IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION, MTHATHA]

CASE NO: 1915/16

Heard on: 31/01/18

Delivered on: 08/02/18

In the matter between:

NTABOZUKO MMANGWENI — Plaintiff

and

MINISTER OF POLICE — Defendant

JUDGMENT

NHLANGULELA DJP

[1] This matter concerns compliance, or otherwise, of the Plaintiff's legal advice with the provisions of s 12 (3) of the Prescription Act 68 of 1969 (the Act). It is so because the Plaintiff did not institute his action for damages which is alleged to have arisen from assault committed by the employees of the Defendant on 17 July 2008 at Maqanyeni Locality, Sibangweni Administrative Area that is situated in the district of Libode. In terms of s 11 (*d*) of the Act such a claim becomes prescribed if it is not brought within a period of three years.

[2] The provisions of s 11 of the Act read as follows:

> "The periods of prescription of debts shall be the following:
>
> *(a)* thirty years in respect of—

(i) any debt secured by mortgage bond;

(ii) any judgment debt;

(iii) any debt in respect of any taxation imposed or levied by or under any law;

(iv) any debt owed to the State in respect of any share of the profits, royalities or any similar consideration payable in respect of the right to mine minerals or other substances;

(b) fifteen years in respect of any dent owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor; unless a longer period applies in respect of the debt in question in terms of paragraph (a);

(c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b);

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt."

And the provisions of s 12 (3) of the same Act read:

> "A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of <u>the facts from which the debt arises</u>: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."
> (underlining is mine for my emphasis).

[3] Initially the special plea of prescription was raised for consideration at the trial of the action in which oral evidence would first be led and evaluated before the Court makes a decision. However on the day of trial on 30 January 2018

both parties approached the Court with a stated case prepared in terms of Rule 33 of the rules of this Court and asking that the determination of the special plea be made separately from all other issues of the case; and that the Court do so without hearing evidence.

[4] As is stated in *Mtokonya v Minister of Police* (CCT 200/16) [2017] ZACC 33; 2017 (11) BCLR 1443 (CC) (19 September 2017) the ambit of a hearing and the manner in which a court decides the cases under Rule 33 are delineated by the provisions of Rule 33 themselves. In this regard the Constitutional Court stated as follows at para [15]:

> "From rule 35 (5) it is clear that the decision of the court is required to be "upon any question in terms of this rule." As I have said, the reference to the "question in terms of this rule" in rule 33 (5) is a reference to the question or questions of law that the parties have submitted to the court for a decision. A court that is called upon to decide a special case under rule 33 is required to decide the question of law presented to it and has no right to travel outside the four corners of the agreed statement and decide a different question that it wishes the parties had submitted to it to decide but did not or that it may wish the parties have included as one of the questions of law they had submitted to it to decide but did not."

[5] What the provisions of Rule 33 (1) and (2) compel the parties to do in a stated case is to set forth the: (i) facts agreed upon, (ii) the questions of law in dispute between them and their (iii) contentions thereon. I proceed to list these items as they appear in the stated case in this matter:

(i) The agreed facts:

The plaintiff is an adult male person aged 54 years. On 17 July 2008 whilst he was in his homestead certain employees of the Defendant assaulted him. Aggrieved by the unlawful conduct of the employees, on 08 July 2008 he went to Libode Police Station to lay a criminal charge with the result that a docket was opened under CAS 73/07/2008. On 08 August 2008 he proceeded to report the matter to the Independent Complaints Directorate. At the beginning of 2016 the Plaintiff met one Mr Zolile Nontswabu, a registered Attorney; who advised the Plaintiff that he had a right to sue the police for damages for unlawful and wrongful assault. On 02 June 2016 the Plaintiff issued and served summons against the Defendant.

(ii) The question of law in dispute:

The parties seek a determination of the question whether the Plaintiff's claim has become prescribed or not.

(iii) The contentions:

For the Plaintiff:

Before meeting Mr Nontswabu in 2016 the Plaintiff did not know that there was in existence a debt owed to him; the Minister of Police was the co-debtor; the facts giving rise to the debt and that he had a right of civil law suit against the police. He contends further that the provisions of s 11 of the Act relied upon by the Defendant ought to be declared invalid to the extent that a 3 year extinction period gives to the Plaintiff insufficient time within which to lodge a claim arising from violation of a constitutionally protected right in s 12 (*c*) of the Constitution against violence committed by the members of the SAPS.

For the Defendant:

It is contended on behalf of the Minister that the Plaintiff knew about the existence of the debt; the identity of the debtor; and the facts giving rise to the debt. The Plaintiff's ignorance about the existence of a right to claim compensation against the Defendant does not stop prescription period from running. It is also disputed that s 11 of the Prescription Act is unconstitutional.

