectively; plaintiffs suffered damages on account of the said wrongful, unlawful and malicious prosecution set in motion by the defendants. Such damages amounting to R500 000,00 each.'

DEFENDANTS' PLEAS OF PRESCRIPTION

[4] The first to fifth defendants filed a special plea of prescription, which reads as follows:

'(a) The second plaintiff claims damages in the amount of R26 400 000,00, being an alleged loss of profits sustained as from January 1994 as a result of the conduct of the defendants.

(b) The second plaintiff further claims damages in the amount of R19 500 000,00, being an alleged loss of profits sustained as from January 1998 as a result of the conduct of the defendants.

(c) The first plaintiff claims damages in the amount of R1 000 000,00 being in respect of an alleged injury to his good name and business reputation sustained as a result of the conduct of the defendants.

(d) Each of the aforesaid claims constitutes a "debt" for the purposes of Section 12 of the Prescription Act No. 68 of 1969.

(e) In respect of each claim, the plaintiffs had, respectively, knowledge prior to 30 October 1998 of:

(i) the identities of the first to fifth defendants; and

(ii) the facts from which the said debts are alleged to have arisen,

alternatively could acquired such knowledge by the exercise of reasonable care.

(f) The Summons and Particulars of Claim were served on the first to fifth defendants no sooner than on 30 October 2001.

(g) in the premises:

(i) the second plaintiff's claims in the sums of R26 000 000,00 and R19 000 000,00 have prescribed;

(ii) the first plaintiff's claim in the sum of R1 000 000,00 has prescribed.

WHEREFORE the first to fifth defendants pray that the plaintiffs' said claims be dismissed with costs of suit.'

[5] The sixth to ninth defendants filed two special pleas of prescription, the first dealing with the second plaintiff's claims for R26.4m and R19.5m and the second dealing with the first plaintiff's claim for R1m. They repeat in essence the points contained in the special plea filed on behalf of the first to fifth defendants.

JUDGMENT IN COURT *A QUO*

[6] The learned judge said in his judgment that the argument advanced before him by counsel for the defendants (to the effect that as all the events which brought about the damage allegedly suffered by the plaintiffs had occurred more than three years before the current action commenced, any claims arising therefrom had prescribed) lost 'sight of the effect and reach of the conspiracy alleged by the plaintiffs as the moving force behind all the individual injurious actions complained of by the plaintiffs and singled out in argument by the defendants.'

[7] He continued:

'Whilst I have been unable to find any authority in our law, and none were brought to my attention during argument, actionable conspiracy is certainly known to the English Law (cf *Lonhro PLC v Fayed (No.5) [1994] I All ER 188*). It appears that the leading authority in that jurisdiction in respect of conspiracy as an actionable tort is to be found in *Crofter Hand Woven Harris Tweed Company Limited v Veitch 1942 AC 435.* In that case the House of Lords held that in a case where no unlawful means are used, the question whether a conspiracy was an actionable tort turned on the predominant purpose of the conspirators. If is was to advance or protect a legitimate interest of the conspirators then it was not actionable.

When, on the other hand, the predominant purpose was to injure the plaintiff, it constituted an actionable tort. (See too *Gulf Oil (G.B.) Limited v Page 1987 Ch 327*). Parenthetically it should be pointed out that in *Lonhro supra* it was held, inter alia, that damages for injury to reputation, as opposed to patrimonial loss, are not claimable under actionable conspiracy.

In my view actionable conspiracy, being an agreement between two or more persons to do an act which is intended to injure another (*Midland Bank Trust Company Limited v Green [1981] 2 WLR 1*) is entirely consistent with a delict actionable under the *actio legis aquiliae,* particularly in the form alleged by the plaintiffs' in paragraph 14 of their particulars of claim, *viz:*

“During or about the period June 1993 to April 2001 the defendants, acting as aforesaid, wrongfully, unlawfully and intentionally conspired to damage or destroy the plaintiffs’ business operations in the manufacture and sale of edible oils, to damage the plaintiffs in their patrimony generally and in their good name and reputation as more fully set out below.”

Even if the conspiracy alleged by the plaintiffs were not be regarded as a separate delict, the factual existence thereof and the actions performed by the conspirators as particularised in the plaintiffs’ particulars of claim, said to have been performed in execution of the unlawful aims of the conspiracy, then, in my view, one is not dealing with a single event which took place on a particular date, but with continuous unlawful acts with a common design which occurred and endured for the duration of the conspiracy and the achievement of its aims or, conversely, the ultimate failure thereof.

