



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 1807/2021

In the matter between:

DANIE KLUE

Plaintiff

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

Defendant

CORAM: LOUBSER, J

HEARD ON: 7 FEBRUARY 2023

JUDGEMENT BY: LOUBSER, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII on 18 APRIL 2023. The date and time for hand-down is deemed to be 18 APRIL 2023 at 12:00

- [1] This matter concerns two special pleas raised by the defendant in his plea in response to a summons issued by the plaintiff and delivered on the offices of the state attorney on 26 April 2021. In the first special plea it is contended that the plaintiff failed to comply with the provisions of the Institution of Legal Proceedings against Certain Organs of State Act¹ ("the Act") in that the required notice was sent more than six months after the debt or cause of action arose. In the second special

¹ Act 40 of 2002

plea it is contended that the plaintiff's claim has become prescribed in terms of the provisions of the Prescription Act² in that the summons was served more than three years after the debt became due, or after the cause of action arose.

[2] The parties have agreed at a pre-trial conference that the two special pleas would be argued first and separately from the merits and the quantum of the matter. At the hearing of the special pleas no evidence was presented by either of the parties, and counsel representing the parties relied only on the facts and the sequence of events as they unfolded on the pleadings and other documents before the court in making their submissions.

[3] Before turning to the merits of the special pleas, it is necessary to refer to the chronology of the events in order to put the special pleas in context. The following represents the relevant and common cause chronology and facts of the matter:

3.1. On 26 November 2013 the plaintiff was convicted in the Bloemfontein Regional Court on one charge of sexual assault and two charges of rape of a minor child. He was sentenced to 5 years imprisonment for the sexual assault and to life imprisonment on each of the rape charges on 3 December 2013. The effective sentence was one of life imprisonment.

3.2. The plaintiff then made application for leave to appeal against his convictions and sentences, which application was dismissed as far as the convictions are concerned by the trial magistrate on 27 January 2014. The trial magistrate, however, granted leave to appeal against the three sentences.

3.3. On 9 December 2015 the Judge President of the Free State High Court dismissed a petition by the plaintiff for leave to appeal against his conviction, apparently on the charge of sexual assault.

3.4. The plaintiff then applied to the Supreme Court of Appeal for leave to appeal against his convictions. On 27 February 2017 he was granted leave to appeal to the High Court against his conviction and sentence on the sexual assault charge. It was pointed out in the order that the plaintiff had an

² Act 68 of 1969

automatic right of appeal in respect of the rape charges by virtue of the provisions of section 309(1) of the Criminal Procedure Act.³

- 3.5. The appeal against the convictions and sentences on all three charges was heard in the High Court by Mbhele J and Chesiwe AJ, as they then were, on 4 December 2017. On 9 March 2018 they delivered judgement and dismissed the appeal.
- 3.6. On 21 May 2018 the plaintiff approached the Supreme Court of Appeal for special leave to appeal against the judgement of Mbhele, J and Chesiwe, AJ. This application for leave was heard by the SCA on 18 February 2020.
- 3.7. On 21 April 2020 the SCA handed down a majority judgement (with two Judges of Appeal dissenting) in the application for leave. In the judgement leave to appeal was granted and the appeal itself was upheld. The plaintiff's convictions and sentences were therefore set aside.
- 3.8. The plaintiff's first letter in terms of the Act was sent to the address of the defendant in Pretoria during the second half of August 2020. It was pointed out in this letter that the evidence of the single child witness in the trial court was found to be unsatisfactory in "material aspects".
- 3.9. This letter was followed by another letter to the defendant dated 22 September 2020, in which the plaintiff alleged that the trial magistrate had acted in breach of her duty of care towards the plaintiff in that she had failed to carry out her functions with the necessary professional skill and care. The magistrate had acted negligently and her conduct fell short of what was expected from a reasonable person in her position, it was alleged in this letter.
- 3.10. As mentioned earlier, the plaintiff served summons on the offices of the State attorney on 26 April 2021. In the summons, the plaintiff's claim was based on the conduct of the trial magistrate and the causes of action already set out in the letters of August and 22 September 2020 to the defendant.
- 3.11. In December 2021 the plaintiff gave notice of his intention to amend his particulars of claim, and eventually the amended pages were served on the

³ Act 51 of 1977

state attorney on 17 December 2021. In the amended pages, the plaintiff relied on a further cause of action in the form of an alleged breach of a duty of care by the two High Court judges who heard the appeal. In these pages, it was alleged that the judges persisted with the wrongful actions of the trial magistrate by dismissing the appeal of the plaintiff on 9 March 2018. The alleged wrongful action consisted in the finding of the trial magistrate that the evidence of the complainant was reliable. The plaintiff claimed damages of R7 270 000.00 plus interest in the amended pages.

