



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION - GQEBERHA**

Case No: 3679/2010

In the matter between:

ANDRÉ BARNARD

Plaintiff

and

SCHOONRAAD, DELPORT & VAN DER MERWE INC.

Defendant

JUDGMENT

MAKAULA J:

A. Introduction:

[1] The plaintiff sought and engaged the legal services of the defendant, which is a firm of attorneys. The defendant accepted the mandate but failed to issue summons timeously, as a result of which his claim prescribed. In turn, the plaintiff issued summons against the defendant for damages based on the alleged failure to properly carry out its mandate, resulting in the prescription of the claim. Similarly, the defendant

raised a special plea of prescription. The issue between the parties is whether the claim against the defendant has prescribed.

B. Background:

[2] The common cause facts are that the plaintiff was employed at Cape Produce Company (Pty) Ltd (the Company). The plaintiff, because of his employment became a member and contributed to the company's Provident Fund (the Fund). As a member, the plaintiff was entitled to certain benefits, of which, was compensation for injury on duty, temporal or permanent disablement etc. The Fund was, underwritten by Metropolitan Life Ltd (Metropolitan Life).

[3] On 16 July 2002, the plaintiff was involved in an accident, while on duty, which resulted in him experiencing poor health and rendered him permanently disabled and unable to continue with his occupation. On 13 March 2003, the plaintiff consulted, Dr Ian Taylor, a specialist psychiatrist who diagnosed him as suffering from depression and thus unable to perform his duties as the employee of the company. In terms of the Fund Regulations, he was entitled to 75% of his salary until he reached the retirement age of 65 years.

[4] On or about 31 July 2003, the plaintiff instructed the defendant, who at the time was represented by Mr van der Merwe, in his capacity as an attorney in the employ of the defendant, to take all steps necessary to ensure that he received his benefits in terms of the Fund Regulations. The mandate was accepted by Mr van der Merwe. In carrying out instructions against Metropolitan Life, the defendant issued summons on 26 February 2007. Metropolitan Life raised three special pleas of prescription. The

action had to be withdrawn because of merit in the special pleas. The dispute between the parties emanated from the facts surrounding what occurred pursuant to the withdrawal of the action against Metropolitan Life.

[5] On 3 December 2010, the plaintiff issued summons against the defendant for damages alleging that if the defendant had carried out its mandate as a reasonable attorney would have, the plaintiff would have been successful against Metropolitan Life. The plaintiff pleaded in its particulars of claim that he suffered damages because of the breach.

[6] In defence of the summons, the defendant raised a special plea of prescription. The defendant pleaded that the plaintiff was made aware by Mr Marius Delport (Mr Delport), a director of the defendant, on 28 November 2007, that the special plea raised by Metropolitan Life had merit that his claim had prescribed. The defendant contended that the plaintiff knew or ought reasonably to have known as of 28 November 2007 that the defendant had not performed its mandate in a proper and professional manner. The upshot of the defence is that the plaintiff's claim commenced to run on 29 November 2007 and prescribed in terms of section 11 (d) of the Prescription Act¹ (the Act) on 28 November 2010.

[7] The matter served before me only for the determination of the special plea. Both parties led evidence, the burden of proof being on the defendant to establish the special plea. I shall, however, for purposes hereof, deal with the evidence of the plaintiff first.

¹ 68 of 1969.

C. Plaintiff's evidence:

[8] Apart from the summary of facts stated above and relevant to the plea of prescription, the plaintiff testified that towards the end of 2007, he attended a meeting with Mr Delport who informed him that he had taken over his file from Mr van der Merwe, who had left the defendant. Mr Delport informed him that the matter was not going to proceed on the day of trial. He could not remember what else they discussed.

[9] Later, whilst at a rugby field where his child was practising, he met with Mr Huisamen, an attorney, who had also attended a rugby practice with his son. He told him that Mr Delport had taken over his file. He requested Mr Huisamen to find out from Mr Delport what was going on in his case because he was confused, as Mr Delport had advised him that his case was not going to proceed on the date of trial. On that second meeting, Mr Delport informed him that his claim against Metropolitan had been prescribed. He testified as follows:

“Yes, that the case has prescribed and stuff, so I have asked him but how things like that happen. So, he said no . . . and I have asked him when he informed me there is no case anymore. So, I have asked him “do I owe you money”, so he told me no and then I took my file, and I left his office”. (*sic*) (My underlining). (*sic*).

