



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO. 6488/12

In the matter between:-

LINDA HOLDEN

PLAINTIFF

and

ASSMANG LIMITED

DEFENDANT

ORDERS

1. The defendant's special plea of jurisdiction is dismissed;
 2. The defendant's special plea of prescription is dismissed;
 3. The defendant is ordered to pay the costs associated with the hearing of the special pleas, such costs to include the costs associated with the application in terms Rule 33(4).
-

JUDGMENT

HENRIQUES J

Introduction

[1] The above matter came before me as a defended action enrolled for hearing on the Trial Roll from 19 to 21 November 2014.

[2] At the commencement of the trial, the defendant (as applicant) launched a formal application supported by an affidavit deposed to by the defendant's legal representative, seeking orders for the separation of the defendant's special pleas of prescription and jurisdiction from the merits of the action.

[3] Such application was consented to by the plaintiff (respondent), however, agreement could not be reached on the costs occasioned by such application.

[4] I granted a consent order for the separation in terms of Rule 33(4) of the Uniform Rules of Court and directed that the defendant's special pleas as contained in the defendant's plea be determined separately from the main action. The costs in respect of such application were reserved.

Plaintiff's action

[5] The plaintiff instituted action against the defendant for damages arising from the defendant's alleged wrongful and malicious conduct in pursuing a complaint to the Health Professions Council of South Africa (HPCSA) against the plaintiff.

[6] The salient averments are contained in paragraphs 4, 5 and 6 of the plaintiff's particulars of claim which reads as follows:-

'4.

During or about 2008 and at or near Cato Ridge, KwaZulu-Natal and/or Johannesburg, Gauteng, the defendant wrongfully and maliciously set the law in motion by:-

- 4.1 laying false charges with the Health Professions Council of South Africa (the HPCSA) that the defendant is and has been in gross breach of the professional ethics by which her profession is regulated and is guilty of unprofessional conduct;
- 4.2 prevailing upon the HPCSA to institute an investigation against the plaintiff;
- 4.3 prevailing upon the HPCSA to take action against the plaintiff;
- 4.4 prevailing upon the HPCSA to account to the defendant's attorneys regarding the charges.

5.

When laying these charges the defendant furnished the HPCSA with the following disinformation:-

- 5.1 that the plaintiff (at or near Pietermaritzburg within this Court's jurisdiction) had sought to make diagnoses of "manganism" in respect of eight patients who had been employed by the defendant and at its Cato Ridge Works and which employees the defendant had referred to the plaintiff;
- 5.2 that the plaintiff's conduct in doing so had; alternatively would have; alternatively, could have:
 - 5.2.1 resulted in state institutions improperly compensating persons for occupational diseases which they do not suffer from and which have been wrongly identified;
 - 5.2.2 resulted in patients being subjected to incorrect treatment with adverse consequences to these patients;
 - 5.2.3 adverse consequences for the defendant and its officers.

6.

When laying these charges and getting this disinformation the defendant:

- 6.1 had no reasonable or probable cause for doing so;
- 6.2 had no reasonable belief in the truth of the information given;
- 6.3 intended to convey/impute that the plaintiff as a medical practitioner, was, and continued to be grossly unprofessional;
- 6.4 intended to convey/impute that the plaintiff, as a medical practitioner had been conducting herself, and continued to conduct herself in a grossly unethical manner;
- 6.5 intended to convey/impute that the plaintiff's conduct was unbecoming of a medical practitioner and particularly of a psychologist;
- 6.6 intended to convey/impute that the plaintiff was unfit to continue practicing as a psychologist;
- 6.7 intended to injure the plaintiff in her reputation and/or in her general standing with her disciplinary and governing body (the HPCSA);
- 6.8 set in motion a strategy maliciously designed to intimidate the plaintiff and to neutralise her from exposing information regarding these patients which the defendant had referred to her from its Cato Ridge manganese division, by compelling her to defend herself instead;
- 6.9 intended to cause Plaintiff to lose her job.'

