

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2010/28156

DATE:14/10/2011

REPORTABLE

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....
DATE

.....
SIGNATURE

In the matter between:

GABRIEL MPATO

Plaintiff

And

HLATSWAYO-MHAISE INCORPORATED

Defendant

J U D G M E N T

Summary

Prescription – Party's knowledge of the facts upon which a claim to be founded - Neither counsel's opinion nor a judgment by a court constituting such facts – Knowledge of wrong not a fact but a conclusion of law.

WEPENER, J:

[1] This matter comes before me as a stated case. The common cause facts are:

- “1. On 21 January 2004 the Plaintiff mandated the Defendant as follows: -
 - 1.1 To file a claim for damages/loss of income against CBRTA (“the third party”);
 - 1.2 The Plaintiff had a five year renewable employment contract with CBRTA;
 - 1.3 On 27 July 2004 it will be three years since the Plaintiff's unfair dismissal and as such, prescription should be avoided.
2. The Defendant failed to issue summons within the prescribed period, i.e. 27 July 2004, thereby rendering the Plaintiff's claim unenforceable in law.
3. During September 2004 counsel gave an opinion that according to him, the claim had not prescribed on 26th of July 2004, which opinion was communicated to the Plaintiff.
4. On the 9th of November 2004 a damages claim was instituted on behalf of the Plaintiff on the High Court of South Africa.
5. On the 8th of June 2010 the North Gauteng High Court upheld the plea of prescription against the Plaintiff.
6. The Plaintiff had appointed his current attorneys of record in respect of the CBRTA-matter during June 2005.
7. The Plaintiff lodged a complaint against the Defendant with the Law Society on the 30th of June 2005 and filed an affidavit in this regard, a copy of which is attached hereto. It is common cause that the Plaintiff made the allegations as contained in the affidavit under oath.
8. The prescription period in this instance is three years. The summons was served on the Defendant on the 17th of August 2010.
9. The Plaintiff was aware of the identity of the Defendant on the 27th of July 2004.
10. The Plaintiff was aware that the claim against the CBRTA will prescribe on 27 July 2004.

11. *The Plaintiff has terminated the mandate with the Defendant when he instructed his current attorneys in June 2008.”*

[2] The affidavit referred to in para 7 contains the following allegation “*I specifically instructed this attorney to ensure that the matter does not prescribe. He however failed to pursue the mandate as instructed, and in a grossly negligent manner: - caused the matter to prescribe.*”

[3] It is against this background that the parties wish me to pronounce on the plea of the defendant that the plaintiff’s claim against him has become prescribed.

[4] Relying on *Truter & another v Deyssel* 2006 (4) SA 168 (SCA) and in particular on para 16-20 and the subsequent judgment in *Mpinga v Makakuvhule* (2011) ZAGPJH116, the defendant argued that all the facts upon which a claim against it can be founded were known to the plaintiff by no later than 27 July 2004 when the failure to issue and serve a summons on the third party occurred. The only relevant fact pursuant to which a claim could be established against the defendant was the failure of the defendant to serve a summons on the third party. The plaintiff’s counsel was unable to advance any other facts which could be relevant in order for the plaintiff to institute a claim against the defendant.

[5] The plaintiff, however, argued that one of the factors required in order to assert and enforce a claim against the defendant was the question of the defendant’s negligence which “fact” the plaintiff only had knowledge of on 8

June 2010 when a court upheld a plea of prescription against the plaintiff in his case against the third party. I do not agree with this argument. In *Truter* it was said at para 16-20:

"[16] I am of the view that the High Court erred in this finding. For the purposes of the Act, the term "debt due" means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.

[17] In a delictual claim, the requirements of fault and unlawfulness do not constitute factual ingredients of the cause of action, but are legal conclusions to be drawn from the facts:

"A cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed with his action. Such facts must enable a court to arrive at certain legal conclusions regarding unlawfulness and fault, the constituent elements of a delictual cause of action being a combination of factual and legal conclusions, namely a causative act, harm, unlawfulness and culpability or fault" (emphasis added).

[18] In the words of this Court in Van Staden v Fourie:

"Artikel 12(3) van die Verjaringswet stel egter nie die aanvang van verjaring uit totdat die skuldeiser die volle omvang van sy regte uitgevind het nie. Die toegewing wat die Verjaringswet in hierdie verband maak, is beperk tot kennis van 'die feite waaruit die skuld ontstaan'."

[19] "Cause of action" for the purposes of prescription thus means:

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

[20] As contended by counsel for Drs Truter and Venter, an expert opinion that a conclusion of negligence can be drawn from a particular set of facts is not itself a fact, but rather evidence. As indicated above, the presence or absence of negligence is not a fact; it is a conclusion of law to be drawn by the court in all the circumstances of the specific case. Section 12(3) of the Act requires knowledge only of the material facts from which the debt arises for the prescriptive period to begin running – it does not require knowledge of the relevant legal conclusions (ie that the known facts constitute negligence) or of the existence of an expert opinion which supports such conclusions.”