[10] The plaintiff took the file to Mr Huisamen to take “control over the situation”. (*sic*). He, thereafter, consulted with Mr Huisamen on numerous occasions. He could not remember after how long on the second occasion he saw Mr Delport. He further could not recall meeting with Adv Gajjar.

[11] The plaintiff was cross-examined at length about the evidence of Mr Huisamen. He did not recall receiving a telephone call from Mr Huisamen wherein he informed him that the claim against Metropolitan Life had prescribed.

[12] It was put to him that the meeting with Mr Delpont took place on 28 November 2007 to which proposition he responded as follows:

“I cannot dispute it and I cannot say yes, I cannot say no, because sorry I cannot remember that”.

He further stated:

“No, I cannot recall this, I am sorry. I cannot recall anything that he said, or anybody told me in the matter . . . I do not even know what special pleas means”. (*sic*)

He was further asked whether he was told that the claim had prescribed based on the special pleas raised by Metropolitan Life, to which he responded as follows:

“The only word that I can remember is when I was at Mr Delpont’s office and that he informed me “daar is ‘n problem die saak het verjaar”. That is the only stuff that I can remember, because that is the only thing that is in my mind. . . . They did not do the job that they had to do. That is correct. . . . and I took the file that day”. (*sic*)

[13] The plaintiff called Mr Huisamen as his witness. The plaintiff told him at the rugby field that his case might not proceed on the date of trial, and he did not understand why not. Mr Huisamen undertook to enquire from Mr Delpont and would explain the status of the matter once that was done. Indeed, he telephoned Mr Delpont shortly thereafter on 4 December 2007. Relying on his file notes, which formed part of Exhibit “A”, Mr Huisamen testified that Mr Delpont invited him to attend a consultation with Adv Gajjar on 6 December 2007, where the issue of the special pleas was discussed. Adv Gajjar opined that the special pleas would be upheld by the Court and suggested that the action against Metropolitan Life be withdrawn with each party to

pay its costs. Adv Gajjar communicated his opinion on 10 December 2007. Pursuant to that he received the file from the plaintiff. He perused the file and concluded that the defendant and the Advocate who handled the matter were negligent. He made a courtesy call to both advising that he would be issuing summons against them. They both permitted him to do so. Indeed, he issued and served summons on the defendant on 3 December 2010.

[14] Under cross-examination, he denied that he received instructions and took over the matter on 04 December 2007. He stated that he received the file after 10 December 2007 from the plaintiff. Based on the correspondence, he confirmed that he wrote a letter to Metropolitan Life's attorneys on 10 December 2007, suggesting the withdrawal of the action with each party to pay its costs. He denied the evidence of Mr Delport that when he contacted him, in early December 2007 he was aware of the facts of the matter. At the time of the telephone call, he did not have information about the claim against Metropolitan Life. He did not even have the file at that stage. He was asked and referred to his affidavit which he filed in a superannuation application involving the parties. In it Mr Huisamen stated as follows:

"When I took possession of the 1st respondent's file at the end of 2007 and after discussions with the 1st respondent Mr Delport or the applicant, instructed Adv Gajjar to advise whether the issue of prescription, which has been raised by Metropolitan was valid".

He stated that it was a mistake as he was relying on his recollection when he drafted the affidavit. That he was now looking at his file notes, he did not personally contact Adv Gajjar.

D. Defendant's evidence:

[15] Mr Delport testified that he is the sole director of the defendant. In August 2007, Mr van der Merwe, who was dealing with the Metropolitan Life matter on behalf of the plaintiff left the defendant on 30 August 2007. He had to take over the file. Firstly, he had to acquaint himself with the file contents. He recorded everything he did on the file cover. That, according to him was during the latter part of 2007. On reading the file, he spotted that Adv Grobler was briefed to deal with the matter. He telephoned him. Adv Grobler advised that he was no longer available to deal with the matter. He read the special pleas which were raised and realised that:

“It did not look too well for Mr Bernard’s matter. . .”

