

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO. 787/2020

In the matter between:

N[....] M[....]1(Q[....])

Plaintiff

and

D[....] J[....] M[....]2

Defendant

JUDGMENT

Bloem J.

1. The plaintiff instituted an action against the defendant wherein she claims an order that settlement agreements be set aside, that a person be appointed as receiver and liquidator “*to the erstwhile joint estate of the parties*” as it existed as at the date of the divorce and that the defendant pay her costs of the action.

2. The parties were married to each other in community of property until 28 February 2012 when the regional court issued a decree of divorce and ordered “(a) *division of the joint estate; (b)(i) that the primary care and residence of the minor children born out of the marriage be awarded to [the plaintiff]; (ii) that the right to reasonable access to the minor children be awarded to [the defendant]; and (iii) that both parties retain full guardianship of the minor children*”.

3. On 13 March 2012 the parties signed a settlement agreement wherein their agreement on immovable and moveable properties was recorded. That agreement concluded with a clause to the effect that it constituted the full and final settlement of all disputes between them and that neither party shall have any further claim against the

other. During May 2014 the parties signed an addendum to the settlement agreement wherein their agreement on motor vehicles and the maintenance of the children (which has nothing to do with the division of their joint estate) was recorded.

4. The material terms of the agreement are that the plaintiff would be sole owner of an immovable property situated at [...] M[...]3 Street, the defendant would be the sole owner of immovable properties situated at [...] E[...] and 37 Buxton Streets respectively. All the immovable properties are situated in Queenstown. It was also agreed that the plaintiff would become the sole owner of two vehicles (Ford Ranger and Mercedes Benz), with her to pay the outstanding balances on those two vehicles to the bank. They also agreed that the defendant would become the sole owner of two vehicles (BMW and Mitsubishi Colt) and that the furniture and appliances will be divided between them by agreement. In the addendum the parties recorded that the plaintiff had traded in the Mercedes Benz, the defendant had purchased an Audi for the plaintiff and that the defendant would pay half of the amount outstanding on the purchase price of the Audi to the bank.

5. The plaintiff's main claim is based on misrepresentation and her alternative claim is based on undue influence. Regarding the main claim, the plaintiff alleged in her particulars of claim that, when the defendant presented the draft agreement to her for signature, he represented to her that the assets in the joint estate consisted only of the above immovable properties and vehicles. She claimed that when he made the intentional representation to her, the defendant knew that the joint estate included other assets but that he concealed those assets from her when he caused her to sign the agreement. As a result of his conduct, the assets in the joint estate were under-reported and not all the assets of the joint estate were included in the agreement. The above material representation induced the plaintiff to sign the agreement, unaware as to the true extent of the assets of the joint estate. She claimed that, had she known the true extent of the assets in the joint estate, she would not have entered into the settlement agreement.

6. In the alternative, the plaintiff alleged that at the time of entering into the

agreement, she was unemployed and financially dependent on the defendant who wielded influence over her. She had no independent legal advice and relied on the legal advice given to her by the defendant. He reduced her resistance to entering into the agreement by advising her that the settlement agreement was in the parties' best interest, when, in fact, it was only in his interests. The plaintiff alleged that the defendant accordingly abused his position as attorney and provider and therefore abused a position of trust to induce her to enter into the agreement that was unfavourable to her. She entered into the agreement to her detriment because the assets in the joint estate were under-reported.

7. The plaintiff alleged in her particulars of claim that the immovable properties which should have been included in the agreement were 110 E[....]1 Street and a vacant plot in E[....]2; that the businesses which should have been included in the agreement were the defendant's practice as an attorney, Mbambo Attorneys (the firm or practice), Sabaoth Bed and Breakfast and Ngegazi Construction; and that the vehicles which should have been included in the agreement were an Audi, two mechanical horse and trailers, two 8-ton water trucks and tanks and a truck with sewage tank (the tanks).

