IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: MTHATHA

CASE NO. 1725/2011

MGOBOZI PATRICIA FUNEKA Plaintiff

and

T. QINA & SONS Defendant

JUDGMENT

BROOKS J

[1] On 19 July 2011 the plaintiff issued summons against the defendant, who was her erstwhile attorney who had been instructed to pursue a claim which the plaintiff had against the Road Accident Fund (the RAF). In the amended particulars of claim it is alleged on behalf of the plaintiff that in breach of a material term of his agreement with the plaintiff the defendant allowed the plaintiff's claim against the RAF to prescribe and acted negligently in doing so.

[2] In the amended particulars of claim the plaintiff alleges that as a result of the defendant's conduct she has been deprived of her claim against the RAF, which, had the defendant executed the terms of his mandate properly, would have been successful. In the circumstances, the plaintiff alleges that she has suffered damages and that the defendant is liable to compensate her accordingly.

[3] In paragraph 16 of the amended particulars of claim the following allegation is made:

> "Defendant wilfully prevented the plaintiff from coming to know the existence of defendant's indebtedness to the plaintiff, who only became aware of the existence of the debt, alternatively the identity of the defendant as a debtor and or the facts from which the debt arose at the earliest on 17 November 2009."

[4] In due course the summons was served on the defendant and he entered an appearance to defend the action. On 26 March 2013 the defendant filed a special plea of prescription. It is expressed in the following terms:

> "1. The plaintiff's cause of action arises pursuant to the death of her alleged husband as a result of an alleged collision which occurred on or about the 27th April 2002.
>
> 2. The provisions of the Road Accident Fund Act 56 of 1996 (hereafter referred to as Act 56 of 1996) applied.

3. In terms of Act 56 of 1996, the plaintiff and/or her attorney was required to lodge a claim with the Road Accident Fund within three years of the date of the alleged collision and thereafter a summons was to be served on the Road Accident Fund within five years of the alleged collision failing which the plaintiff's claim for compensation against the Road Accident Fund would prescribe.

4. The plaintiff allegedly instructed the defendant during or about July 2004 to lodge a claim for compensation on her behalf with the Road Accident Fund.

5. The plaintiff alleges that:

 5.1 the defendant failed to take the necessary steps to ensure that the plaintiff's claim did not become prescribed in terms of section 23 of the Act and her claim against the Road Accident Fund accordingly prescribed on or about 26 April 2007.

 5.2 the defendant wilfully prevented her from coming to know of the existence of the defendant's indebtedness to her, such that prescription only commenced to run from 17 November 2009 at the earliest.

6. In terms of section 11(d) of the Prescription Act 68 of 1969 (hereafter referred to as Prescription Act), the plaintiff was required to effect service of summons upon the defendant within a period of three years from the date of the alleged failure and/or negligence in order to prevent her claim against the defendant prescribing.

7. In terms of the Prescription Act:

 7.1 Section 12 (1) states that prescription shall commence to run as soon as the debt is due.

 7.2 Section 12 (2) states that if the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

8. The defendant avers that the plaintiff has failed to allege sufficient particularity to sustain the argument that prescription in the above matter falls to be decided in terms of section 12 (2) of the Prescription Act and avers that the issue of prescription ought to be decided in terms of section 12 (1) of the Prescription Act.

9. The summons in this matter was served upon the defendant on or about the 26 July 2011 being more than three years after:-

   9.1 the defendant's alleged negligence, and

   9.2 more than three years after the time when the plaintiff ought to have knowledge or could by the exercise of reasonable care have had knowledge that her claim against the Road Accident Fund had prescribed.

WHEREFORE the defendant prays that the plaintiff's clam be dismissed with costs."

[5] On 21 July 2015 the plaintiff filed a replication. The portion dealing with the special plea reads as follows:

"AD PARAGRAPHS 1 to 5 (inclusive)

1. The contents hereof are admitted.

AD PARAGRAPH 6 and 7

2. The contents hereof are admitted in so far as they correctly reflects the provisions of Act 68 of 1969 (the "Act") and are denied in so far as they do not correctly reflect the provisions of the Act.