On 28 November 2007, he had a consultation with the plaintiff which lasted an hour at his office. He recorded what they discussed on the file. He testified thus in this regard:

“My consultation is to the effect that I specifically pointed out the contents of the pleas, the special pleas that is there and that I was material concerned about the contents thereof and that I believe there is problems and that is negative for his case going forward with regards to having success with his claim . . . we will obviously not proceed with the matter further”. (*sic*)

[16] On hearing the news, he testified that the plaintiff was obviously disappointed with that information. He, after that consultation, decided to make an appointment with Adv Gajjar to either confirm his opinion about the special pleas. On 4th December 2007, he received a call from Mr Huisamen whose evidence I have dealt with above. Mr Huisamen informed him that he had received instructions from the plaintiff to deal with the matter. They both agreed that a postponement should be sought and a proposal be made to Metropolitan Life’s attorneys that they (the defendant) withdraw the action with each party to pay its costs. Mr Huisamen, according to him, was at that time in control of the matter to an extent that Mr Huisamen drafted the letter

proposing the withdrawal of the action. However, his firm did not file a notice of withdrawal because he thought, if accepted, then that would be the end of the matter.

[17] On 10 December 2007, he and Mr Huisamen consulted with Adv Gajjar in his chambers. Adv Gajjar wrote an opinion in which he informed them that the special pleas had merit and suggested that the action be withdrawn with a proposal that each party pay its costs. As he felt he was no longer in control of the file, he waited for Mr Huisamen to write the letter proposing settlement along the lines suggested by Adv Gajjar. He left it to Mr Huisamen to notify the plaintiff of Adv Gajjar's opinion. Metropolitan Life accepted the proposal. He last heard from Mr Huisamen in January 2008.

[18] December 2010, he received a call from Mr Huisamen. He informed him about the summons in this matter. The letter he received informed him that summons would be served on the defendant on 3 December 2010, and advised him that the defendant may file its notice of intention to defend the matter in January of 2011 when the offices open after Christmas holidays. He further suggested a round table to try and resolve the matter. Indeed, he received the summons on 3 December 2010. He stated that from 31 January 2008, till 3 December 2010, he never received correspondence nor telephone calls from Mr Huisamen about this matter.

[19] Under cross-examination, Mr Delport testified that according to him prescription started to run on 28 November 2007, when he first mentioned the issue of the special pleas to plaintiff. In fact, he testified thus:

“As I said I told Mr Barnard this is the pleas, that we have received and it is obviously negative for our matter and then I believe there is a problem for this case, his case against Metropolitan at that stage”. (*sic*)

[20] Mr Delport testified that when he received summons on 3 December 2010, he thought the claim had not prescribed. At that stage, he did not even think that prescription commenced to run on 28 November 2010. It was only brought to his attention by his attorney and counsel. He conceded that, for Mr Huisamen to have been able to advise the plaintiff about this matter, he needed the file contents to formulate an opinion so as to be able to give advice. However, he did not recall where the file was on 6 December 2007 when they went to consult with Adv Gajjar. He did not recall whether he gave the file to Adv Gajjar. He was referred to a pre-trial minute in which the parties agreed that the file was handed over to Adv Gajjar by Mr Delport. He still could not recall doing so.

[21] Mr Delport confirmed that the reason he sought Adv Gajjar’s opinion is that he did not know whether the special pleas would succeed or not. The questioning in this regard proceeded as follow:

“Mr Shubart: Yes, but you did not know if it is correct, not so? As you say you read the plea and you realised that if the plea is correct well then that is the position is”. (*sic*)

Mr Delport: That is fair comment, Yes sir.

Mr Schubart: But at that stage you did not know whether that plea was correct. No so?

Mr Delport: That is correct.

Mr Schubart: That is why you had to get an opinion from Adv Gajjar to find out is there merit in these special pleas, is the matter in fact . . . had the action in fact become prescribed against Metropolitan, did . . . not so.

