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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 11032/07

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

21 February 2017

.....

SIGNATURE

In the matter between:

MAGAGULA, LOLO ELIZABETH

Plaintiff

And

SOUTH AFRICAN RAIL COMMUTER CORPORATION LTD

Defendant

JUDGMENT

SPILG, J:

BACKGROUND

1. This is an application to amend the plaintiff's particulars of claim at a stage after the plaintiff had closed its case and during the cross-examination of the defendant's first witness.
2. It is common cause that at about 16h00 on 10 March 2006 S. Magagula sustained injuries when he fell from a moving train as it departed from the Johannesburg Station.
He was 17 years old at the time.
3. In May 2007 S.'s mother instituted proceedings as his mother and natural guardian. S. was still a minor at the time.

The claims made on his behalf were for future hospital, medical and similar expenses as well as loss of future earning capacity and general damages.

The plaintiff also claimed to have suffered damages in her personal capacity in relation to past medical expenses.

4. Despite S. attaining majority the plaintiff brought an application in 2009 to be appointed *curatrix ad litem* until the final determination of the case and also applied for the appointment of a *curator bonis* should it become necessary.
5. S.'s neuropsychological assessment indicated that he had sustained a severe head injury in the accident but mentioned that he had significant pre-existing learning difficulties. The conclusion was that he was able to read, had a basic understanding both of social processes and of money but that his pre-morbid condition compounded by the severe head injury resulted in S. probably suffering permanent neuropsychological sequelae and loss of cognitive potential; whatever intellectual potential he had was extinguished by the accident and he was likely to have a higher risk of neuro-psychiatric illness.

The other significant injury sustained by S. was the traumatic amputation of his left arm at the shoulder when he fell under the train's wheels.

6. On 26 May 2009 Claassen J granted an order appointing the plaintiff as the *curatrix ad litem* to S. for the purposes of claiming damages against the present defendant, being the South African Rail Commuter Corporation Ltd, and Transnet Ltd which was then cited as the second defendant

THE INITIAL PLEADINGS

7. The cause of action relied on was the negligence of the train driver, guard, ticket examiner or train conductor. The substantive ground was that one or more of them allowed the doors of the train to open while it was still in motion and failed to prevent S. from falling off the moving train when by the exercise of reasonable care one or the other could and should have done so.
8. There were also a number of broad catch-all allegations of negligence such as failing to pay due regard to the safety and well-being of commuters.

However all the alleged negligent acts and omissions were confined to these same categories of employees whose negligence was limited to what they personally did or omitted to do on the day in question.

9. The defendant pleaded that S. tried to jump onto a moving train as it was departing from the station but fell between the platform and the train. All acts of negligence on behalf of the defendant's employees were denied and in the alternative the defendant pleaded an apportionment.

THE TRIAL

10. The trial commenced before me in September 2011. S. testified and also his two friends who had been with him that day. Their testimony was that they had boarded the train and were in the carriage near the door as the train was full. There were however some people on the train who were pushing to get out saying that they had boarded the wrong train. They continued pushing to get out as the train started to move. Because the train doors were not closed when the

train departed the physical pressure of this group trying to still disembark forced S. to fall off the train while it was in motion.

11. During the course of the plaintiff's case an inspection *in loco* was held on the platform where the accident occurred.
12. The plaintiff closed her case and the defence led the train driver as its first witness. During his evidence, including while under cross-examination by Adv *Mokopo* the train driver stated that in his experience people keep the doors open and hang onto them while the train is in motion. It is something he has seen and is bound to happen when the trains are overcrowded. It occurs during peak hour on a weekly basis. The remedy taken was to introduce more coaches and platform marshals.
13. At this stage Adv *Joseph* objected to the line of cross-examination on the grounds that the plaintiff's counsel was raising issues that went beyond the ambit of the pleadings.
14. Adv *Mokopo* then sought a short adjournment to amend the plaintiff's particulars of claim. A concern I expressed was that if an amendment was not opposed there would still be the need for the defence to consult with the train driver despite cross-examination having commenced. This was readily accepted by plaintiff's counsel.
15. On the following day an amendment was presented. By agreement the matter was postponed sine die in order to enable the defence to consider its position.

THE AMENDMENT

16. The amendment remained in limbo and eventually a meeting was sought to assist in moving the matter forward after the defendant had objected to the

proposed notice of amendment. As a result an application to amend in terms of rule 28 was served in mid-November 2014.

17. The salient features were firstly the removal of Transnet as the second defendant since the remaining defendant had already pleaded that it had taken over the management and operational control of the commuter rail services of Transnet pursuant to a sale of the latter's business.

