OLD MUTUAL LIFE ASSURANCE COMPANY NAMIBIA LIMITED V OLD MUTUAL NAMIBIA STAFF PENSION FUND AND ANOTHER

CASE NO. (P) A 321/2005

2005/11/22

Maritz, J

PENSIONS
LAW OF DELICT

Pension Funds Act, 1956 – s 37A and D – providing stringent protection for pension savings – circumstances under which creditors may lay claims to Fund narrowly circumscribed – provisions will be strictly interpreted – only cases falling clearly within scope of language to be excepted

Pension Funds Act – s 37D(b) – affording employer access to funds of employee not afforded to by other creditors – employer must fulfil 3 requirements – requirements discussed – threshold requirement is that the amount must be due by employee on date of retirement or when employees ceases to be member of Fund – Not shown debt was due on that date

Law of delict – when debt due – equated with when cause of action arise – latter discussed – no cause of action until everything has happened which would entitle the plaintiff to judgement – only exception is “once and for all”-rule

CASE NO. (P) A321/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

OLD MUTUAL LIFE ASSURANCE COMPANY NAMIBIA LIMITED **APPLICANT**

and

OLD MUTUAL NAMIBIA STAFF PENSION FUND **FIRST RESPONDENT**

JOHAN DEYSEL **SECOND RESPONDENT**

CORAM: MARITZ, J.

Heard on: 2005.11.18, 21

Delivered on: 2005.11.22

JUDGMENT

MARITZ, J.:

In this application brought as a matter of semi-urgency, the applicant, Old Mutual Life Assurance Company Namibia Limited is, in

essence, seeking an order interdicting its employees' pension fund, the Old Mutual Staff Pension Fund, from paying out the pension fund benefits (including the interest thereon) of a former employee pending the finalisation of an action to be instituted by the applicant against the former employee for payment in the amount of N$7 943 591-16 plus interest *a tempore morae.* The Old Mutual Staff Pension Fund is cited in the proceedings as the first respondent and the employee, one Johan Deysel, as the second respondent. In addition, the applicant is also seeking an order that the Interdict shall lapse if the applicant does not institute the main action within 30 days from the date of the order and that the costs of the application be costs in the main action.

The first respondent filed an affidavit indicating that it will abide the judgment of this Court but the second respondent, herein represented by Mr Smuts duly instructed by Weder Kruger & Hartmann, opposes the application for reasons which will become more apparent later in this judgment. One of the grounds on which the application was initially opposed, was that the application was not urgent and, in any event, that any urgency attaching to it was contrived and self-induced. Mr Heathcote, instructed on behalf of the applicant by Messrs Conradie and Damaseb, submitted that it was apparent from the extensive explanation advanced in the applicant's founding and replying affidavit that the application was

clearly one of urgency and that it should be entertained on that basis. I ruled in favour of the applicant, condoning its non-compliance with the Rules of Court relating to service and filing and granted it leave for the application to be heard as one of semi-urgency. Given the limited time available in the Court's schedule to hear the application on its merits, I indicated at the time that I would provide reasons for the ruling on the issue of urgency in due course. What follows, in summary, are those reasons but, because the factual matrix in which urgency had been decided is also relevant to the Court's findings on the merits later in this judgment, I propose to give a synopsis of the facts relevant to both urgency and the merits at the outset.

It is common cause that the second respondent was employed by the applicant as a Financial Advisor in 1990. The working relationship between him and the applicant was, amongst others, defined in terms of an employment contract which was substituted from time to time during the currency of his employment - the most recent one dated 8 November 2002. His duties included the procurement of new business in respect of accredited Old Mutual products both for existing and new clients. One of those clients within the applicant's investment portfolio "inherited" by him upon his appointment and thereafter managed by him was Ms Helene Naude, a 70 year old lady and long-time client of the applicant. She

had investments under the control or safe-custody and administration of the applicant in excess of N$15 000 000-00. The second respondent was responsible to manage the applicant's relationship with Ms Naude and he provided her with financial advice regarding her investments with the applicant.

More recently, the second respondent realised that some of her investments with the applicant declined in value due to adverse international investment market conditions. It just so happened that a certain Mr Phillip Fourie contacted the second respondent on the recommendation of one Boonzaaier during or about October or November 2003 and introduced him to a favourable investment opportunity outside those offered by the applicant. According to Fourie, he was in a position to invest large amounts of money offshore for a period of one year guaranteed to render a return of 22% per annum payable quarterly to the investor. When the investment would mature at the end of the term, the capital would also be refunded to the investor.