[7] The plaintiff further contends that as a consequence of the defendant's aforesaid conduct, she suffered damages relating to inter alia legal and professional costs, loss of income and *contumelia*, impugning of professional dignity and reputation, and deterioration of professional confidence.

Defendant's plea

[8] The defendant in resisting the plaintiff's action filed two special pleas and a plea to the merits of the plaintiff's claim.

[9] The special pleas raised by the defendant relate to the alleged prescription of the plaintiff's claim in terms of the Prescription Act 68 of 1969 and the lack of jurisdiction of this court to entertain the plaintiff's action.

[10] The defendant's special pleas were couched in the following terms:-

1. PRESCRIBED CLAIM

- 1.1 The Plaintiff pleads that during or about 2008, the Defendant wrongfully and maliciously laid a complaint with the Health Professions Council of South Africa (HPCSA) against the Plaintiff (paragraph 4 of the Particulars of Claim);
- 1.2 The complaint was, in fact, lodged on 30th June 2008;
- 1.3 The Plaintiff responded to the complaint on 29th September 2008;
- 1.4 The Plaintiff's alleged claim against the Defendant therefore arose on or about 30th June 2008, alternatively, and at the latest, on 29th September 2008;
- 1.5 The Summons in this matter was issued on 06th August 2012, more than three years after the debt, which gave rise to the Plaintiff's alleged claim arose;
- 1.6 In terms of Section 11 of the Prescription Act, 1969, any claim which the Plaintiff may have had against the Defendant (which, in any event, is denied) prescribed three years after 30th June 2008, alternatively, 29th September 2008;
- 1.7 In the premises, the Plaintiff's alleged claim against the Defendant has been extinguished by prescription.

2. JURISDICTION

- 2.1 As appears on paragraph 2 of the Particulars of Claim, the Defendant is a Company with limited liability, with its registered office at 24 Impala Road, Chislehurst, Johannesburg, Gauteng;
- 2.2 The Defendant's principal place of business is also 24 Impala Road, Chislehurst, Johannesburg, Gauteng;
- 2.3 The complaint which forms the basis of the Plaintiff's alleged claim against the Defendant was lodged with the HPCSA in Pretoria, Gauteng;
- 2.4 In the premises, the Defendant does not reside within the jurisdiction of this Court nor did the Plaintiff's alleged cause of action arise in the jurisdiction of this Court;
- 2.5 This Court therefore does not have jurisdiction to entertain this action.'

Common cause facts

[11] At the commencement of the hearing, the parties submitted the following as common cause facts:-

[11.1] That the complaint was lodged with the HPCSA in June 2008;

[11.2] That the complaint was responded to by the plaintiff on 29 September 2008;

[11.3] The action was instituted on 6 August 2012;

[11.4] The summons and particulars of claim was served on the defendant at its registered office in Johannesburg on 21 August 2012 and on the defendant's Cato Ridge Works on 29 August 2012;

[11.5] The complaint served before the committee of preliminary enquiry of the HPCSA and the plaintiff appeared before such committee of preliminary enquiry on 30 October 2009;

[11.6] On 13 November 2009, the HPCSA addressed a letter to the plaintiff's then counsel in which she was advised that no further action would be taken against her and the complaint was dismissed.

[12] The evidence intended to be led by the parties was to be constrained to the issues raised in the defendant's special pleas.

Evidence of the plaintiff

[13] Linda Jane Holden, a duly qualified psychologist and the plaintiff testified that she was registered with the HPCSA and obtained her qualifications in counselling psychology in 1994. She did her internship in Durban and has been in private practice since 1994. Throughout that period she was formally registered and a paid up member of psychologists of the HPCSA.

[14] She testified that it was in February 2007 when she first saw patients employed by the defendant at her practice in Pietermaritzburg. They had been referred to her by doctors employed by the defendant being Dr P E Erasmus and Dr Do Vale. Her fees were paid for by the defendant's accounts department at its Cato Ridge offices. This was until the end of August 2008 as at the beginning of August 2008, she was informed that with effect from the end of August 2008 the defendant would no longer be paying her accounts.