In the instance the plaintiffs allege that the unlawful conspiratorial acts were all directed at an abuse of the legal process by wrongfully and maliciously setting the law in motion against the plaintiffs, both criminally and civilly. The former manifested in the form of the criminal prosecution detailed in the particulars of claim and the latter in the form of the customs action, the VAT assessment and the garnishing of the second plaintiff’s VAT refunds, together with the injurious results caused thereby.

Whilst it might well be argued, as do the defendants, that most of the events, e.g. the customs assessment (14 June 1993); the attachment of the imported oil (8 June 1993); the Customs Duty Assessment (20 September 1993); the attachment of second plaintiff’s manufacturing equipment under an alleged customs lien and the civil action instituted by the Commissioner of Customs and Excise; occurred more than three years before the current action was commenced, those events cannot be viewed in isolation, but must be seen as products of the alleged conspiracy which, in the examples mentioned, had as its ultimate aim the achievement of a successful customs action against the second plaintiff.

The same reasoning applies, *mutatis mutandis,* to the alleged events which gave rise to the steps taken against the second plaintiff by the South African Revenue Service and the alleged events which gave rise to the criminal proceedings instituted against the plaintiffs.

In the case of the latter, the claim for damages arising from the alleged malicious prosecution cannot, in my view, be divorced from the alleged conspiracy which ultimately gave rise to it and that claim could not be pursued by the plaintiffs until such time as the criminal prosecution terminated either in an acquittal or a withdrawal. For only then would the plaintiffs have been entitled in law to institute action (cf *Lemue v Zwartbooi (1896) 13 SC 403; Bacon v Nettleton, 1906 TH 138; Thompson and Another v Minister of Police and Another 1971 (1) SA 371(ECD).*

The rationale appears to be … "because one of the essential requisites of the action is proof of a want of reasonable and probable cause on the part of the defendant, and while a prosecution is actually pending its result cannot be allowed to be prejudiced by the civil action."

See also *Els v Minister of Law and Order and Others 1993 (1) SA 12(C) at 17.* Again the same reasoning applies to the civil proceedings instituted against the second plaintiff by the South African Revenue Services and the Commissioner of Customs and Excise. It is only when those proceedings were withdrawn, in the case of the Commissioner, and the appeal conceded by the South African Revenue Service, that the second plaintiff was entitled to institute the action relating to the malicious institution of those proceedings.

In paragraph 28 of their particulars of claim the plaintiffs allege that the criminal prosecution was withdrawn by the Director of Public Prosecutions on 25 November 1999 and the South African Revenue Services conceded second plaintiff's appeal against the VAT assessment and withdrew that assessment and refunded the amount of VAT garnished during April 2001 and, finally that the Customs Service withdrew the Customs Assessment, the liens imposed on the second plaintiff's assets and also withdrew the customs actions during April 2001.

The aforegoing events, having occurred well within the three-year period, signaled the culmination or conclusion of the conspiracy. Whether it terminated in success or failure is open to debate, I venture.'

He concluded by stating that he was in the circumstances of the view that none of the claims in the plaintiff's particulars of claim had become extinguished by prescription.

[8] He added:

'In coming to that conclusion, I confess to a measure of uncertainty concerning the first plaintiff's claim for damages in the amount of R1 million. It will be recalled that in respect of that claim the first plaintiff alleges that he was injured in his good name and business reputation, bearing in mind that he is the managing director of the second plaintiff, as a result of the malicious actions of the defendants. Whilst there is something to be said for the notion that that claim arose and was actionable well before the commencement of the three-year period which immediately preceded the institution of the current action, and, as a consequence, has become prescribed, I conclude, and accordingly hold that it did not. That claim is inextricably interwoven with the other claims and, like those, also arose out of the unlawful actions taken pursuant to the aforementioned conspiracy, which, inter alia, culminated in the criminal prosecution and became actionable – in the sense that the delictual debt became payable – when the criminal prosecution was terminated by the withdrawal of the charges as aforementioned.'

RELEVANT STATUTORY PROVISIONS

[9] Before I discuss whether the judge was correct in dismissing the pleas of prescription raised by the defendants it will be appropriate to set out the relevant provisions in the Prescription Act 68 of 1969, viz s 10(1), 11(d), 12(1) and (3) and 15(1).