The second respondent, in turn, mentioned this investment opportunity to Ms Naude and advised her to disinvest (through the repurchase of) two unit trust investments and to surrender her life insurance policies - both held with the applicant - and to reinvest the proceeds as well as certain additional funds in the investment

opportunity presented by Fourie in an entity known as Great Triangle Investments (Pty) Limited. In total about N$7 000 000-00 was accordingly transferred into a call account to be so invested.

Whilst the investment appeared rosy for both the second respondent and Ms Naude during the first two quarters of 2004 - when Naude received returns in the form of two quarterly payments of N$350 000-00 each and the second respondent received commission totaling N$700 000-00 of which he had to pay Boonzaaier N$100 000-00 - it soon thereafter proved to be a most unfortunate investment for Ms Naude. The third quarterly payment was not made on time and, when it was eventually paid, it came from an ABSA Bank account held in the name of Fourie. At the end of 2004, when the fourth quarterly payment and repayment of the capital of the investment became due, nothing was forthcoming.

The explanations for the delay by Fourie suggested undercurrents of trouble but he promised payment thereof and of the balance of commission due to the second respondent before the end of January 2005. Concerned, but not yet alarmed, the second respondent advanced one of the commission payments earlier received by him as a loan to Fourie to enable the latter to pay the fourth quarterly payment to Ms Naude, which he did. Since then, no further payments were made. Fourie indicated that he had difficulty to

recover the investment he had in turn made and that the matter was under investigation by the Metropolitan Police Service in the United Kingdom. Initially, he pointed out that he had sufficient assets - including a property in Stellenbosch which, according to him, was conservatively valued at R20 000 000-00 - to cover the investment. He offered to cause the registration of a mortgage bond as security if payment would not be made to Ms Naude.

Both promises came to naught. Fourie evaded repeated attempts of the second respondent to contact him. In the result, the second respondent advised Ms Naude of the problems concerning her investment and assisted her in appointing attorneys in South Africa to apply for the sequestration of Fourie. The circumstances surrounding the investment also came to the attention of the applicant who immediately caused an internal audit to be conducted. In the course thereof it obtained an affidavit from the second respondent setting forth most of the circumstances referred to earlier in this judgment. In the affidavit the second respondent maintains that he made it clear to Ms Naude that the applicant had no involvement whatsoever with the investment proposed by Fourie.

Although Ms Naude did not oppose to any affidavit in these proceedings, it appears from a letter written by her to the applicant that she intends to hold the applicant liable for any losses suffered

as a consequence of the investment. In it she points out that the particulars of the investment were reflected on a letterhead of the applicant; that they were consolidated with her other investments in that letter and that the letter was signed by the second respondent in his capacity as a Financial Advisor of the applicant. Since then she has al so demanded (through her lawyers) payment of the capital sum and the return promised on the investment. The potential vicarious exposure of the applicant to Ms Naude amounts to N$7 943 591-16. The matter is also under investigation by law enforcement agencies in Namibia and in the Republic of South Africa.

As a result of the second respondent's conduct, the applicant resolved to institute Disciplinary Proceedings against him and served a Notice of Suspension on him on the 19th of August 2005. On the 7th of September the second respondent was also notified of a Disciplinary Inquiry to be held on the 16th of that month. He was given a list of the allegations of misconduct on his part but, on the 13th of September - that is only three days before the scheduled Disciplinary Hearing - the second respondent tendered his resignation with 24 hours notice. The second respondent's resignation, it seems, followed upon consultations which were held between the second respondent's legal representative and Messrs Briel and Van Der Walt, both employees of the applicant. Whilst the

reasons for the second respondent's resignation may not be clear, the second respondent nevertheless admits that his conduct in these events constituted a breach of his fiduciary duties under his contract of employment with the applicant.

By reason of his resignation, the second respondent became entitled to the payment of N$3 286 508-81 by the first respondent under the applicant's Pension Fund Scheme. He requested on the 22nd of September 2005 that the amount due to him be paid directly into a Sanlam Annuity Fund.