[6] In argument *Mr Mhambi*, for the Plaintiff, conceded that the issue about the unconstitutionality of s 11 of the Act is for present purposes irrelevant. The concession was made consequent upon a debate that had ensued about the fact that a declaration of constitutional invalidity of s 11 of the Act was never foreshadowed in the Plaintiff's particulars of claim; and as such is not central to the Defendant's special plea of prescription, especially the applicability of s 12 (3), that informs the framing of the stated case in terms of Rule 33. I derive comfort in the concession made because the constitutionality point is in any event not a question of law that has been identified by the parties for determination by the Court. The question of law for determination is whether the Plaintiff's claim prescribed or not.

[7] On the issue of prescription it was submitted on behalf of the Plaintiff that for the contentions as set out in the stated case prescription of the Plaintiff's claim started to run in March 2016 when the Plaintiff was alerted to the fact that he had a legal right to claim compensation from the Defendant. It was argued strenuously that the case of *MEC For Education, KwaZulu-Natal v Shange* 2012

(5) SA 313 (SCA) is the supporting authority for the Plaintiff's case on both points of fact and law.

[8] *Mr Swana*, for the Defendant, submitted that the case of *Shange* is distinguishable from the present case on the facts and, therefore, cannot find application here.

[9] The application of the case of *Mtokonya* to this case must be put in the correct perspective. In my view the case of *Mtokonya* gives an answer to the question whether the Plaintiff's knowledge in 2016 that he had a right to sue the Defendant constitute "the facts from which the debt arises" as envisaged in s 12 (3) of the Act. I found in the case of *Mtokonya v Minister of Police*, Mthatha High Court, C/N 1057/14 dated 23 September 2015 that lack of knowledge of a legal remedy, as is the case here, does not stop the prescription period from running. For this reason, amongst others, I upheld the special plea of prescription with costs. On appeal to the Constitutional Court the following was said at para [36]:

> "Section 12 (3) does not require the creditor to have knowledge of any right to sue the debtor nor does it require him or her to have knowledge of legal conclusions that may be drawn from "the facts which the debt arises." Case law is to the effect that the facts from which the debt arises are the facts which a creditor would need to prove in order to establish the liability of the debtor. In his founding affidavit in support of his application for leave to appeal to this Court, the applicant in effect criticises the fact that section 12 (3) refers only to knowledge of "the facts from which the debt arises" and does not also refer to knowledge of legal conclusions that must be drawn from those facts. He says in the affidavit that this creates a lacuna in section 12 (3) and that that is the question he is asking this Court to decide,

> namely, whether section 12 (3) requires a creditor to also know that the conduct of the debtor is wrongful and actionable before a debt may be deemed to be due or before prescription may begin to run. It is not necessary to deal with the third exception which is provided for in subsection (4) because it does not arise in the present case."

[10] In arriving at the judgment on the interpretation of the meaning of the term: "the facts upon which the debt arises "in s 12 (3) of the Act, which is the second part of the subsection, Constitutional Court in *Mtokonya* applied a plethora of previously decided cases such as: *Fluxman Inc v Leveson* 2017 (2) SA 520 (SCA); *Eskom v Bojanala Platinum District Municipality* 2003 JDR 0498 (T) at para 16. *Truter v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA)*; Yellow Star Properties 1020 (Pty) Ltd v MEC; Department of Development Planning and Local Government, Gauteng* [2009] ZASCA 25; 2009 (3) SA 577 (SCA); *Claasen v Bester* [2011] ZASCA 197; 2012 (2) 404 (SCA) and *Macleod v Kweyiya* [2013] ZASCA 28, 2013 (6) SA (SCA).

[11] The Constitutional Court also dealt with the term: "the creditor has knowledge of the identity of the debtor" in s 12 (3) of the Act it referred to the term as being the first part. In this case the contention that the Plaintiff did not know the identity of the co-debtor (the Minister) falls to be examined under the first part of s 12 (3) of the Act. The Plaintiff pins his faith on the case of *Shange* for his contention that he did not know the identity of the Defendant. To resolve this issue the Court must have regard to the agreed facts, and then compare the meaning thereof to the facts in *Shange.*

[12] In evaluating the agreed facts the provisions of Rule 33 (3) become an injunction. The sub-rule reads as follows:

> "At the hearing … the court and the parties may refer to the whole of the contents of such documents and the court may draw any inference of fact or of law from the facts and documents as if proved at a trial."

[13] The facts speak for themselves: The Plaintiff's legal right to sue the Defendant was at all material times in existence at the time of unfolding of the facts giving rise to the cause of action; and such right, as already found in the matter, did not prevent prescription from beginning to run on 17 July 2008. At the time when the Plaintiff was assaulted he did know as a fact that the wrongdoers were the members of the police who had emanated from Libode Police Station. The reports that the Plaintiff later on gave to the police and Independent Complaints Directorate, in the same month of July in which the assault took place inferentially point to the Plaintiff having known the identity of the wrongdoer (the debtor). For present purposes I am of the view that a reference to a co-debtor does not add a new dimension to the Plaintiff's case. Consequently, the factual findings that are capable to be made from all conceivable scenarios of this case is that as at 17 July 2008: (a) the cause of action had crystalized with the particulars of the debtor being known and (b) the facts from which the debt arose were known to the Plaintiff.