[10] They read as follows:

'10(1) Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.'

'11 The periods of prescription of debts shall be the following:

. . . .

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

'12(1) Subject to the provisions of subsections (2) [which is not relevant] and (3), prescription shall commence to run as soon as the debt is due.

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'

'15(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.'

DISCUSSION

[11] I do not think it is necessary for the purposes of this case to express an opinion on the correctness of the judge's view that the English tort of actionable conspiracy 'is entirely consistent with a delict actionable under the *actio legis aquiliae'.* I say that because it is clear, as Viscount Simon LC put it, in *Crofter Hand Woven Harris Tweed Company Limited v Veitch, supra,* at 439, that 'the tort of conspiracy is constituted only if the agreed combination is carried into effect in a greater or less degree and damage to the plaintiff is thereby produced.' With us also there can be no question of a delict having been committed unless the conduct of the defendant of which the plaintiff complains

has caused damage and then all damage resulting from that conduct, whether 'already realized or . . . merely prospective', can be claimed (see *Oslo Land Co Ltd v Union Government* 1938 AD 584 at 590), unless an essential element of the delict complained of (such as the termination of proceedings in the plaintiff's favour in the case of the delict of malicious prosecution, see *Lemue v Zwartbooi, supra*) has not yet occurred. Where the delict complained of is a continuing one the plaintiff will have a 'series of rights of action arising from moment to moment' (*Oslo* case at 589).

[12] I do not think that the acts allegedly committed in pursuance of the conspiracy referred to in the plaintiffs' particulars of claim can be regarded as forming part of what Watermeyer JA described in the *Oslo* case, at 589, as 'a continuing injury'. He pointed out that 'there is a distinction between what may be regarded as a single wrongful act giving rise to one cause of action and a continuing injury causing damage from day to day which may give rise to a series of rights of action arising from moment to moment.'

[13] The case pleaded by the plaintiffs, as appears from the judge's summary which I have quoted above, was that the second plaintiff sustained damages (i) in an amount of R26.4m for loss of profits from oil exports in January 1994 and (ii) in an amount of R19.5m for loss of profits from operations excluding exports in January 1998, while the first plaintiff sustained damages in an amount of R1m for injury to his good name and reputation. The first plaintiff's damages must have been sustained in consequence of the events which caused the second plaintiff to lose its export profits and subsequently to close its business operations with the consequent loss of its profits from its remaining operations. (In what follows I shall call the second plaintiff's claim for R26.4m 'claim 1', its claim for R19.5m 'claim 2', and the first plaintiff's claim for R1m 'claim 3'.)

[14] The plaintiffs do not allege that there was a continuing wrong which caused damage from day to day. I was not able to find nor was this court referred to any authority in English law for the proposition that the period of limitation in respect of damage brought about by the conduct of co-conspirators acting in pursuance of a conspiracy to injure only runs from the date when the conspiracy

came to an end either because it succeeded in achieving aims or failed to do so – as the judge in effect found. In my view the learned judge erred in dismissing the appellants' pleas of prescription by invoking the principles underlying the English and Scottish cases on the tort of conspiracy (on which it should be pointed out counsel for the plaintiffs did not rely).

[15] I am also of the opinion that the plaintiffs' counsel's submissions based on the decision of this court in *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317(A) cannot be accepted. That case was concerned with the alleged wrongful and unlawful closure by the respondent municipality of a street within its jurisdiction, which, so it was averred, caused the appellant to sustain damages in an amount of R23 200, being the loss of rental he suffered because he was unable to let three shops belonging to him which were situated in the street that was closed. This court held (at 328G-H) that the essence of the appellant's complaint was that 'the road was wrongfully and unlawfully closed in February 1960, and was wrongfully and unlawfully *kept closed* until 17 December 1963' (my emphasis). At 331F-G it was held that the case was not 'a case where the injurious effects of a completed wrongful act (eg., a single blow with a weapon) have continued, but is one of continuance of the wrongful act itself'. At 331H the definition of a continuing injury given by Salmond (*The Law of Torts,* 13 ed, p 779,) namely 'an injury was said to be a continuing one so long as it is still in the course of being committed and is not wholly past', was approved. In the present matter the injuries complained of were not 'still in the course of being committed' and were wholly past, in the case of claim 1 in January 1994 and in the case of claims 2 and 3 in January 1998.