[15] Thereafter she received a letter from the defendant which indicated that they were unhappy with her diagnosis of Manganese poisoning. Prior to this letter and for as long as she had treated the patients no complaints were raised with her. She had never met or spoken to Mr Broekman¹ either before or after the letter was sent. On receipt of the complaint she responded to same and was assisted by a legal practitioner. Her response is annexed to the papers. Following this, her counsel forwarded her a copy of the letter indicating that the complaint proceedings had terminated and she accepted at the time that the complaint was found to be without merit by the HPCSA. She testified that even though she is not a South African

¹ Bryan Robert Broekman had been seconded to Cato Ridge Works from 1996 to 2000. He was based in Johannesburg but he was the CEO of the Cato Ridge Works. He was responsible for health and safety issues at the Cato Ridge Works and the general manager of Cato Ridge Works reported to him even though he was based in Johannesburg.

citizen, she is resident in Pietermaritzburg and has regarded it as her permanent home since 1970. She has held permanent residence in South Africa since then.

[16] She testified that the effects of the complaint were felt by her personally, professionally and psychologically. As such, she spoke to a psychiatrist, Dr Grobler, and subsequently a clinical psychologist based in Pietermaritzburg who helped her deal with the issue. When the complaint was lodged, she heard rumours of unethical conduct doing the rounds amongst practitioners in Pietermaritzburg. The number of referrals diminished as well as her finances. She found the whole situation very unpleasant.

[17] The plaintiff testified that she was also financially affected. Her income decreased as the number of referrals and patients diminished. She still had to maintain her expenses including her legal expenses, expenses in respect of the maintenance of her child, her home and business expenses, as well as support her two elderly parents. Because work practically dried up, she procured work overseas and incurred additional expenses.

[18] During cross-examination she testified that she assumed that because Mr Broekman sometimes came to the Cato Ridge Works of the defendant he was based there. She could not dispute any evidence that the registered office of the defendant and principle place of business were in Johannesburg and similarly that Mr Broekman was based Johannesburg.

[19] She could also not dispute that the complaint had been prepared in Johannesburg by Mr Broekman and his legal advisors. She confirmed that the complaint was sent from the HPCSA to her from their Arcadia offices and that they are based there. She acknowledged that as at 29 September 2008 and when she sent the subsequent letter on 26 November 2008 she considered it a 'malicious' complaint. The complaint served before the committee of preliminary enquiry before the HSPCA and the plaintiff was summoned on 30 October 2009 to appear before the HSPCA. She learnt that on that date the HPCSA had resolved the complaint as a decision was taken that she had acted within the scope of her practice and it would not be taking any further steps.

[20] She was aware that Prof Olanow, a movement disorder specialist, was based in Hillcrest and that Mr Broekman was based in Cato Ridge and that the labour hearings and enquiry into Manganese poisoning of the defendant's employees all occurred within the Cato Ridge area. She also assumed that because Mr Broekman often attended at the Cato Ridge Works he was the CEO stationed at Cato Ridge.

Evidence of the defendant

[21] The defendant led the evidence of Bryan Robert Broekman. He is no longer in the full time employment of the defendant but is employed by them as a consultant. He was employed by African Rainbow Minerals and was an executive director of the defendant from 2002 to 2009. He had been seconded from African Rainbow Minerals to the Michael Grow Works and Cato Ridge Works from 1996 to 2000. He testified that between 2008 and 2012 he was based in Johannesburg at the defendant's head office which is situate at Chislehurst, Sandton. This is also where the board of directors and the sub-committee, being the operations committee which consists of four executive directors is based. He is an executive director of the operations committee which is based in Johannesburg.