8. The plaintiff alleged that, because of the misrepresentation, alternatively abuse of trust, she is entitled to an order that the settlement agreement be set aside; and to the extent necessary, tendered to the defendant, alternatively to a receiver, those assets which she received as consideration for the assets distributed to her in terms of the agreement.

9. In his first special plea the defendant alleged that the plaintiff's claim fell due on the conclusion of the agreements, being on 13 March 2012 alternatively during May 2014, that she issued summons only on 25 March 2020, more than three years after her alleged claim arose, that she had, or should have had, knowledge of the nature, extent and value of the joint estate at the time of concluding the agreements and that her claim

has accordingly become prescribed in terms of section 11 of the Prescription Act.¹

10. In his second special plea the defendant alleged that the agreements have been implemented by the parties, that the plaintiff's claim was not instituted within a reasonable time, that, by reason of the delay, she cannot effect restitution and that an order cancelling the agreement and directing division of the joint estate by a curator, receiver or liquidator would not be capable of practical implementation.

11. On the merits, the defendant denied that he misrepresented the nature, extent or value of the joint estate to the plaintiff, as alleged, pleading that the settlement agreement and addendum thereto (the agreement) was the product of negotiation and agreement between him and the plaintiff. He pleaded that at all times material to the conclusion of the agreement, the plaintiff was aware of the nature, extent and value of the joint estate because of her management and/or participation in the parties' businesses and financial affairs and her employment in the firm. The defendant pleaded that, by reason of the effluxion of time, the implementation of the agreements by the parties and the impossibility of restitution, the plaintiff was not entitled to cancellation of the agreements or any other relief.

12. The plaintiff did not deliver a replication to the defendant's special pleas. The defendant accordingly did not know on what basis the plaintiff would contend at the trial that prescription did not commence to run from the conclusion of the agreement. Mr. Raqowa, counsel for the plaintiff, relied on the plaintiff's evidence to the effect that she did not know until June 2019, when she consulted her erstwhile attorney, that she had a claim, based on misrepresentation, alternatively, undue influence against the defendant.

13. Chapter III of the Prescription Act, which includes sections 10 to 16, deals with the prescription of debts. A debt is not defined in the Prescription Act. However, "*creditor*" and "*debtor*" are defined in section 1 thereof. In terms of that section a creditor "*means a person by whom a right is enforceable by action*" and a debtor "*means a*

¹ The Prescription Act, 1969 (Act 68 of 1969).

person against whom a right is enforceable by action". A debt, for purposes of the Prescription Act, is accordingly a right enforceable by action. On the assumption that it is supported by fact, the plaintiff's claim is a debt.

14. In terms of section 11(d) of the Prescription Act the period of prescription of the debt in this case is three years. It was not disputed that the plaintiff's claim was instituted after a period of three years had lapsed from the date on which the addendum was signed during May 2014. What was disputed, when counsel made submissions at the conclusion of the hearing, was whether or not the claim had become prescribed.

15. Although Mr. Ragowa did not refer to it, he effectively relied on section 12(3) of the Prescription Act which provides as follows:

"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."

16. In terms of section 12(3) a debt is not deemed to be due until a debtor has knowledge (i) of the identity of the debtor; and (ii) of the facts from which the debt arises. There can be no doubt that at all material times the plaintiff knew the defendant's identity. The only issue to be determined is whether she had knowledge of the facts from which the debt arose.

17. What is meant by "*knowledge ... of the facts from which the debt arises*" was examined in *Mtokonya v Minister of Police*² where the court was required to determine whether a creditor must have *knowledge* that the debtor's conduct from which the debt arises is wrongful and actionable in law before the debt may be said to be due or before prescription can start running. In other words, does the lack of knowledge on the part of a creditor that a debtor's conduct is wrongful and actionable prevent prescription from running. The court found that knowledge that the debtor's conduct is wrongful and

² *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC).

actionable is knowledge of a legal conclusion and is not knowledge of a fact.