[16] Counsel for the plaintiffs also submitted that the particulars of claim encompassed a number of causes of action. When asked to state what they were he mentioned two: unlawful competition and abuse of legal proceedings. He contended on this part of the case that, although more than three years had elapsed after the wrongful and culpable acts complained of had occurred, the damages claimed had been suffered and his clients had knowledge of all the facts they needed to prove the unlawful competition claim (with the result that their unlawful competition claim had prescribed), their claim for damages suffered

as a result of the alleged abuse of legal proceedings did not prescribe until the proceedings in question had terminated in their favour, which only occurred when the criminal prosecution, the civil action for customs duties and penalties, the VAT assessment, the customs assessment and the liens imposed upon the second plaintiff's assets were withdrawn and the VAT refunds which were garnished were refunded to the second plaintiff, all of which events took place within the three year period preceding the commencement of the action. (This contention can only apply to the second plaintiff's claim. It is not suggested that the first and sixth defendants were competitors of the first plaintiff. A cause of action based on unlawful competition was accordingly not available to the first plaintiff.)

[17] In support of this contention counsel for the plaintiffs submitted that the 'termination in favour of the plaintiff' principle applicable in malicious prosecution matters, which was applied in such cases as *Lemue v Zwartbooi, supra,* and *Els v Minister of Law and Order, supra,* must be applied to cases where a defendant has maliciously made false statements to the revenue authorities to the prejudice of another and succeeded in inducing the authorities to exercise the draconian powers vested in them by the revenue legislation against that other person and to institute civil proceedings against such person, who has suffered damages in consequence.

[18] In what follows I shall assume, without deciding, that the second plaintiff had available to it a cause of action based on the abuse of legal proceedings. In my view counsel for the appellants were correct in submitting that the contentions summarized in paras [15] and [16] above are no answer to the pleas of prescription raised in respect of claims 1 and 2. This is because what prescribes in terms of the Prescription Act 68 of 1969 is a 'debt', that is to say not a 'cause of action' but a 'claim': see *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1(A) at 15B-16D, *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in Liquidation)* 1998 (1) SA 811 (SCA) at 825B-827F and *Drennan Maude & Partners v Pennington Town Board* 1998 (3) SA 2001 (A) at 212E-G.

[19] Claims 1 and 2 were claims for damages, for loss of export profits and for

loss of non-export profits. It is true that these claims may well have been covered by two separate causes of action but the fact that there may have been these separate causes of action available to the second plaintiff does not mean that it had, as its counsel contended, separate alternative claims.

[20] It follows from what I have said that, as the second plaintiff knew all that it needed to establish claims 1 and 2 more than three years before the action commenced, the plea of prescription raised against these claims should have been upheld.

[21] The first plaintiff is in a different position. As I have said, he did not have a separate cause of action based on unlawful competition. He has a claim for malicious prosecution, in respect of which he claims damages of R500 000, and to which no plea of prescription has been raised. Claim 3, his claim for R1 000 000, must relate to the actions of the defendants other than those relating to his prosecution. In the circumstances it can only relate to the actions of the defendants in (i) maliciously making false statements to the revenue authorities and inducing them to institute civil proceedings against the second plaintiff for recovery of R19 025 761 and to exercise their statutory powers of attachment, pursuant to the imposition of customs liens, and garnishment in respect of VAT refunds, (ii) 'publishing' (in the sense in which that expression is used in the law of defamation) the letter to the South African Minister of Agriculture dated 18 July 1993; and (iii) by bringing about the publication of certain false allegations concerning them in the 'Food and Beverage Magazine'.

[22] In so far as the averments relating to the publication of false allegations of and concerning the first plaintiff are concerned, the first plaintiff's claim is clearly based on an alleged defamation which in the light of what I have already said has prescribed. But some at least of the damages to which claim 3 relates may well have been caused by the institution of the civil proceedings and the attachments and garnishment to which I have referred.

[23] Questions debated before us by counsel included whether our law recognises a delict of malicious instigation of civil proceedings in circumstances

such as are here alleged or a delict of malicious instigation of the exercise of fiscal powers such as those of garnishment and attachment which it is said were exercised in this matter.