Given his potential exposure to Ms Naude, the applicant is seeking to prevent the first respondent from releasing the second respondent's Pension Fund benefits (including the interest thereon) pending the finalisation of the action to be instituted by the applicant against the second respondent for (a) payment of N$7 943 591-16 and (b) an order declaring that the applicant shall be entitled to execute any judgment obtained by virtue of such an action against the second respondent's Pension Fund Benefit held by the first respondent. To that end it relies on the provisions of Section 37D(b)(ii)of the Pension's Funds Act, 1956. I shall henceforth refer to the Pension's Fund Act as 'the Act' and I shall deal with this section in more particularity later in this judgment.

It is common cause that, unless the Court otherwise orders, the first respondent will pay the benefit as requested to the second respondent. Such payments are normally processed within one month after the date of termination of employment but the process may in certain circumstances take as long as three months. Once payment has been made, the remedy contemplated in Section 37D of the Act will no longer avail the applicant. It is for that reason apparent that the applicant could not enforce a remedy by litigation in the ordinary course: the time periods prescribed in respect of such litigation would have taken the exchange of pleadings or affidavits and the enrollment of the case on the ordinary roll substantially beyond the period within which the first respondent will be obliged to pay the second respondent's pension benefits. I am reminded by Counsel for the applicant that, in deciding the urgency of the application, the Court will depart from the premise that the applicant's case is a good one and that he is entitled to the relief that is being sought in the application (See: *Bandle Investments (Pty) Limited v Registrar of Deeds & Others,* 2001(2) SA 203 (SE) at 213E and also *20th Century Fox Film Corporation & Another v Anthony Black Films (Pty) Limited*, 1982(3) SA 582 (W) at 586D. For these reasons the matter is, and, at all relevant times since the second respondent's resignation, has been one of urgency.

The second respondent's real objection, as I understand Mr Smuts, is that the application was initially brought on two days notice to the second respondent. Referring to a number of delays in bringing this application - most notably that in completing the internal investigation; delaying the second respondent's request for payment of his pension benefits to the first respondent; delaying the instruction of the applicant's Counsel and the preparation of the application - Mr Smuts contended - and forcefully so I should add - that the urgency with which the application had been brought was self-induced and contrived. He referred the Court to the matter of *Bergmann v Commercial Bank of Namibia Limited & Another*, 2001 NR 48 (HC) where the Court held at 49H-J as follows:

> "The Court's power to dispense with the forms and service provided for in the Rules of Court in urgent applications is a discretionary one. That much is clear from the use of the word 'may' in Rule 6(12). One of the circumstances under which a Court, in the exercise of its judicial discretion, may decline to condone non-compliance with the prescribed forms and service, notwithstanding the apparent urgency of the application, is when the applicant, who is seeking the indulgence, has created the urgency either mala fides or through his or her culpable remissness or inaction. Examples thereof are to be found in Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd 1982 (3) SA 582 (W) and Schweizer Reneke Vleismaatskappy (Edms) Bpk v Die Minister van Landbou en Andere 1971 (1) PH F11 (T))."

The Court went on to say (at 50H to 51B):

> “Whilst Rule 6(12) allows a deviation from those prescribed procedures in urgent applications, the requirement that the deviated procedure should be 'as far as practicable' in accordance with the Rules constitutes a continuous demand on the Court, parties and practitioners to give effect to the objective of procedural fairness when determining the procedure to be followed in such instances. The benefits of procedural fairness in urgent applications are not only for an applicant to enjoy, but should also extend and be afforded to a respondent. Unless it would defeat the object of the application or, due to the degree of urgency or other exigencies of the case, it is impractical or unreasonable, an applicant should effect service of an urgent application as soon as reasonably possible on a respondent and afford him or her, within reason, time to oppose the application. It is required of any applicant to act fairly and not to delay the application to snatch a procedural advantage over his or her adversary.”

This principle is derived from a long line of cases referred to in *Gallager v Norman’s Transport Lines (Pty) Limited*, 1992(3) SA 500 (W), where Flemming DJP pointed out at 502E and further:

> “Rule 6(5)(a) of the Uniform Rules of Court is peremptory. An application must be in a form 'as near as may be in accordance with Form 2(a)'. Rule 6(5)(b) also compels. An applicant is bound to nominate a day, at least five days after service on the respondent, on or before which the respondent must notify the applicant of intended opposition. Within 15 days after that notification, a respondent who does oppose must deliver opposing affidavits (Rule 6(5)(d)(ii)).
>
> No Rule says that any of the said obligations do not apply to an urgent application. Such an application is an 'application' in terms of Rule 6(5). The only qualification is that in an urgent matter an applicant may amend 'the rules of the game' without asking prior

permission of the Court. (*Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) .)

