

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2018/27381

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

B.C. WANLESS

30 May 2023

In the matter between:

DINA JOHANA CATHRINA BOTES

Plaintiff

and

NOSINOTHI SELINA XHANTINI N.O.

Defendant

Neutral Citation: *Dina Johana Cathrina Botes v Nosinothi Selina Xhantini N.O.* (Case No: 2018/27381) [2023] ZAGPJHC 595 (16 May 2023).

**WRITTEN REASONS
IN TERMS OF SUBRULE 49(1)(c)**

WANLESS AJ

Introduction

- [1] In this matter the Defendant raised a Special Plea of prescription. It was agreed between the parties that in terms of subrule 33(4) this issue would be separated from all the other issues and determined by this Court.

- [2] On the 16th of May 2023 the issue of prescription was heard by this Court. The Plaintiff's cause of action in the matter is that one IVY NOKUSA XHANTINI, an erstwhile attorney of this Court and now deceased ("*the deceased*"), negligently allowed the Plaintiff's claim against the Road Accident Fund ("*RAF*") for damages to prescribe. In the premises, the Defendant in the action is now the *executrix* of the deceased's estate.
- [3] It is common cause that the Plaintiff's claim against the RAF did in fact prescribe after the Plaintiff had given the said attorney a mandate to represent the Plaintiff. However, the Special Plea of the Defendant is that the Plaintiff's claim against the Defendant has also prescribed in terms of subsections 11(d) read with 12(1) and (3) of the Prescription Act 68 Of 1969 ("*the Act*"). It is the Special Plea which this Court is asked to determine.
- [4] In the Defendant's Special Plea the Defendant relies on three (3) different dates (in the alternative) upon which it is alleged the Plaintiff should have reasonably been aware of the identity of the debtor and, by the exercise of reasonable care, the facts giving rise to the debt.
- [5] It was common cause that the Defendant bore the onus to prove, on a balance of probabilities, that the claim of the Plaintiff had prescribed and that the Defendant had also attracted the duty to begin adducing evidence in proof thereof.

The evidence

- [6] This Court originally understood that the Defendant intended leading the *viva voce* evidence of two (2) witnesses. Be that as it may the Defendant ultimately relied on the evidence of a single witness only, namely that of one FERZANA MOHAMMED MIA ("*Mia*"). Mia, an attorney of this Court, gave evidence before this Court that, *inter alia*, she knew the deceased prior to the deceased's death; took over the files in the deceased's practice for a period of time; addressed letters to clients of the deceased and handed over files of the deceased's practice to the Legal Practice Council. When testifying, she referred to various documents which were in a trial bundle and were admitted into evidence by consent.

- [7] Mia's evidence before this Court was more remarkable for what it failed to prove rather than for what it did in fact prove. Under cross-examination she readily conceded (and this was factually correct) that she could assist this Court in no manner whatsoever as to whether the Plaintiff would have been aware at any of the dates and based on any of the facts as relied upon by the Defendant that the deceased had failed to take the necessary steps to lodge the Plaintiff's claim with the RAF and thus allowed the Plaintiff's claim to prescribe. In fact, Mia testified that she never met the Plaintiff at any stage and the Plaintiff's file was not one of the files she came across when she took care of the deceased's practice after the death of the deceased.
- [8] Not surprisingly, in light of the fact that the onus of proof lay with the Defendant the Plaintiff closed her case without leading any evidence. Adv Killian asked this Court to dismiss the Defendant's Special Plea with costs. Adv Jongani, whilst accepting that the evidence of Mia did not assist the Defendant in discharging the onus incumbent upon the Defendant (*and lamenting the fact that he had not been given the opportunity to cross-examine the Plaintiff*) nevertheless attempted to argue before this Court that the Special Plea should be successful.
- [9] This argument was based, *inter alia*, on the fact that he contended that this Court should, in *lieu* of the failure of the Plaintiff to place any *viva voce* evidence before this Court in respect of the Defendant's Special Plea of prescription, have regard to the pleadings in this matter, with particular regard to the requests for further particulars and the replies thereto which had been exchanged between the parties.
- [10] Adv Jongani also referred this Court to the matters of ***Gunase v Anirudh***¹ and ***Macleod v Kweyiya***.²

Conclusion

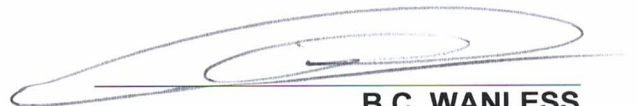
- [11] It is trite that a Court cannot decide a matter on pleadings alone. Pleadings do not constitute evidence. As for *Gunase* this matter merely confirms the principle that a creditor cannot delay the onset of prescription by wilful or negligent inaction and, as

¹ 2012 (2) SA 398 (SCA).

² 2013 (6) SA 1 (SCA).

such, does not assist the Defendant in this particular matter. Also, the Defendant's reliance on *Macleod* was completely misplaced since this matter is authority for the principle that a defendant bears the full evidentiary burden to prove a plea of prescription, including the date upon which a plaintiff obtained actual or constructive knowledge of the debt and this burden only shifts to the plaintiff if the defendant has established a *prima facie* case.

- [12] On the basis that pleadings are not evidence; the Defendant had not even established a *prima facie* case and had clearly failed to discharge the onus incumbent upon the Defendant to prove, on a balance of probabilities, that the Plaintiff's claim against the Defendant had prescribed, this Court made an order whereby the Special Plea was dismissed, with costs. This was all made clear to the legal representatives during the course of the hearing.
- [13] At the time that this Court made that order it was noted and placed on record that an *ex tempore* judgment would not be given (whilst it could have been) since it appeared (apart from the obvious merits of the matter) that the order was not appealable as it is not final in effect, definitive of the rights of the parties and does not dispose of a substantial portion of the relief claimed within the meaning thereof as held in the matter of ***Zweni v Minister of Law and Order [1993] 1 All SA 365 (A)***. Despite the foregoing the Defendant has elected to request reasons for that interlocutory order (not judgment), presumably in terms of subrule 49(1)(c). In this regard the Defendant's notice requesting reasons does not specify in terms of which rule or on what basis the Defendant requests or is entitled to reasons for this Court's order.
- [14] Nevertheless, despite the foregoing and the onerous workload under which this Court is placed, this Court has elected, in the interests of justice, to provide the reasons for the order made (as set out above).



B.C. WANLESS
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard:	16 May 2023
<i>Ex Tempore:</i>	16 May 2023
Written Reasons Requested	22 May 2023
Written Reasons Provided:	30 May 2023

Appearances

For Plaintiff:	J Killian
Instructed by:	A Wolmarans Incorporated

For Defendant:	N Jongani
Instructed by:	Fairbridges Wertheim Becker Attorneys