18. The most significant proposed amendment was the introduction of a ground of negligence based on a duty of care owed by the defendant itself to ensure that;

- a. the coaches of the train would be safe for use by the public
- b. the train driver would not set the train in motion unless all doors were properly closed;
- c. boarding and dismounting from the coaches would proceed without endangering the safety of the public;
- d. safety regulations and precautions would be implemented in respect of the safe boarding and alighting from the trains;
- e. the coaches would be safe for use by the public.

and that the defendant was negligent in a number of additional respects not covered in the initial formulation of the claim.

19. The amendment now sought to rely on a number of new grounds of negligence in relation to the expanded grounds of duty of care which was allegedly owed by the defendant to railway commuters. These grounds included that ;

- a. The defendant failed to employ an adequate number of personnel to prevent members of the public from being squeezed or pushed out of the train once it was in motion;
- b. The defendant's employees failed to take any adequate precautions to prevent the trains from being overcrowded, commuters from being pushed out of a moving train by other commuters and to maintain adequate control of commuters.

20. The defendant objected to the amendment in terms of rule 28(4) and the plaintiff brought an application allowing the amendment.

THE ISSUES

21. The objection was confined to those parts of the amendment which raised for the first time the negligence of persons other than the train driver, guard, ticket examiner or train conductor.

22. The issues raised in the objection were that;

- a. The amendment would introduce a new right of action which had become prescribed;
- b. The defendant would be unfairly prejudiced and irreparably harmed because the failure to raise these grounds in good time prevented it from undertaking a proper investigation and responding to it;
- c. The amendment was vague and embarrassing because the employees were stated to be unknown or indeterminable;

- d. The plaintiff did not have a reasonable ground or cause to propose the amendments. This ground was not persisted with, and correctly so in my view having regard to the testimony already placed before the court.

PRESCRIPTION

23. The amendment was brought more than three years after S. attained majority and more than three years after the plaintiff was appointed as *curatrix ad litem*.
24. Adv Makopo argued that in terms of s13 (1) (a) of the Prescription Act 68 of 1969 the completion of prescription was interrupted when S. was placed under curatorship in terms of Claassen J's order of 26 May 2009.
25. The defendant however contended that once the plaintiff was appointed as curatrix she substituted S. as creditor and since she was of full legal capacity prescription commenced running again. Reliance was placed on *Kotze N.O. v Santam Insurance Ltd* 1994(1) SA 237 (C) and a passage from *Extinctive Prescription* by MM Loubser (1996) which dealt with that case.
26. The relevant parts of the provision read:

13 Completion of prescription delayed in certain circumstances

(1) If-

(a) the creditor is a minor or is insane or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15 (1);

....

and

(i) *the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist,*

the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).

27. In my view neither Kotze nor the excerpt from: Loubser supports the defendant's submission. One of the issues in *Kotze* was whether prescription could run against a person *prior* to being placed under curatorship in cases where he or she was not insane having regard to the wording of s13 (1) (a) of the Prescription Act and s14 of the Motor Vehicle Accidents Act 84 of 1986 which dealt with the prescription of claims in personal injury cases arising from a motor vehicle accident. The submission on behalf of the insurance company was that the MVA Act took precedence over the Prescription Act and that "*because no mention is made of persons who are not of full mental capacity or insane, but have not been detained or placed under curatorship, prescription would run against such persons.*"¹

28. *Kotze* was therefore concerned with whether prescription ran prior to the appointment of a curator in cases of a patient who was not insane but mentally impaired. This much is clear from the following passages of Foxcroft J's judgment:

"The Prescription Act grouped together persons who were minors, were insane, were under curatorship or were prevented by superior force from interrupting the running of prescription, and provided that prescription would not run against such persons while the relevant impediment still existed. The reason for such exceptional treatment was grounded in the common-law

¹ At 246E

proposition that advantage cannot be taken of a person who is unable in law to protect himself.” (at 247B-C)

“The reason for not allowing prescription to run against a person under curatorship in terms of the Motor Vehicle Accidents Act is clear. Such a person cannot take juristic steps himself. A person in plaintiff’s situation in the present case should on the authority of Pheasant v Warne (supra at 487), be treated in the same way, legally speaking, as the insane person or furiosus of the Roman law.

...