But the intent of the Rules is that such amendment is permissible only in those respects and to that extent which is necessary in the particular circumstances. I use the word 'necessary' in its ordinary signification, but naturally in relation thereto that evidence shows 'real loss or disadvantage if he is compelled to rely solely on the normal procedure'. The Court is enjoined by Rule 6(12) to dispose of an urgent matter by procedures 'which shall as far as practicable be in terms of these Rules'. That obligation must of necessity be reflected in the attitude of the Court about which deviations it will tolerate in a specific case.

The mere existence of some urgency cannot therefore justify an applicant not using Form 2(a) of the First Schedule to the Uniform Rules. The rules do not tolerate the illogical knee-jerk reaction that, once there is any amount of urgency, that form of notice of motion may be jettisoned - and often that a rule nisi may be sought. The applicant must, in all respects, responsibly strike a balance between the duty to obey Rule 6(5) and the entitlement to deviate, remembering that that entitlement is dependent upon and is thus limited according to the urgency which prevails. Vide *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 136D-E, the philosophy of which has received wide support in other Divisions."

I am of the view that it would have been irresponsible of the applicant to launch this application without conducting the internal investigation to determine the nature of the applicant's conduct and breach of contract; without conducting a forensic investigation to assess the risk, nature and scope of its potential liability to Ms Naude and without soliciting legal advice on those matters and on the applicant's legal entitlement under Section 37D of the Act to

apply for the relief prayed for. These steps, by necessity, took time and, notwithstanding the criticism that the applicant could have particularised them in greater detail and with reference to more dates, I am satisfied that the applicant was alive to the urgency of the matter and acted with a measure of expeditiousness.

Whilst justifiable criticism may be directed to the applicant's failure to more fully explain the delay in forwarding the second respondent's request for payment to the first respondent at an earlier stage, I'm not inclined to infer from the available facts - as Counsel for the second respondent invited me to do - that the applicant deliberately delayed payment of the benefits by the first respondent to create a window of opportunity for this application to be launched.

Whilst I hold that there has not been any impropriety in the applicant's conduct, I am of the view that the degree of urgency with which the applicant investigated the matter and launched the application is not commensurate to the urgency with which it required the second respondent to oppose the application. In allowing only two days for opposition in a complicated matter like this, the applicant expected a significantly higher degree of urgency from the second respondent than that with which it conducted itself. Had applicant pressed the application on that basis, I would not

have been surprised if the Judge before whom this application was initially called, would have declined to grant the condonation requested. As it happened, the case was only postponed on that day for two weeks to allow the applicant to collate the application properly and for the exchange of answering and replying affidavits. When this application was called before me, all the affidavits had been filed and Mr Smuts made it clear that the second respondent would not seek a further postponement to supplement his affidavit. The absence of any prejudice to the respondent is an important factor which the Court must take into consideration in deciding the issue of urgency. In *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another* 1981 (4) SA 108 (C) at 112J to 113A, Fagen J dealt with the considerations which will be weighed up to assess the urgency of a matter:

> "It is clear from the requirements set out in Rules 27 and 6 (12) that the Court's power to abridge the times prescribed and to accelerate the hearing of the matters should be exercised with judicial discretion and upon sufficient and satisfactory grounds being shown by the applicants. The major considerations normally and in these two applications are three in number, viz the prejudice that applicants might suffer by having to wait for a hearing in the ordinary course; the prejudice that other litigants might suffer if the applications were given preference; and the prejudice that respondents might suffer by the abridgment of the prescribed times and an early hearing."

Mr Smuts emphasized the second consideration mentioned by Fagan J and submitted that, even if the second respondent had not been prejudiced, other litigants might by having to wait longer for their cases to be called. This argument might have found some favour had it not been for the fact that, as I have held earlier, the application was one that had to be disposed of as a matter of urgency. The applicant could not have proceeded with it in the normal course to obtain the relief which, for purposes of urgency, the Court must accept it was entitled to. The applicant had to be permitted to jump the queue of litigants waiting for the determination of their cases in the ordinary course. On that premise, I did not understand the second respondent to contend that the applicant would not have suffered severe prejudice if it had to wait for adjudication in the ordinary course.