18. After making reference to a long line of cases, Zondo J (as he then was and writing the majority judgment) declined the invitation of counsel for the creditor (Mr. Mtokonya) to hold that the meaning of the provision in section 12(3) that a *“debt shall not be deemed to be due until the creditor has knowledge ... of the facts from which the debt arises”* includes that the creditor must have knowledge of legal conclusions, ie that the debtor’s conduct was wrongful and actionable. Counsel urged the court to hold that a lack of knowledge of a legal conclusion, just like a lack of knowledge of facts from which the debt arises, prevents prescription from running. The court held firstly, that the text of section 12(3) does not support that contention, because it specifically requires a creditor to have *“knowledge ... of the facts from which the debt arises”*.³ Secondly, the court held that to require a creditor to have knowledge that the debtor’s conduct giving rise to the debt is wrongful and actionable in law *“would render our law of prescription so ineffective that it may as well be abolished”*.⁴

19. In the circumstances, section 12(3) does not require a creditor to have knowledge of a right to sue the debtor nor does it require the creditor to have knowledge of legal conclusions that might be drawn from the facts from which the debt arises.

20. Mr. Raqowa conceded, correctly so, that the plaintiff did not make out a case for the relief sought in respect of any of the immovable properties; the businesses, except for the firm; and the vehicles, except for the horse and trailers and the tanks. I shall accordingly deal with the plaintiff’s evidence only insofar as it is relevant to the firm, the horse and trailers and the tanks. Before I do so, I point out that, on a question during cross-examination as to whether or not she had knowledge of all the assets in the joint estate, the plaintiff reply was *“Yes, I did”* and later *“I did know what the assets were”*. In other words, her evidence was that she had knowledge of all the assets in the joint estate. Her further evidence was that, when she did not see all the assets in the draft

³Mtokonya supra at 46C.

⁴ Mtokonya supra at 46D.

settlement agreement, she asked questions.

21. The plaintiff testified that she did not know that the firm formed part of the joint estate and that she was accordingly entitled to "*the goodwill*" of the firm. Her evidence was accordingly that she did not have knowledge of a right to sue the defendant for the goodwill of the firm. As was held in *Mtokonya*, section 12(3) does not require a creditor to have knowledge of any right to sue the debtor. The knowledge that section 12(3) requires a creditor to have is knowledge of the facts from which the debt arises. That the plaintiff did not know that she had a claim against the defendant based on misrepresentation, alternatively, undue influence, is a lack of knowledge of a legal conclusion, and not a lack of facts from which the debt arose.

22. But, even if I am wrong in that regard, the plaintiff's own evidence shows that at all times material hereto she had knowledge of the facts from which the debt arose. Her evidence was that she and the defendant started the firm. She was employed as an all-rounder. She testified that she took statements from clients, took deposits from them, arranged for money to be banked, collected fees due to the firm and "*did the accounts*" of the firm. She also prepared payment of the firm's debts. With the money generated by the firm, the defendant maintained her, their children and the household. With that money the two of them also purchased immovable property, vehicles and other movables. There was no evidence to suggest that the defendant concealed any income, generated by the firm, from her. She basically knew everything of the firm. Any suggestion that she did not have knowledge of facts from which the debt arose is accordingly untenable, on her own evidence.

23. The plaintiff's evidence regarding the existence and ownership of the mechanical horse and trailers and water trucks with tanks was unclear. She gave no evidence of a "*truck with sewage tank*", as alleged in her particulars of claim.

24. During her cross-examination, it emerged that a MAN-truck owned by the defendant was deregistered on 1 July 2011 because it was scrapped. The plaintiff accepted that Nqobenhle Construction, which she and the defendant owned, did not

purchase the remaining truck because the seller of the truck, Cradock Truck Repairs and Spares CC, was unable to furnish Ngqobenhle Construction with the original certificate of registration in respect thereof. The plaintiff accepted that the agreement of sale in respect of that truck was cancelled on 21 February 2011, and that the truck was returned. That was about a year before the parties divorced on 28 February 2012.