The plaintiff's knowledge that the conduct of the defendant caused him loss, (the failure to serve a summons) was gained on 27 July 2004. The affidavit attested to by him on 1 July 2005 supports this conclusion and as he was then already aware that his claim against the third party had become prescribed. The knowledge of the facts i.e. failure to serve a summons on the third party, is to be distinguished from the knowledge of a wrong, in a sense of culpability, which does not constitute a fact but is a conclusion of law. See *Truter* para 20.

[6] The summons was served on the defendant more than three years after the plaintiff obtained knowledge of the causative conduct of the defendant, the latter date which is 27 July 2004. In the circumstances the plaintiff's claim has become prescribed against the defendant.

[7] Mr Moshokane, appearing for the plaintiff, argued that this approach is incorrect and that the date when the judgment regarding prescription was given i.e. 8 June 2010 is the relevant date. For this argument Mr Moshokane relied on *Eskom v Bojanala Platinum District Municipality & another* 2003 JDR0498 T. The reasoning of Moseneke J (as he then was), it was argued,

was that, at best for the party in that matter, the party had knowledge of the facts from which the debt arose when judgment was granted by a court. I am of the view that the court did not determine the precise date of prescription in that matter but employed an arbitrary date to illustrate the latest date upon which the party indeed had the requisite knowledge of the relevant facts. The Court did not find that the date of the judgment and consequent legal certainty was the date when the running of prescription had extinguished the claim.

[8] Indeed, Moseneke J (as he then was) held in *Eskom* as follows at p15-16:

“In my view, there is no merit in the contention advanced on behalf of the plaintiff that prescription began to run only on the date the judgment of the SCA was delivered. The essence of this submission is that a claim or debt does not become due when the facts from which it arose are known to the claimant, but only when such claimant has acquired certainty in regard to the law and attendant rights and obligations that might be applicable to such a debt. If such a construction were to be placed on the provisions of section 12(3) grave absurdity would arise. These provisions regulating prescription of claims would be rendered nugatory and ineffectual. Prescriptive periods would be rendered elastic, open ended and contingent upon the claimant's subjective sense of legal certainty. On this contention, every claimant would be entitled to have legal certainty before the debt it seeks to enforce becomes or is deemed to be due. In my view, legal certainty does not constitute a fact from which a debt arises under section 12(3). A claimant cannot blissfully await authoritative, final and binding judicial pronouncements before its debt becomes due, or before it is deemed to have knowledge of the facts from which the debt arises.”

I respectfully agree with this conclusion and the date when the court upheld the question of prescription of the claim is irrelevant to the plaintiff's claim.

[9] Insofar as the plaintiff attempted to rely on the fact that counsel's opinion was obtained during September 2004 in order to argue that the claim had not become prescribed, I am of the view that such opinion can be of no relevance regarding the determination of the material facts, which existed for the institution of the plaintiff's claim. Counsel's opinion, in my view, falls in the same category as the expert opinion obtained in *Truter*, which does not form part of the material facts.

[10] Mr Moshokane finally argued that by supplying the opinion of counsel to the plaintiff, the defendant prevented the plaintiff from obtaining knowledge of the relevant facts. I disagree. The plaintiff knew full well that his claim would become prescribed against the third party on 27 July 2004 and attested to an affidavit on 1 July 2005 where the fact that the claim had become prescribed is set out by him. If the opinion of counsel could play any role, and I am of the view that it could not, the plaintiff was, despite counsel's opinion, aware that the claim had become prescribed, at best for the plaintiff, on 1 July 2005 when the affidavit was attested to and his claim based on the attorneys' failure to issue the summons against the third party would have become prescribed three years later, on 30 June 2008. Counsel's opinion, having been obtained during September 2004 would in any event have the effect that prescription would run its course at the latest, at the end of September 2007. Summons was served well outside the three year prescription period thereafter, namely 17 August 2010.

[11] In all the circumstances I find that the plaintiff's claim against the defendant has become prescribed. The plaintiff's claim is dismissed with costs.

W L Wepener
JUDGE OF THE HIGH COURT

ATTORNEY FOR PLAINTIFF:
INSTRUCTED BY:

MR MOSHOANE
MOHLABA & MOSHOANE INC

COUNSEL FOR DEFENDANT:
INSTRUCTED BY:

ADV D J COMBRINK
BENNETT FRANCIS & MAITIN INC

DATE OF HEARING:
DATE OF JUDGMENT:

13 OCTOBER 2011
14 OCTOBER 2011