It was for these reasons that I granted condonation of the applicant's non-compliance with the Rules relating to service and filing and allowed the application to be heard as one of urgency.

Extensive argument was presented to the Court on the merits of the application. Both litigants accept that the Pension Fund benefits of a person enjoy special protection under the Act. So, for instance, does Section 37A of the Act provide:

“(1) Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act 58 of 1962), and the Maintenance Act, 1963 (Act 23 of 1963), no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law, or to the extent of not more than three thousand rand per annum, be capable of being taken into account in a determination of a judgment debtor's financial position in terms of section 65 of the Magistrates' Courts Act, 1944 (Act 32 of 1944), and in the event of the member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate such benefit or right, the fund concerned may withhold or suspend payment thereof: Provided that the fund may pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine.

(2)(a) If in terms of the rules of a fund the residue of a full benefit, after deduction of any debt due by the person entitled to the benefit, represents the benefit due to that person, such reduction shall for the purposes of subsection (1) be construed as a reduction of the benefit.

(b) The set-off of any debt against a benefit shall for the purposes of subsection (1) be construed as a reduction of the benefit.

(3) The provisions of subsection (1) shall not apply with reference to anything done towards reducing or obtaining settlement of a debt-

(a) which in the case of a fund to which the Financial Institutions Amendment Act, 1976 (Act 101 of 1976), applies, arose before the commencement of that Act;

(b) which, in the case of a fund to which the Financial Institutions Amendment Act, 1976, does not apply, arose before the commencement of the Financial Institutions Amendment Act, 1977; or

(c) which a fund may reduce or settle under section 37D, to the extent to which a fund may reduce or settle such debt."

The purpose of this section is clear. It provides stringent protection of the pension savings of persons normally made during the productive years of their lives to retire with a measure of dignity. Thus, the Legislature is also seeking to reduce the social and financial responsibility of society to those who have contributed their industry, health and vigor during younger years for the betterment of all. With old-age approaching after retirement, so does the risk of illness and infirmity when a pension income is often the only protection against the indignities and inhumanity of living in abject poverty. The circumstances under which this protection may be derogated from are expressly enumerated in the Act and narrowly circumscribed. Central to the determination of the litigant's rights and obligations, stand the provisions of Section 37D(b)(ii) of the Act. It reads:

"A registered Fund may –

(b) deduct any amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund, in respect of-

(i) (aa) ...

(bb) any amount for which the employer is liable under a guarantee furnished in respect of a loan by some other person to the member for any purpose referred to in section 19(5)(a), to an amount not exceeding the amount which in terms of the Income Tax Act, 1962, may be taken by a member or beneficiary as a lump sum benefit as defined in the Second Schedule to that Act; or

(ii) compensation (including any legal costs recoverable from the member in a matter contemplated in subparagraph (bb)) in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which-

(aa) the member has in writing admitted liability to the employer; or

(bb) judgment has been obtained against the member in any court, including a magistrate's court,

from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such amount to the employer concerned."

A reading of the subsection suggests that the Legislature defined the nature of a debt which may be deducted from the pension fund of a person with regard to three requirements - all of which must be present for the debt to fall within the parameters of the sub-section. They are, firstly, that the amount of the debt must be due by the member to his employer on the date of his retirement or on which he ceases to be a member of the Fund; secondly, that the amount

must be due in respect of compensation (including any legal costs recoverable from a member in a matter contemplated in sub-paragraph (bb)) in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member and thirdly, it must be in respect of which the member has, in writing, either admitted liability to the employer or judgment has been obtained against the member in any Court, including a Magistrate's Court.

Mr Smuts submits on authority of *ABSA Bank Limited v Burmeister & Others*, 2004(5) SA 595 (SCA) at 600F-H and 601E-G, that this sub-section must be strictly interpreted. Paragraphs [12] and [14] of the judgement read as follows:

> "[12] The effect of s 37A(1) is to establish a general rule protecting pension fund benefits from, inter alia, attachment and execution. (The amendment of the section by s 45 of 1998 is not material to the present case.) Its object is clearly to protect pensioners against being deprived of the source of their pensions. In terms of s 37(B) such benefits are also deemed not to form part of the assets in the insolvent estate of the person in question. The protection afforded by s 37A(1) is, however, subject to a number of exceptions, one of which is the exception provided for in s 37D(1)(b). That section, therefore, affords to an employer a right of access to pension fund benefits which other creditors do not have."