25. That leaves the two 8-ton water trucks and tanks. The plaintiff testified that Ngegazi Construction, which is a close corporation registered as Ngegazi Construction and Projects CC (the CC), bought two old trucks. She was cross-examined on the CC's financial statements comprising its financial position as at 29 February 2012. The financial statements show that the CC's assets as at that date consisted of furniture, fittings and computer equipment to the value of R5 844.00 and cash equivalent of R11 474.00. Those financial statements do not include any trucks as part of the CC's assets, as the plaintiff testified. In any event, those financial statements show that as at 29 February 2012 the CC was in a sorry financial state. For the year under consideration, it made a profit of R266 482.00, but its operating expenses amounted to R629 237.00 and it had an income tax expense of R19 863.00, leaving the CC with a loss of R342 896.00 as at 29 February 2012. The plaintiff accepted that the CC was in that financial position as at that date. It means that, as at the date of their divorce, the CC did not own the trucks, as the plaintiff testified.

26. In all the circumstances, because the plaintiff's own evidence was that she knew of all the assets of the joint estate as at May 2014, when the addendum was signed, and since more than three years have lapsed since then, her claim has become prescribed. It must accordingly be dismissed.

27. Even if it is found that her claim has not prescribed, the plaintiff has failed to show that, at the time when the agreement or addendum thereto was signed, the defendant misrepresented the extent of the assets in the joint estate to her or that he unduly influenced her to sign the agreement or addendum. Her claim must accordingly be dismissed on the merits.

28. What turned out to be a matter which should have detained this court for three days, turned out to have been a trial running in excess thereof. The hearing commenced on 25 January 2022. After the court had adjourned for lunch on the following day, it was reported that the plaintiff had injured her ankle and was in severe pain. Later that afternoon counsel agreed that, because of the pain that she was experiencing, it was impossible for the plaintiff to testify on that day and requested the matter to stand down until the following day. On 27 January 2022 the action was postponed to 13 and 14 April 2022 because, so it was reported, the plaintiff had fractured her ankle and was unable to attend court. The costs occasioned by the postponement were reserved.

29. The plaintiff's attorneys of record withdrew on 2 March 2022. On 8 April 2022 the registrar handed a letter of that same day to me. It was written by the plaintiff's present attorney, Zetu Kulu, of KZ Attorneys, Johannesburg. A copy of that letter was emailed to the defendant's attorney. In that letter Ms. Kulu advised of the withdrawal of the plaintiff's erstwhile attorney, that she had been appointed to assist the plaintiff and that she had informed the defendant *"of a need to take comprehensive instructions from [the plaintiff] and to prepare for trial with the result that the plaintiff will have to seek indulgence to postpone the trial"*. In that letter she stated *"that on 13 April 2022 the plaintiff intends to bring an application, to the extent necessary, to postpone the matter for purposes of providing instructions and for the legal team to prepare for trial"*. That letter concludes by expressing the hope that *"the court will grant the indulgence and that there will be no need for a formal application"*. On 11 April 2022 I received a letter from the defendant's attorney, copied to Ms. Kulu, wherein he raised his objection to her communication with me, albeit through the registrar. He requested Ms. Kulu, should the plaintiff require a postponement, to favour the respondent with a substantive application for a postponement.

30. When the matter was called on the morning of 13 April 2022 the court was informed that the defendant had been served with an application for a postponement at approximately 20h50 on the previous day and that the defendant required time to

finalise his answering affidavit. That affidavit was delivered later that day. During the address on whether or not the application for a postponement should be granted, the defendant's counsel informed the court that the plaintiff's counsel⁵ had informed him that the plaintiff was not in Makhanda. The plaintiff's counsel denied that he had made such a statement to his opponent and indicated that he had informed him that the plaintiff was not in the court building. I then stood the matter down until 16h30. At approximately 16h15 counsel saw me in chambers and confirmed that the plaintiff was not in Makhanda and had not been in Makhanda on that day. The action was postponed to 30 May 2022 primarily because the plaintiff, who was still under cross-examination, was not at court. I furthermore ordered Ms. Kulu to deliver affidavits explaining why she should not pay the costs occasioned by the postponement, inclusive of the application for a postponement as well as the hearing on 13 and 14 April 2022, such costs to be on the scale as between attorney and client. Ms. Kulu complied with the order. The defendant also deposed to an affidavit to which Ms. Kulu replied. When the matter resumed on 30 May 2022, the plaintiff testified that she was advised by Ms. Kulu not to attend court on 13 April 2022.