- [4] At this point it needs to be mentioned that throughout all the processes referred to above, it was primarily the case of the plaintiff that the trial magistrate, and later the two judges of the High Court, had erred by accepting the version of the complainant as reliable and by concluding that she was a credible witness. This fact is particularly evident from a reading of the plaintiff's notice of application for leave to appeal in the Regional Court, dated 24 January 2014, from his application for leave to appeal in the Supreme Court of Appeal in February 2017, from his application for special leave to appeal against the judgement of the two High Court judges in May 2018 and from the two letters of demand in terms of the Act dated August and September 2020.
- [5] In the summons as it presently stands, it is alleged that the plaintiff's cause of action "arose and/or was completed or has fully accrued" on 21 April 2020 when the Supreme Court of Appeal upheld the plaintiff's appeal. In both the special pleas raised by the defendant, it is contended that in as far as the plaintiff relies on a breach of a duty of care by the trial magistrate, the cause of action arose and the debt became due on 3 December 2013, being the date on which the plaintiff was sentenced by the trial magistrate. Alternatively, it is contended that the cause of action arose and the debt became due on 27 January 2014 at the latest, being the date on which the trial magistrate dismissed the plaintiff's application for leave to appeal.
- [6] In as far as the plaintiff relies on any wrongful and/or negligent conduct by the two High Court judges, it is contended in the special pleas that the cause of action arose on 9 March 2018 at the latest, being the date on which they dismissed the plaintiff's appeal. It is further contended that the amendment of the particulars of

claim to include the alleged wrongful conduct of the judges, only came into effect on 17 December 2021 when the amended pages were served on the defendant's attorney. This happened more than three years after the cause of action arose, and therefore the claim has become prescribed, it is alleged in the special pleas.

- [7] The relevant provisions of the Prescription Act are the following: In terms of section 11(a) the period of prescription of debts of the kind in question shall be three years. Section 12(1) provides that prescription shall commence to run as soon as the debt is due. Section 12(3) provides that a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor 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. Section 15(1) provides that the running of prescription shall be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.
- [8] The relevant provisions of the prior notice Act⁴ are the following: Section 3(1)(a) thereof provides that no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the creditor has given the organ of state in question notice in writing of his or her intention to institute the legal proceedings in question. Section 3 (2) provides that a notice must, within six months from the date on which the debt became due, be served on the organ of state, and must briefly set out the facts giving rise to the debt, and such particulars of such debt as are within the knowledge of the creditor. Section 3(3) has the same provisions as section 12(3) of the Prescription Act, speaking in broad terms. Section 3(4)(a) provides that, if an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure. There is no application for condonation in this respect before this court.
- [9] Both the above Acts make it clear that prescription commence to run and that prior notice must be given within six months from the date on which the debt became due. For the purposes of deciding the special pleas raised, it needs to be established when "a debt becomes due". When that is established, it will become

⁴ See footnote 1 above

clear whether the debt in the present matter became due only on 21 April 2020 as contended by the plaintiff, or on any prior date as contended by the defendant.