[22] He confirmed that he, together with his legal advisor Willem Le Roux, and another attorney Paul Anderson, prepared the complaint against the plaintiff in Johannesburg. At the time they were all in Sandton. The complaint was reviewed by the sub-committee of the board of directors of the defendant and was approved by them before it was forwarded to the HPCSA. He presently lives and works in Johannesburg and has done so for approximately twenty eight (28) years. From 2000 he was permanently based in Sandton at the Chislehurst offices but was seconded for certain periods of time such as in the 1980s when he was seconded to the Northern Cape and between 1996 and 2000 when he was seconded to the Cato Ridge Works.

[23] During cross-examination he confirmed that he drafted the letter of 18 February 2008 which was addressed to the plaintiff. He confirmed that problems were experienced at the plant at Cato Ridge Works which surfaced in approximately 2005/2006 in relation to Manganese poisoning. The defendant facilitated treatment of people who displayed symptoms of Manganese poisoning and these employees

were assessed by practitioners in Pietermaritzburg, Durban and Cato Ridge. The Cato Ridge Works employed two doctors, namely Drs Erasmus and Do Vale who referred the employees to the plaintiff. He confirmed that the defendant paid the plaintiff's fees for services which she rendered as a psychologist. The choice of psychologist was made by Drs Erasmus and Do Vale and the defendant acquiesced to such decision. Even though the board sat in Johannesburg, he confirmed that at times he would visit the Cato Ridge Works for operational reasons. The senior general manager of Cato Ridge Works reported to him and he was appointed as CEO of the Cato Ridge Works.

[24] Mr Broekman confirmed that he was fully responsible for health and safety issues at the Cato Ridge Works but that these responsibilities were delegated to the general manager.

[25] He colloquially stated that 'the buck stopped with me' and that he bore the ultimate responsibility. In February and November 2008 he went down to the Cato Ridge Works while the labour hearings were proceeding. He personally attended the hearings as he was the main witness for the defendant and his task was to draft a letter² to the plaintiff in relation to the problems experienced. The factual input insofar as the letter was concerned was given by him but he also relied on information received from people at the Cato Ridge Works. This information was collated by him.

Issues for adjudication

[26] As alluded to earlier, the specific issues for determination are only in respect of the special pleas raised by the defendant, being that of jurisdiction and prescription.

[27] In order to determine such issues, the court was requested to consider the formulation of the plaintiff's claim in juxtaposition with the documents in the Trial Bundles entered into the record as exhibits 'A' and 'B' respectively.

² Exhibit A, pages 8 to 10 - the letter addresses the diagnosis of manganism in respect of one of ten patients treated by the plaintiff, Mr B Anderson, the plaintiff's letter of 15 January 2008 and certain medical reports completed by the plaintiff in which she diagnoses manganism amongst employees at the Cato Ridge Works.

Submissions

[28] As already indicated, the crux of the issues in this matter is the formulation of the plaintiff's claim.

[29] Mr Hartzenburg for the plaintiff submitted in argument that the plaintiff's claim is a delictual one for the recovery of compensation for loss and damage suffered by her as a consequence of the infringement of her personality rights. The claim is for *contumelia* and loss of income and consequently, as a permanent resident of South Africa she is entitled to institute such claim.

[30] He submitted that the effects of the complaints were felt by the plaintiff in Pietermaritzburg as the dispute originated at the Cato Ridge Works, the referrals were done at the Cato Ridge Works and she was further paid at Cato Ridge. Relying on the decision in *Thomas v BMW South Africa (Pty) Ltd* 1996 (2) SA 106 (C), it was submitted that considerations of convenience dictated that this court has jurisdiction.

[31] Insofar as the issue of prescription is concerned, Mr Hartzenburg submitted that the plaintiff's claim would only accrue once she became aware of the decision of the HPCSA not to proceed. This occurred in November 2009 and consequently that is when prescription started to run. The complaint filed by the defendant constituted continuous proceedings and only when the HPCSA made a final decision not to continue with such proceedings is when the plaintiff's right would accrue. He placed reliance on the decision in *Unilever Bestfoods Robertsons (Pty) Ltd & others v Soomar & another* 2007 (2) SA 347 (SCA) wherein Farlam JA remarked *obiter* that because a complaint had the potential to develop into a criminal complaint, she would have had to wait for the finalisation of these proceedings before instituting her claim.