[14] Briefly stated, the facts in the case of *Shange, supra*, were that in June 2003 Mr Shange the aged 15 years and 10 months was injured in the eye by his teacher. In January 2006 a friend of Shange's mother advised him to report the matter to the Public Protector. An advocate in that office advised Shange that he had a claim against the MEC for Education, KZN, thus referred him to an attorney. On 02 February 2006 Shange's attorneys addressed a letter of demand for payment of damages to the Minister for Education in terms of s 3 (1)(*a*) of Act 40 of 2002. On 03 December 2008 Shange addressed a similar letter which was followed by the issuance of summons commencing action in a court of law.

To address the issue of the late delivery of the letter of demand he also brought an application seeking condonation in terms of s 3 (4)(*a*) of Act 40 of 2002. The Minister objected to the claim on the basis that it had become prescribed to the extent that despite Shange's knowledge of the identity of the MEC in 2003 as is envisaged in s 12 (3) of the Prescription Act, he had failed to bring the action within the prescribed period of three years. After finding that Shange gained knowledge of the identity of the debtor only in January 2006, the Supreme Court of Appeal held that the claim had not become prescribed at the time of issuing of the summons on 03 December 2008. The Supreme Court of Appeal arrived at that conclusion after taking into account the fact that Shange had been caused to understand by his teacher that the circumstances that led to his injury were a genuine mistake which exonerated the teacher from any legal obligation towards the child. The tender age of Shange was a factor that was considered, and so was the legal principle envisaged in s 13 (1)(*i*) of the Act that since Shange attained the age of majority in July 2007 the running of 3 year prescription period that started in January 2006 was delayed by a period of one year. In a nutshell Shange's claim would have been extinguished by prescription in January 2009, the date after 03 December 2008 when the summons was in fact served.

[15] As correctly submitted by *Mr Swana* the facts in *Shange* are distinguishable from the facts of the present case. Shange was a minor child when he was assaulted by his teacher and he believed his teacher that the explanation that the assault was a mistake put paid to the matter. The belief of the minor child was excusable because it was found to be a reasonable consideration. But the mistake that was committed by the Attorney of Shange who wasted time by suing the Minister instead of the MEC was regarded as unreasonable. In this case the stated facts prove on a preponderance of probabilities that the Plaintiff's delay in instituting his claim is unreasonable. As already stated the explanation he gives that he did not know that he had a right to sue the Defendant until he was advised by a lawyer to do so is not reasonable.

The advice that the Plaintiff relied upon is of the kind that does not fit into neither the first nor the second part of s 12 (3) as that has been shown by the Constitutional Court in *Mtokonya*.

[16] I cannot help it but repeat in this judgment the rationale behind the provisions of s 12 (3) as stated by Maseneke J, as he was then, in the case of *Bojanala Platinum District Municipality, supra* , at para [46] as follows:

> "In my view there is no merit in the contention advanced on behalf of the plaintiff that prescription began to run only on the date the judgment of the SCA was delivered. The essence of this submission is that a claim or debt does not become due when the facts from which it arose are known to the claimant but only when such claimant has acquired certainty in regard to the law and attendant rights and obligations that might be applicable to such a debt. If such a construction were to be placed on the provisions of section 12 (3) grave absurdity would arise. These provisions regulating prescription of claims would be rendered nugatory and ineffectual. Prescription periods would be rendered elastic, open ended and contingent upon the claimant's subjective sense of legal certainty. On this contention, every claimant would be entitled to have legal certainty before the debt it seeks to enforce becomes or is deemed to be due. In my view, legal certainty does not constitute a fact from which a debt arises under section 12 (3). A claimant cannot blissfully await authoritative, final and binding judicial pronouncements before its debt becomes due, or before it is deemed to have knowledge of the facts from which the debt arises."

[17] The question of law that the parties raised in their stated case in terms of Rule 33 must be answered in favour of the Defendant. That is, the Plaintiff's claim had already become prescribed on the date when the summons were issued on 03 December 2008 by reason that the legal advice that the Plaintiff received in January 2006 did not stop the prescription period of three years from running between 17 July 2003 to 16 July 2006.

[18] The legal principle that the costs follow the result of the matter finds application in this case.

[19] In the result the following order shall issue:

1. The Defendant's special plea of prescription is upheld.
2. The Plaintiff's claim is dismissed with costs.

Z. M. NHLANGULELA

JUDGE PRESIDENT OF THE HIGH COURT

MTHATHA

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