And paragraph 14:

> "[14] ... Such a provision will normally be strictly interpreted; in other words, the Legislature will be presumed to have intended that only cases clearly falling within the scope of the language used are to be excepted. (See *Hartman v Chairman, Board for Religious Objection, and Others* 1987 (1) SA 922 (O) at 927G - 928B.) This approach to statutory interpretation is particularly apposite when the rule of general application has as its object the protection of a particular class of persons considered by the Legislature to be worthy of protection, such as pensioners.

Having those objects in mind, I am of the view - insofar as the applicant may rely on the provisions of the employment agreement applicable between the applicant and second respondent for the relief prayed for - that par 9.3 read with par 9.4 of that contract does not contemplate to grant the applicant any rights beyond those contemplated in s 37D. To the extent that it does - if I am wrong in this interpretation - such excess will be overly broad and, to that extent, be *contra bonos mores*.

The threshold requirement contained in Section 37D(b) is that the amount must be <u>due</u> by a member to his employer on the date of his retirement or on the date on which he ceases to be a member of the Fund. Whether that requirement has been satisfied must be examined at the outset.

It is common cause that Ms Naude has not instituted any legal proceedings against the applicant as yet. The letter of demand

indicates - at best for the applicant - that it is at risk of such an action being instituted. In anticipation of the contemplated action it is seeking the interdict to protect its rights to execute against the second respondent's pension fund in the event that it will held vicariously liable for the actions of the second respondent. Should that action be instituted, it intends to seek an indemnity from the second respondent and/or damages based on his conduct on a cause of action not fully disclosed on the papers before me. But, whatever the cause of action may be and even on the assumption that Ms Naude will institute legal proceedings against the applicant and that the applicant will be held vicariously liable for the actions of the second respondent (both of which, I hasten to add, the second respondent takes issue with) the applicant has to show - at the very least on a *prima facie* basis - that the amount of the debt to be claimed against the second respondent in such eventuality was due on the date of his retirement or on which he ceased to be a member of the Fund.

As a matter of law, a debt cannot be due if the cause of action from which such debt arises has not been completed. But when does a cause of action arise? In the matter of *Coetzee v S A Railways & Harbours*, 1933 CPD 565, Gardiner JP had the opportunity to discuss that question and I quote from that judgment:

> "(W)e have now to decide when the cause of action arose. In my opinion we can adopt the definition in *Hallsbury* (XIX, sec. 64) - 'A cause of action accrues when there is in existence a person who can sue and another who can be sued and when all the facts have happened which are material to be provided to entitle the plaintiff to succeed.'
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> In *Cook v Gill* (L.R. 8 C.P. 107) 'cause of action arising in the city' was defined as 'every part which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court.'
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> This was approved by the Appellate Division in *McKenzie v Farmers' Co-operative Meat Industries Limited* (1922 A.D. 23). As Watermeyer, J., put it in *Abrahamse & Sons (Pty) Limited v S.A. Railways and Harbours* (1933 C.P.D. 626): - 'The proper legal meaning of the expression *cause of action* is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle the plaintiff to succeed in his claim. It includes all that the plaintiff must set out in his declaration in order to disclose the cause of action.'
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> From these definitions this emerges: - That there is no cause of action until everything has happened which would entitle the plaintiff to judgment."

Later in this judgment in dealing with *actiones legis Aquilia* the Learned Judge said at page 572:

> "…(T)he plaintiff in the present case could not have recovered judgement (then), unless he had sustained damage and if he could not have recovered judgment, he could not have had a 'cause of action'. It would be absurd to say that a person has a cause of action if the action is bound to fail."

If the applicant's cause of action against the second defendant in a future action will not be under the *lex Aquilia* but in contract,

essentially the same reasoning will apply. Christie, in his authoritative work *The Law of Contract in South Africa* (3rd ed.) at p 541, says:

> "A debt becomes due (and prescription begins to run) when it is recoverable, owing and already payable; immediately claimable when the creditor acquires a complete cause of action for its recovery, or when the cause or right of action accrues, which are synonymous expressions."