- [10] Neither the Prescription Act nor the prior notice Act defines the phrase “when a debt becomes due”. Therefore, the authority probably most quoted when it comes to determining when a debt becomes due in respect of the running of prescription is the unanimous decision of the Constitutional Court in *Links v Department of Health*⁵. In that case, the plaintiff’s thumb was amputated in hospital, and he was apparently not aware that the amputation was due to the negligence of the hospital staff. When he was later advised of the negligence he instituted action, but prescription of the claim was raised as a defence.
- [11] Firstly, the Court referred with approval to the following passage in the case of **Truter vs Deyssel**:⁶ “debt due means a debt, including a delictual debt, which is owing and payable. A debt is due in this case 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 pursue his or her claim.” The Court also referred to another passage⁷ in the Truter case where “cause of action” for the purpose of prescription was defined as...” every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement 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.”
- [12] In addition, the Court also referred with approval⁸ to the case of **Minister of Finance and Others v Gore N.O.**⁹ where it was held that “... time begins to run against the creditor when it has the minimum facts that are necessary to institute action”.¹⁰ It was further stated in the Gore-case that the running of prescription is not postponed until a creditor becomes aware of the full extent of its legal

⁵ 2016 (4) SA 414 (CC)

⁶ 2006 (4) SA 168 (SCA) at par [16]

⁷ Par [19] in the Truter case

⁸ At par [35]

⁹ 2007 (1) SA 111 (SCA)

¹⁰ At par 17 of the Gore-case

rights, nor until the creditor has evidence that would enable it to prove a case 'comfortably'.¹¹

[13] Applying these principles to the question in the present case, there can be no doubt that the plaintiff had acquired a complete cause of action for the recovery of his debt, and that the entire set of facts which he had to prove against the defendant, were already in place when he was sentenced by the trial magistrate and when the trial magistrate dismissed his application for leave to appeal. This happened on 3 December 2013 and 27 January 2014 respectively. This is so because he knew at the time, or at least believed at the time, that the trial magistrate had wrongly accepted the version of the complainant as reliable and had wrongly concluded that she was a credible witness. In the years that followed, the plaintiff persisted with this contention in all the legal processes he embarked upon. Even in his eventual summons he mainly relied on the same contention as a basis for his claim.

[14] The finding of the Supreme Court of Appeal on 27 April 2020 did not establish a new cause of action based on different facts than those that the plaintiff had relied on right from the beginning. It only confirmed what the plaintiff had known or believed through the years. It is true that this finding constituted evidence that could have enabled the plaintiff to prove his case more comfortably, but as we have seen, such fact could never postpone the running of prescription in the circumstances. Incidentally, the finding of the Supreme Court of Appeal was not a pre-condition to the institution of the present claim. It is only in cases of malicious proceedings where a plaintiff must allege and prove that the proceedings were terminated in his favour.¹²

[15] In the premises, I find that the plaintiff's cause of action did not arise on 21 April 2020. In as far as the plaintiff relies on a breach of a duty of care by the trial magistrate, his cause of action arose at the latest on 27 January 2014. In as far as he relies on a breach of a duty of care by the two High Court judges, his cause of action arose on 9 March 2018, being the date on which they dismissed his

¹¹ Ibid

¹² *Els v Minister of Law and Order and Others* 1993 (1) SA 12 (CPD)

appeal. The plaintiff's claim has therefore become prescribed on 28 January 2017 as far as the trial magistrate is concerned, and only on 17 December 2021 the plaintiff included the alleged conduct of the High Court judges in his amended particulars of claim when the amended pages were served on the defendant's attorneys.

[16] The plaintiff's claim in relation to the conduct of the High Court judges had already become prescribed on 10 March 2021, some nine months before the claim in this respect was included in the particulars of claim. It follows that the plaintiff's claim has already become prescribed both in relation to the conduct of the trial magistrate and the High Court judges by the time that the summons was served on 26 April 2021 and by the time that the conduct of the High Court judges became involved on 17 December 2021.

[17] As far as the prior notices are concerned, they only referred to the conduct of the trial magistrate and not to the conduct of the High Court judges. In this respect, the notices did not comply with the Act. In any event, the notices were sent after the expiry of six months from the date on which the debt arose.

[18] The following orders are made:

1. The special plea relating to non-compliance with the provisions of Act 40 of 2002 is upheld.
2. The special plea relating to prescription is upheld.
3. The action instituted by the plaintiff against the defendant is dismissed with costs.


P. J. LOUBSER, J

For the Plaintiffs: Adv. K. Pretorius
Instructed by: J.G. Kriek and Cloete
Bloemfontein

For the Defendant: Adv. G.J.M. Wright
Instructed by: Office of the State Attorney
Bloemfontein