Mr Delport: Yes – the purpose of the meeting and setting it up with Adv Gajjar was to confirm my understanding of what the position is and then confirm my understanding and what the outcome will be.

Mr Schubart: Because my instructions are that at the meeting that you had with Adv Gajjar you did not know your file very well at that stage.

Mr Delport: Yes correct. I just knew my consultation; I saw the file twice before that and that is correct sir". (*sic*)

[22] Mr Delport testified that on 10 December 2010, his fears were confirmed telephonically by Adv Gajjar that the special pleas would succeed thus confirming that the claim against Metropolitan Life had prescribed. He was referred to the correspondence, which was exchanged between himself and his correspondent attorneys, the sum total of which was that he was still awaiting an opinion from an advocate regarding the prospects of success on the merits and that he would proceed to arrange pre-trial conferences with attorneys for Metropolitan Life thereafter. He did not recall being telephoned by Mr Huisamen on 10 December 2007, informing him that there was a possible claim against his firm for allowing the matter to prescribe. Furthermore, Mr Delport was referred to a letter from Adv Gajjar to the defendant (Mr Delport) wherein he stated that he was returning the file together with his account. He could not remember having the file in his possession on that day i.e., 10 December 2010. It was put to him that Mr Barnard only became aware that his claim had prescribed when he fetched his file on instructions of Mr Huisamen from Mr Delport on 10 December 2007. Mr Delport could neither remember nor dispute that because he had no recollection of it. It was further put to him that it was on that day that the file was given to the plaintiff by Mr Delport after which he inquired whether he had any outstanding fees to which he said no. The answer to this was that he could not recall that.

E. Argument:

[23] The defendant argued that the prescription period started to run on 28 November 2007, when the plaintiff knew or ought reasonably to have known that the defendant did not perform its mandate in a proper and professional – like manner and that prescription commenced to run on 29 November 2007. In context, the defendant argued that what is pleaded by the plaintiff differs from his evidence in court. The argument is premised on the file notes made by Mr Delport, the admission made by the plaintiff in his affidavit in the superannuation application. The file note though in Afrikaans has been read by the defendant to mean the following:

- the consultation lasted approximately an hour;
- that having read the pleadings Mr Delport was personally not positive in respect of the matter and conveyed this to Mr Barnard;
- a consultation had been arranged for the following week with Adv Gajjar to obtain his opinion and advice in respect of the matter; and
- Mr Delport had contacted the attorney (Metropolitan attorneys) and said he was only available for a pre-trial meeting after 15 January 2008.

In his affidavit, the plaintiff said the following about the consultation he had on 28 November 2007 with Mr Delport”.

“I realised that the applicant did not perform its mandate in a proper and professional manner, and I thereafter engaged the services of an attorney Mr Hendrick Huisamen”. (sic) (Emphasis added).

Apart from any other criticism levelled against the evidence of the plaintiff and what has been set out in summary of the evidence above, this is the high–water mark of the evidence of the defendant in establishing that the claim against it had prescribed. Furthermore, the defendant criticised the plaintiff as a poor witness who was unable to answer questions, blaming his poor memory.

[24] The criticism of Mr Huisamen's evidence is premised on the fact that, as an experienced attorney, Mr Huisamen failed to keep file notes of the telephone conversations he had with Mr Delport regarding whether he had reported the matter to his insurers and the alleged admission of liability by him. The defendant submitted that even on the version of Mr Huisamen, Mr Delport's responses did not interrupt prescription as they were not unequivocal conduct, which was capable of no other reasonable interpretation than that he intended to admit liability. The evidence of Mr Huisamen when it came to whether they (with Mr Delport) discussed the latter's admission of liability was the following:

“Mr Schubart: Did you discuss that with Mr Delport at all?

Mr Huisamen: Not in depth, no.

Mr Schubart: Did you discuss it at all?

Mr Huisamen: Well, I told him my opinion.

Mr Schubart: And what did he say about that?

Mr Huisamen: He had nothing to say, I mean he did not admit to anything, nor did he deny anything. He said to me what must he do then, so I said well my advice would be to just report the matter to the insurance”.