[32] Mr Bothma for the defendant submitted however that the plaintiff's claim had prescribed and accepted that the onus was on the defendant to prove this. If one considers the fact that the claim is based on malicious prosecution, then the minute the plaintiff received the complaint, the *injuria* was finalised, and in terms of the principle in *Truter & another v Deyssel* 2006 (4) SA 168, the claim would therefore

have arisen during or about July 2008. That is when her claim would accrue and when prescription would start to run.

[33] He submitted that support for this submission is to be found in the *Unilever* decision and also in the case of *Gregory v Portsmouth City Council* [2000] 1 AC 419 heard in the House of Lords. He disputed that this case is one of malicious prosecution and consequently, if one accepts the principal place of business of the defendant being in Johannesburg, it is only the Johannesburg court that would have jurisdiction.

Analysis

[34] The jurisdiction of the High Court is governed by the provisions of s 19 of the Supreme Court Act (as it was then known). Section 19(1)(a) reads as follows:-

'Persons over whom and matters in relation to which provincial and local divisions have jurisdiction

(1)(a) A provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognizance, and shall, subject to the provisions of subsection (2), in addition to any powers or jurisdiction which may be vested in it by law, have power. . . .'³

[35] Of relevance is the phraseology 'causes arising' and whether the plaintiff's cause of action did in fact arise within the jurisdiction of this court.

[36] The *locus* of a delict for jurisdiction purposes (*ratio delicti*) must be determined with reference to the materiality and the number of ingredients thereof which have occurred in the court's area of jurisdiction.

³ Jurisdiction is now dealt with in section 21 of the Superior Courts Act 10 of 2013 as of 23 August 2013. The provisions of s 21 have remained more or less the same as those of the repealed Supreme Court Act. The cause of action arose when the old act was still in effect and was still in place when the summons commencing action was issued in 2012.

[37] It is not necessary that all elements of a delict must have occurred in a court's area of jurisdiction for it to be able to assume jurisdiction (see *Thomas v BMW South Africa* above at 125G–H).

[38] In *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) para 11, Jafta JA stated as follows:-

'Plainly, what is meant in the above interpretation is that "causes arising" does not refer to causes of action but to all factors giving rise to jurisdiction under the common law.'

[39] An analysis of the pleadings, and in particular the plaintiff's particulars of claim, reveals that the dispute arose as a direct consequence from the engagement of the plaintiff by the defendant to render professional services to the defendant's employees based at Cato Ridge within the jurisdiction of this court.

[40] The subsequent complaint by the defendant to the HPCSA emanated from the dissatisfaction of the defendant in regards to such services rendered by the plaintiff. It is clear that the thrust of the complaint is premised on the services rendered by the plaintiff and it axiomatically follows that such complaint would not have emanated had the plaintiff not been engaged to render services to the defendant.

[41] The fact that the complaint submitted by the defendant to the HPCSA was prepared in Gauteng and lodged with the HPCSA's offices based in Pretoria, outside the territorial jurisdiction of this court, does not detract from the fact that such complaint was premised on the alleged dissatisfaction with the plaintiff's services, which services it is common cause was rendered at Cato Ridge.

[42] A common sense approach dictates that the parochial jurisdiction of this court cannot be excluded in such circumstances. Further, I align myself with the submissions by Mr Hartzenburg that the dictates of convenience coupled with the fact that the underlying circumstances emanated from the defendant's Cato Ridge Works, lends support to a finding that this court does in fact have jurisdiction.

[43] In the circumstances it is not necessary to consider as to whether the defendant resides within the jurisdiction of this court and in particular, whether the defendant's registered office and principal place of business is situate within the jurisdiction of this court.

Prescription

[44] The defendant's contention that the plaintiff's claim has prescribed is premised on its submission that the plaintiff's claim is based on the *actio iniuriarum* and is accordingly subject to a prescriptive period of three years from the date the plaintiff had knowledge of all the facts from which the debt arose, which it alleges as being 30 June 2008, the date when the complaint was lodged with the HPCSA.