Could Parliament ever have intended such a person to be in a position where prescription would not run against him once a curator was appointed, but would run against him before a curator had been appointed? I do not think so.” (at 247G-J)

29. An ordinary reading of section 13 as a whole in the context of the Prescription Act and having regard to the purpose of providing for the exceptions contained in subsection (a) (as mentioned in the first passage cited from *Kotze*) as well as the need to have consistency of application in respect of each of the postulated situations can only mean that prescription will not run for as long as any one of the mentioned impediments is present.

30. If regard is had to the other subsections the legislature fully appreciated that the impediment may endure for the creditor’s lifetime (such as a debt between spouses² or where the debtor is a member of the governing body of a juristic person³).

Moreover a curator ad litem does not become the creditor. The plaintiff is the court appointed representative of S. because he lacks the mental capacity to make decisions for himself. See *Coughlan NO v Road Accident Fund 2015* (4) SA 1 (CC) at para 4 ftn 2.

² See s13(1)(c)

³ See s13(1)€

31. However the plaintiff's own claim for past medical expenses would have prescribed in 2009 if summons did not interrupt its running in respect of the grounds raised for the first time in the amendment.
32. It is axiomatic that summons interrupts the running of prescription in respect of a right of action. Accordingly a new cause of action may be introduced after summons has been served without raising an issue of prescription provided it falls within the right of action contained in the original summons. See *Sentrachem Ltd v Prinsloo* 1997 (2) SA (SCA) at 15B-E.

The reason for this distinction is that s 15(1) of the Prescription Act provides that the running of prescription is interrupted 'by the service on the debtor of any process whereby the creditor claims payment of the debt', and that a claim for payment of a debt is not to be equated with a cause of action relied on to support the claim⁴.

33. In *Sentrachem* the court held that a summons which was excipiable because it failed to disclose a cause of action, provided it was not a nullity, could nonetheless interrupt prescription. Eksteen JA said at p15H-J :

“Die eintlike toets is om te bepaal of die eiser nog steeds dieselfde, of wesenlik dieselfde skuld probeer afdwing. Die skuld of vorderingsreg moet minstens uit die oorspronklike dagvaarding kenbaar wees, sodat 'n daaropvolgende wysiging eintlik sou neerkom op die opklaring van 'n

⁴ *Sentrachem* at 15A-C:

“Probleme ontstaan dikwels waar 'n eiser aksie instel en bepaalde bewerings in die besonderhede van vordering maak op grond waarvan gestel word dat die verweerder iets aan die eiser skuld. Die eiser wysig later die besonderhede van vordering, soms om die bewerings waarop gesteun word en soms om die omvang van die skuld te verander. Die beswaar word dan opgewerp dat die 'skuld' ná die wysiging 'n ander 'skuld' is as die waarop oorspronklik staatgemaak is, en dat die nuwe skuld verjaar het. Dit het ook in die onderhawige geval gebeur.

Artikel 15(1) van die Verjaringswet 68 van 1969 bepaal dat verjaring gestuit word 'deur die betekening aan die skuldenaar van 'n prosesstuk waarin die skuldeiser betaling van die skuld vorder'. Dit dien daarop gelet te word dat daar nie van 'n skuldoorsaak of 'n grond van aksie gepraat word nie, maar slegs van die vordering van 'n skuld.’’

gebrekkige of onvolkome pleitstuk waarin die vorderingsreg, waarop daar deurgaans gesteun is, uiteengesit word”

34. In *Sentrachem* the appellate division expressly endorsed the distinction drawn in the minority concurring judgment of Trollop JA in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 825G-H that:

“Cause of action' is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action and, complementarily, the dependant's 'debt', the word used in the Prescription Act. The term, 'cause of action', is commonly used in relation to pleadings or in statutes relating to jurisdiction or requiring prior written notification of a claim before action thereon is commenced. But it is not used in either the CMVI Act or the Prescription Act. And its use in the present context may possibly lead to erroneous reasoning. For in claims in delict for damages under the common law or for compensation under the CMVI Act, I am not sure that it necessarily follows that, because one factual basis differs from another in some respect or respects, separate or different rights of action arise; on the contrary, both cases may nevertheless beget only one right of action or debt, eg one for the plaintiff's entire patrimonial loss.”

35. The case regularly cited of when the original summons can interrupt the running of prescription despite the introduction of a different cause of action in a subsequent amendment is *Mazibuko v Singer* 1979 (3) SA 258 (W). Colman J at 265H-266F said:

“The effect of those cases, as I understand them, was that in deciding whether prescription was interrupted, in relation to a particular claim, by prior process served during the prescriptive period, one looks to see whether in the earlier process the same claim was preferred, not whether the same cause of action (or any cause of action) was made out in the earlier process. As pointed out in one of the cases, it is inaction, not legal ineptitude, which the Prescription Act is designed to penalise. But, as none of those cases was

decided under the current Prescription Act 68 of 1969, it will be appropriate to see what that Act lays down in respect of interruption. Section 15 (1) of the Act provides that:

"The founding of prescription shall... be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt".