[25] The plaintiff's argument was that anything outside Mr Delport's file notes about the consultation he had with the plaintiff should not be believed because he did not know the merits of the matter and was not sure whether the claim had prescribed or not until confirmed by Adv Gajjar.

F. The legal position and Analysis of the evidence:

[26] Section 12 of the Prescription Act² (the Act) provides as follows in the relevant part:

- “(1) Subject to the provisions of sub-sections (2), (3) and (4), prescription shall commence to run as soon as the debt is due;
- (2) . . .
- (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity 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.
- (4) . . .”

[27] Subsection 1 of the Act is not in issue. It is further common cause that in terms of Section 11 (d) of the Act, the prescription period in the respect of the plaintiff's claim is three (3) years. The only relevant section is sub-section 12 (3) of the Act regarding whether the plaintiff, on 28 November 2007, was provided with facts upon which a claim against the defendant arose. The contention by the defendant is that the plaintiff was provided with such facts. The question is whether the facts that were provided to him would have given him knowledge that a debt had arisen in his favour against the defendant. Legal conclusions applicable to the accepted facts are not a consideration. The law has developed around sub-section 12 (3) of the Act to the extent that it has become trite. Various courts have pronounced on it³.

[28] Prescription extinguishes a debt. Although the term “debt” is not defined in the Act, it refers to anything that is owed or due, be it money, goods, or services a debtor

² Act 68 of 1969.

³ *Links v Member of the Executive Council Department of Health, Northern Cape* 2016 (4) SA 414 (CC) paras 30 to 35; *Minister of Finance and Others v Gore N.O.* 2007 (1) SA 111 (SCA) at para 17.

is under an obligation to pay or render to a creditor⁴. In the context of this matter, the debt is in relation to failure to render services as an attorney firm.

[29] In order to succeed the plaintiff, would have to allege and prove that:

- (a) a mandate was given to and accepted by the defendant;
- (b) a breach of the mandate;
- (c) negligence in the sense that the defendant did not exercise the degree of skill, knowledge and diligence expected of an average practising attorney;
- (d) that he had suffered damages; and
- (e) that damages were within the contemplation of the parties when the mandate was extended⁵.

[30] The high-water mark of the defendant's defence is that prescription started to run on 29 November 2007, the latter being the date after the plaintiff got to know the facts upon which his claim is premised. As stated previously, what was said during the consultation is a bone of contention between the parties. All that has to be resolved is whether what was said to the plaintiff during that consultation was clear enough to have informed him that his claim against Metropolitan Life had prescribed and that he had a claim against the defendant for damages arising out of the negligent handling of the claim against Metropolitan Life. In doing so, I have to evaluate the conversations⁶ between them. If unable to resolve the issue based on that, I have to have regard to the conduct of the parties going forward⁷.

⁴ *Amler's Precedents of Pleadings*, 9th Edition, Harms page 305 and the cases cited therein.

⁵ *McMillan v Bate Chubb and Dickson Inc.* [2021] JOL 50108 (SCA) para 35; [2021] ZASCA 45.

⁶ Which are premised on the file notes made by Mr Delport.

⁷ That is the involvement of Mr Huisamen and the consultation with Adv Gajjar.

[31] Based on the note he made on 28 November 2007, Mr Delport testified that all he told the plaintiff was that he was “concerned about the contents thereof (the special pleas) and that I believe there is problems and that it is negative for this case going forward with regards to having success with his claim”.(sic) The dictionary meaning of “concerned” is that he was “worried”, “troubled” and “anxious” about the special pleas raised by Metropolitan Life. This, to me, does not amount to a clear statement that conveys that they were “dead in the water” and therefore nothing could be done as, the claim had prescribed. The statement cannot be read to mean that. It cannot be said that Mr Delport, with certainty, told the plaintiff that his claim had prescribed. Instead, the statement indicates that he was not certain whether the special pleas would stand, hence, he expressed doubts by even saying:

“Well, if that was . . . [indistinct] we will obviously not proceed with the matter”.