31. A costs order is not lightly given against a legal practitioner, whose duty it is to protect his or her client's interests without fear. Such an order is made only in exceptional circumstances⁶. In my view, had Ms. Kulu contacted the plaintiff's attorney timeously after receiving instructions on 31 March 2022, the need for a formal application for a postponement and the unnecessary incurring of costs on 13 April 2022 could have been avoided. That is more so the case in the light of the fact that on 4 April 2022 the defendant's attorney informed Ms. Kulu that there would be an assumption that the trial would proceed on 13 and 14 April 2022, unless he heard from her to the contrary and that in that event, the defendant's counsel would prepare for trial and "*fees will be dramatically increased*". On 5 April 2022 he requested to have a substantive application in good time if the plaintiff intended seeking the indulgence of a

⁵ Mr. Raqowa was not the plaintiff's counsel on 13 April 2022.

⁶ *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd; Telkom SA Soc Limited and another v Blue Label Telecoms Limited ad others* [2013] 4 All SA 346 (GNP) at par 34.

postponement and on 7 April 2022, because there was no response to his earlier letters from Ms. Kulu, the defendant's attorney sent a letter to the plaintiff, copied to Ms. Kulu, wherein he informed the plaintiff that she should appear in court on 13 April 2022, with or without an attorney. I have already dealt with the letters of 8 and 11 April 2022 from Ms. Kulu and the defendant's attorney to me.

32. In the light of the above facts, I have difficulties to order the plaintiff to pay the defendant's costs occasioned by the postponement on 13 April 2022. The above exceptional facts would, in my view, justify and order that Ms. Kulu pay those costs. Mr. Quinn submitted that those costs should be on the scale as between attorney and client. I do not agree. Although Ms. Kulu was remiss in the performance of her duties regarding the application for a postponement, her conduct was not such that it should attract the payment of costs on the suggested scale. Sight should also not be lost of the fact that Ms. Kulu was instructed by the plaintiff only on 31 March 2022. Although she had precious little time to prepare, she should have approached the defendant's attorney timeously for a postponement, and if such postponement could not have been agreed upon, instituted an application for a postponement. As pointed out above she should accept liability for that failure. However, the plaintiff is not without blame. She should have instructed Ms. Kulu earlier. Had she done so, Ms. Kulu might have prepared for trial for 13 April 2022. In the circumstances I would order Ms. Kulu to pay the costs occasioned by the postponement on 13 April 2022. In my view, there is no reason for either Ms. Kulu or the plaintiff to pay the costs which may have been incurred on 14 April 2022.

33. In the result, it is ordered that:

1. The plaintiff's claim against the defendant has prescribed and is accordingly dismissed.
2. Zetu Kulu shall pay the defendant's costs occasioned by the postponement on 13 April 2022, such costs to include the application for a postponement.

3. The plaintiff shall pay the defendant's costs of the action, such costs to include all costs previously reserved.

G H BLOEM

JUDGE OF THE HIGH COURT

For the plaintiff: Mr Z. Raqowa, instructed by KZ Attorneys and Neville Borman & Botha Attorneys, Grahamstown.

For the defendant: Mr R Quinn SC, instructed by Mbambo Attorneys Queenstown, and Zilwa Attorneys, Grahamstown.

Dates heard: 25, 26 and 27 January, 13 April and 30 and 31 May 2022.

Date of delivery of judgement: 7 June 2022.