These views found favour with Friedman in the matter of *Primavera Construction SA v Government North-West Province & Another*, 2003(3) SA 579 (B) at 596-597. At page 596D of the judgment, the Learned Judge said with reference to a number of authorities referred to earlier in the judgment:

> "From the aforegoing it is clear therefore that a cause of action is equated with 'the debt is due'. The classical definition of cause of action was defined by Lord Esher MR in Read v Brown (22 QBD 131) to be
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> 'every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact but every fact which is necessary to be proved.'"

At p 576 of the judgment in *Coetzee's* case, Gardiner JP points out that the only exception which arises to these legal principles relating

to claims for prospective damages is the ‘once and for all’ - rule. He deals with it as follows:

> “It seems to me that the award of prospective damages in an action based primarily on accrued damages is an exception to the rule that in an action one can recover only what one can prove. The exception is drafted on this rule to avoid multiplicity of actions. The cases, as far as I have ascertained, go only to this extent, that if a person sues for accrued damages, he must also claim prospective damages, or forfeit them. But I know of no case which goes so far as to say that person, who has as yet sustained no damages, can sue for damages which may be possibly sustained in the future. Prospective damages may be awarded as an ancillary to accrued damages, but they have no separate, independent force as a cause of action.”

The “once and for all” - rule does not arise in this case. Mr Heathcote conceded on behalf of the applicant that it applicant did not make out any case against the second respondent for damages already suffered in its founding papers – its only potential claim being for those damages which might result from the appellant vicarious liability to Ms Naude as a result of the second respondent’s conduct.

I pause here to say that whether or not such a cause of action has indeed arisen prior to the second respondent’s resignation from the Fund or before he ceased to be a member thereof is, strictly speaking, a question of law which this Court cannot decide on a

prima facie basis. In *Fourie v Olivier*, 1971 (3) SA 274 (T) at 285D-E, Viljoen J said:

> "Indien die saak afgemaak kan word deur 'n beslissing van 'n regsvraag is daar egter nie ruimte vir enige voorbarige oordeel nie. Alleen een oordeel, een beslissing is moontlik en indien die saak voor die Regter dien wat die interdik pendente lite -aansoek verhoor, is dat na my oordeel sy plig om 'n beslissing te gee. Beslis hy die regsvraag ten gunste van die applikant en indien so 'n beslissing 'n einde aan die geskil maak het die applikant 'n duidelike reg ("clear right") bewys en is hy geregtig op finale verligting en nie slegs verligting pendente lite nie. Setlogelo v Setlogelo, 1914 AD 221."

I am mindful that there is some authority that, where detailed argument and mature reflection are not possible given the urgency of a matter, the Court may not be bound to deal finally with the question of law at the interim stage. It is, however, not necessary for me to decide that point in these proceedings.

For the reasons I have given, I am not satisfied that the applicant showed that a cause of action against the second respondent has arisen prior to the second respondent's retirement from the Fund or the date on which he ceased to be a member thereof. The evidence does not establish that any debt was due by the second respondent to the applicant on that date. In view of this conclusion it is not necessary for me to examine whether the applicant has also

satisfied the other requirements of Section 37D(b)(ii): such as, whether it has been established that the compensation to be claimed arose in respect of any damage caused to the applicant by reason of any theft, dishonesty, fraud or misconduct by the second respondent and whether it is necessary for relief under that section that the second respondent must have admitted liability to the applicant in writing or judgment must have been obtained against the second respondent in any court prior to the date of such retirement or on which the second respondent ceased to be a member of that Fund. I, therefore, do not find it necessary to, and therefore expressly refrain from making any finding in that regard. It is also not necessary for me to make any finding on whether or not the appellant made out any *prima facie* case in relation to the threat of Ms Naude to institute legal proceedings or, for that matter, whether the relief that is being sought is of a final nature and that the issues in the application should be approached on that basis.

In the result I conclude that the application must fail and I make the following order –

1. The application is dismissed.
2. The applicant is ordered to pay the second respondent's costs, including the costs occasioned by the postponement of the

application on the 4th of November 2005 and the amendments to the Notice of Motion subsequently made.

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MARITZ, J.