[32] It cannot be said with conviction that Mr Delport, as at that stage, believed that the special pleas meant that was the end of the matter. Had he been certain, nothing would have prevented him from categorically saying so to the plaintiff. The concern that he had about the special pleas cannot be said to have conveyed sufficient facts to the plaintiff (who is a lay person) which could have led him to believe that his claim prescribed in the hands of the defendant. Mr Delport himself was uncertain as to whether the claim had prescribed hence, he expressed a concern going forward.

[33] Mr Delport’s uncertainty is fortified by his actions prior to and after consulting with the plaintiff. He consulted Adv Grobber who was the advocate “managing” the matter. As suggested by Adv Grobber, he, according to him, had to “get confirmation on my opinion belief of my legal interpretation of what I saw on the papers”. (sic) This

statement is clear enough to establish that he was not sure whether prescription would be upheld. Therefore, he could not have informed the plaintiff that the claim had prescribed.

[34] To prove that he was not sure about the status of the special pleas, he approached Adv Gajjar to opine on it. Adv Gajjar gave his opinion on 10 December 2007 confirming that the claim against Metropolitan Life had prescribed. Obviously, that served as confirmation of his belief. He no longer had doubts about the success of the special pleas at that stage. Based on these facts, coming from Mr Delport himself, it is evident to me that he could not have advised the plaintiff about the success or otherwise of the special pleas as of 28 November 2007. As of that date, it cannot be said that the plaintiff had acquired sufficient knowledge that the defendant had not exercised, with a degree of skill, knowledge and diligence to sue Metropolitan Life. If that were the case, Mr Delport would not have sought the advice of Adv Grobblers and Adv Gajjar. He would have told the plaintiff that the special pleas would succeed, and that meant the end of their mandate.

[35] The plaintiff's evidence, which I accept, is to the effect that after the consultation of 28 November 2007, he felt confused to an extent that after fortuitously meeting Mr Huisamen at the EP Rugby Academy, he told him that Mr Delport told him the matter would not proceed on the trial date. The plaintiff did not understand why, because he was looking forward to the finalisation of the matter. This is a clear indication that he really was confused. Mr Huisamen undertook to find out from Mr Delport, as they were colleagues. It is apparent that an explanation was given to Mr Huisamen by Mr Delport which culminated in both attending a consultation with Adv Gajjar. It was put to Mr

Delport that he did not know the merits of the case or the validity of the special plea at that stage. The questioning was as follows:

“Mr Schubart: He will say that at this meeting Adv Gajjar asked you a few questions about the special pleas and you said to him you did not really know what was going on with the matter, because you had not been involved with it [intervenes].

Mr Delport: That is hundred percent correct. I do not know about the matter, its detail”.
(sic)

This confirms that it would have been inconceivable that Mr Delport would have told the plaintiff that the special pleas were valid and that the matter had prescribed. Furthermore, Mr Delport, when asked if he wanted an Advocate’s opinion, especially based on his file notes, he said the following about the consultation on 28 November 2007:

“Correct, because I did not want to burden to, you know just tell this gentleman the case is now just down the drain so to speak”. (sic)

This answer is telling. He did not tell him that the case is “down the drain” hence he sought an opinion. This confirms my view and finding that the plaintiff did not know facts sufficient for him to formulate a cause of action hence he even informally approached Mr Huisamen to express his lack of knowledge about why the matter was to be postponed.

[36] A lot has been said about the probabilities in this matter. In fact, about the conflict in the parties’ versions; where the file was pursuant to the consultation on 28 November 2007; what transpired between Mr Delport and Mr Huisamen; who was in charge after the consultation; the interruption of prescription etc. I shall not deal with these issues especially whether prescription was interrupted or not, for the reason that I find that the cause of action arose on 10 December 2007 and not 28 November 2007

as alleged by the defendant. Prescription was interrupted on 3 December 2010 when summons was served on the defendant.

[37] Consequently, I make the following order.

1. The defendant's special plea is dismissed with costs.

M MAKAULA
Judge of the High Court

Appearances:

Counsel for plaintiff:	Adv L Schubart SC
Instructed by:	Greyvensteins Inc.
Counsel for defendant:	Adv K Williams
Instructed by:	Lizelle Pretorius Inc.
Date reserved:	25 April 2023
Date delivered:	23 January 2024