[45] The plaintiff counters such argument on the basis that her cause of action is based upon both the *actio iniuriarum* and the *actio legis aquiliae* and/or malicious prosecution.

[46] An analysis of the plaintiff's particulars of claim as set out above reveals the plaintiff's reliance on the defendant's alleged wrongful and malicious conduct when laying the charges with the HPCSA.

[47] The requirements for malicious prosecution have been articulated in various authorities as follows:-

[47.1] that the defendant set the law in motion, that it instigated or instituted the proceedings;

[47.2] that the defendant acted without reasonable and probable cause;

[47.3] that the defendant acted with malice or *animo iniuriandi*;

[47.4] that the prosecution has failed; and

[47.5] that the plaintiff suffered damages.

(See *Minister for Justice and Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA)).

[48] If an unfounded complaint is laid with a quasi-judicial body such as a professional disciplinary body against a professional person registered with such a body, the communication will be 'privileged', unless such person can show that the complainant acted with an improper motive such as ill-will, spite or malice. (See J Neethling, J M Potgieter & P J Visser *Law of Delict* 4 ed (2001) at 338 – 350).

[49] Accordingly the sustainability of the plaintiff's action as pleaded is dependent upon the plaintiff proving that the defendant's action was motivated with malicious or improper intent. (See *Michael & another v Linksfield Park Clinic (Pty) Ltd & another* 2001 (3) SA 1188 (SCA)).

[50] It is neither relevant nor germane to the enquiry before this court to make any finding or comment on whether the plaintiff will in fact be able to successfully discharge the onus of proving that the defendant acted with malice or improper motive. It is further instructive to note that no challenge or exception has been taken by the defendant in regards to the sustainability of the plaintiff's cause of action.

[51] The plaintiff has clearly pleaded a case premised on malicious prosecution and in such circumstances the prescriptive period would commence to run once the plaintiff was notified by the HPCSA on 30 October 2009 that no further action would be taken against her.

[52] A cause of action for the purpose of prescription has been defined as 'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment 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.' (See *Truter v Deyssel* above para 19).

[53] It accordingly follows in my view that the plaintiff obtained knowledge of all the essential facts, specifically that the HPCSA had resolved not to pursue any further

action on 30 October 2009, from which date the prescriptive period of three years would commence.

[54] The plaintiff's summons commencing action was instituted within the three year period in terms of s 12(1) of the Prescription Act. I accordingly find that the plaintiff's claim in these circumstances has not prescribed.

Costs

[55] The issue of costs falls within the discretion of the court. The general rule is that the successful party is entitled to his/her costs. There are however exceptions to this rule and ultimately same is dependent on the facts of a matter and falls within the discretion of the presiding officer.

[56] I can find no reason, why I should deviate from the general principle that costs should follow the result.

Order

[57] In the result I grant the following order:-

1. The defendant's special plea of jurisdiction is dismissed;
2. The defendant's special plea of prescription is dismissed;
3. The defendant is ordered to pay the costs associated with the hearing of the special pleas, such costs to include the costs associated with the application in terms Rule 33(4).

HENRIQUES J

Case Information

Date of Trial: 19 November 2014

Date of Judgment: 8 February 2018

Appearances:

Counsel for the Plaintiff: C.J. Hartzenberg SC

Instructed by: Linda Payne Attorneys
Block A, Hilltops Office Park
73 Villiers Drive
Pietermaritzburg
Tel: 033 342 3707
Ref: L/H003/2012

Counsel for the Defendant: H.C. Bothma

Instructed by: ENS
150 West Street
Sandton
Ref.MsK Simpson.Mokoena/0343076
Email: ksimpson@ensafrica.com
c/o Shepstone and Wylie
Suite 2, The Crest Redlands Estate
1 George MacFarlane Lane
Wembley,
Pmbg
Tel: 033 355 1780
Ref: J Finger