[24] Counsel for the sixth to ninth appellants contended that there was no basis in the case law for the recognition of a delict of malicious instigation of civil proceedings or of the exercise of fiscal powers and that there was no warrant for extending the existing law regarding the malicious institution of judicial proceedings to cover the facts alleged in the particulars of claim. In what follows I shall make a similar assumption to the assumption I made in respect of claims 1 and 2, namely, that the first plaintiff did have a claim in respect of what may be called the non defamation aspects of claim 3.

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[25] Because he knew all the facts necessary to establish this claim, (on the assumption that I have made that he had a claim) more than three years before the proceedings commenced, the only basis on which he can resist a plea of prescription is by pointing to an essential element of his cause of action which only came into existence less than three years before the institution of the proceedings. In the present case he endeavours to do this by relying on such cases as *Lemue v Zwartbooi, supra,* and *Els v Minister of Law and Order, supra,* and contending that he could not institute this part at least of his claim until the customs action and the attachments and the garnishment had been withdrawn. The principle underlying the cases relied on was stated by De Villiers CJ in *Lemue's* case (at 407) in the following terms: 'While a prosecution is actually pending its result cannot be allowed to be prejudged in the civil action.' A different reason for the rule was given by Solomon J in *Bacon v Nettleton, supra.* He said (at 142-3):

> 'The proceedings from arrest to acquittal must be regarded as continuous, and no personal injury has been done to the accused until the prosecution has been determined by his discharge.'

Both reasons were cited with approval by Eksteen J in *Thompson's* case, *supra,* at 375 B-C.

[26] The reason given in *Bacon v Nettleton* need not detain us long. In this case the first plaintiff does not allege a continuous wrong nor that he suffered an

injury to his reputation and good name only when the customs action and the attachment and garnishment were withdrawn. On the contrary he says that the *institution* of the action and the acts of attachment and garnishment caused the injury.

[27] The reason given in *Lemue's* case, the need to prevent the prejudging of the pending action, calls for further consideration. Dr CF Amerasinghe in his *Aspects of the Actio Iniuriarum in Roman-Dutch Law* says (at p 22) that:

'reasons of legal policy which have not been expressly formulated seem to have made the termination of the proceedings in favour of the plaintiff a requirement of the *iniuria* [of malicious prosecution].' *Lemue's* case indicates what one at least of the policy considerations is: a court hearing a malicious prosecution case should not be called on to prejudge the findings of the criminal court. Equally, in my view, it is clear that an accused should not be allowed to launch what amounts to a pre-emptive strike against a prosecution pending against him by suing the complainant for damages. Furthermore it is undesirable that a party who loses a case before one tribunal should be allowed to attack the judgment, not on appeal, but in another court, with the resultant possibility of conflicting judgments and what one may describe as judicial discord. A convicted accused who has not appealed or whose appeal has failed should not be allowed to assert in other proceedings that his conviction was unjust and if he cannot do so after conviction, he should not be allowed to do before he is convicted but while the prosecution is still pending.

[28] I am prepared to assume for the purposes of this case that this principle also applies to cases involving the abuse of civil[1] and what I have called fiscal proceedings.

[29] These considerations only really apply when the judgment in question is or may be given against the party seeking in other proceedings to controvert or anticipate a finding given or to be given against him. They do not operate as forcefully where the finding in question is or will be given against another party. There is no legal basis for preventing a plaintiff from seeking a finding in a case

[1] *Cf.* the position in the United States as set out in Prosser, *Law of Torts,* 4ed, 853.

instituted by him which contradicts a finding given or possibly to be given in another case to which he is not a party.

[30] In the present case it is not alleged that the first plaintiff was a party to the customs action or the proceedings flowing from the attachments and garnishment. I am accordingly of the view that nothing prevented him from suing for all the damage he alleges he suffered to his good name and business reputation as soon as that damage was suffered. He concedes that he knew the facts necessary to establish his claim more than three years before he commenced his action. It is accordingly clear that claim 3 in its entirety has prescribed and that the appellants should succeed on this point also.

ORDER

[31] The following order is made:

1. The appeal is allowed with costs, including those occasioned by the employment of two counsel, such costs to be paid by the respondents jointly and severally, the one paying the other to be absolved.
2. The order made in the court *a quo* is set aside and replaced with the following:

   'The special pleas of the defendants are upheld and the claims to which they relate are dismissed with costs including those occasioned by the employment of two counsel.'

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IG FARLAM
JUDGE OF APPEAL

CONCURRING

BRAND JA
NUGENT JA
MLAMBO JA
CACHALIA AJA