.....

The question to be asked, therefore, is this one: "Did the plaintiff, in the earlier process, claim payment of the same debt as now forms the subject-matter of the claim which is said to be prescribed?" If the answer is in the affirmative, prescription has been interrupted, even if one of the grounds upon which the claim is now based differs from the ground or grounds relied on at the earlier stage.

That approach is in conformity with the cases which I have cited. It is in conformity, also, with the test for res judicata propounded by Spencer-Bower and Turner Res Judicata 2nd ed at 160 para 197. The concept of res judicata is, of course, closely related to the concepts involved in the instant problem. If I turn now to the case before me, I find that the amendment did not introduce a claim for payment of a debt other than the debt in respect of which payment was claimed when the summons was issued. What the amendment did was to introduce a reference to an additional default, just as a person who claims damages arising from a motor collision does when he introduces, at a later stage, a further head of negligence in support of his claim. An amendment of that sort can, in my view, be allowed and relied upon even if it is sought at a time when the claim would have been prescribed but for the service of the summons sought to be amended."

(emphasis added)

36. If a summons which fails to disclose a cause of action can nonetheless interrupt prescription⁵ and if a new ground of negligence can be introduced without falling

⁵ *Sentrachem* at 15H-J

foul of the Prescription Act⁶ then it is difficult to appreciate how an act of negligence committed by the defendant through another category of employee in relation to preventing the doors of the coach remaining open when the train is in motion whether due to overcrowding or otherwise can amount to a new right of action.

37. The basis of determining what amounts to a right of action that will interrupt prescription for the purposes of preventing prescription being raised in respect of a subsequent amendment may now also have to be informed by the judgment in *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC). The majority held that the term ‘*debt*’ in the Prescription Act had to be narrowly interpreted so that it least impaired the section 34 constitutional right of access to courts⁷. It was however unnecessary on the facts of the case to determine the precise meaning of the term “*debt*” in s10 of the Prescription Act.

38. The issue before me was argued prior to the decision of the Constitutional Court in *Makate*. By reason of the conclusion I have reached, that the right of action can be subsequently altered by the introduction of a different factual matrix involving different levels of the defendant’s staff compliment or management without raising an issue of prescription, it is unnecessary to consider the possible application of the *ratio* in *Makate* either to restricting the common law definition of ‘*debt*’ or its application by reason of the limitation provisions of s 36 of the Constitution and the broader public interest considerations in a case which involves the risk of serious injury by reason of a possible on-going systemic failure by an organ of state, including a state owned enterprise, to guard against it when providing a required public service.

PEJUDICE AND IRREPERABLE HARM

⁶ *Mazibuko* at 266E-F

⁷ S34 of the Constitution provides:

“Access to courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

39. This essentially related to the lengthy delay from September 2011 to November 2013 before the application to amend was brought. I am satisfied that despite the length of time the issues raised are, on a fair interpretation of the evidence of the train driver systemic and therefore would, or should, have come to the attention of management in the ordinary course. The affidavit opposing the application for amendment did not suggest that this issue had not come to the attention of management at any relevant time.

40. I am satisfied that despite the rather thin explanation there is no actual prejudice demonstrated and the other factors that should be taken into consideration favoured the granting of condonation at the commencement of the application.

VAGUE AND EMBARRASING

41. It was contended that the amendment is vague and embarrassing because the employees were stated to be unknown or indeterminable. This was in my view correctly not pursued in argument.

42. It is often the lot of a defendant to be confronted with a claim alleging actions by an employee whose name was unknown to the plaintiff. It does not render the claim vague and embarrassing. Otherwise many cases against organs of state and large institutions would never see the light of day.

Added to this, in the present type of case, at the best of times the identity of those in charge of systems would not be known to a claimant. However the issue of whether the risk was known and whether adequate steps were taken to guard against it would, or should, ordinarily be matters contained in reports dealt with by those in management.

ORDER

43. It was for these reasons that the amendment to the particulars of claim was granted.

S PILG J

DATE OF JUDGMENT: 21 February 2017

FOR PLAINTIFF: Adv N Makopo
Thembelihle Dlamini Attorneys

FOR DEFENDANT: Adv B Joseph
Clyde and Co