AD PARAGRAPH 8

3. Each and every allegation herein contained is denied as if specifically traversed, in amplification hereof the plaintiff restates her reliance on section 12(2) of the Act and pleads that:

3.1 her averments contain sufficient particularity for pleading;

3.2 are not vague or embarrassing; and that

3.3 further particularity is an evidential matter for trial.

AD PARAGRAPHS 9 and 9.1

4. The contents hereof are admitted.

AD PARAGRAPH 9.2 and 10

5. Each and every allegation herein contained is denied as if specifically traversed, in amplification hereof the plaintiff reiterates that the defendant wilfully prevented her from coming to know of the existence of the defendant's indebtedness to her until 17 November 2009 and therefore in terms of section 12 (2) of the Act prescription only commenced running on that date.

WHEREFORE plaintiff prays that the defendant's special plea is dismissed."

[6] In due course agreement was reached between the parties' legal representatives that the issue encompassed by the special plea of prescription should be separated from the remaining issues in the matter and dealt with at the outset. Accordingly, at the commencement of the proceedings in court an appropriate order was made by agreement in terms of the provisions of rule 33 (4) of the Uniform Rules of Court.

[7] The parties were not in agreement on questions relating to the incidence of the *onus* pertaining to the special plea of prescription and the duty to begin with the leading of evidence. Mr Ploos van Amstel, who appeared on behalf of the defendant, submitted that as the plaintiff had first referred to factors which would determine the date when prescription started to run in respect of her

claim against the defendant (paragraph 16 of the amended particulars of claim), indicating that reliance would be placed on the provisions of s 12 (2) of the Prescription Act 68 of 1969, the plaintiff bore the *onus* of proof. Mr Erasmus, who appeared on behalf of the plaintiff, submitted that the special plea of prescription had been raised pertinently by the defendant and was in no way dependent upon the allegations made in paragraph 16 of the amended particulars of claim. In his submission, nothing militated against the adoption of the customary approach, namely that a defendant bears the *onus* of proof in respect of a special plea upon which a defendant places reliance for the dismissal of a plaintiff's claim.

[8] After a consideration of the submissions made by counsel and the manner in which the issue central to the special plea of prescription emerged from the pleadings, a ruling was given to the effect that the defendant bore the *onus* of proof in respect of the special plea of prescription.

[9] Counsel were unable to reach agreement on the identification of the party who should be the first to lead evidence in respect of the special plea. After hearing the submissions from both counsel on what would be convenient in the circumstances of the matter, a ruling was given to the effect that the defendant had the duty to begin with the leading of evidence.

[10] The defendant gave detailed evidence about the manner in which he handled the plaintiff's claim against the RAF. In doing so he made reference to the content of a bundle of documents handed in as exhibit B. It is clear from the evidence that the plaintiff gave the defendant a special power of attorney on 21 July 2004 with a view to the pursuit of her claim against the RAF. The claim was lodged under cover of a letter addressed by the defendant to the chief

executive officer of the RAF on 22 July 2004. Thereafter, on a fairly regular basis initially, letters appear to have been addressed by the defendant to the RAF in an attempt to ascertain whether any progress had been made in the assessment of the claim. On at least two occasions the letters addressed queries raised by the RAF or furnished it with additional documentation. The last example of this type of letter was written on 6 October 2005 and is included in exhibit B as page 20. After a follow-up letter dated 20 October 2005 went unanswered, the periods of time between the dates upon which the defendant wrote letters to the RAF asking for progress reports appear to have got longer. The next letter was written on 19 June 2006, followed by others on 29 January 2007, 9 January 2008, 16 January 2009 and 9 June 2009 respectively.

[11] It was the defendant's evidence that the plaintiff called at his office every two or three months. Whenever she did so, he would draw the file and tell her what had been done since her last visit. In this regard, he indicated that sometimes there had been telephonic contact between him and the claims handler at the RAF who was responsible for the plaintiff's claim. He would tell the plaintiff about these communications and show her the letters he had written.

[12] On 19 November 2009 the defendant received by facsimile transmission a letter addressed to him by the plaintiff's current attorneys. This letter served as cover for a form entitled "TERMINATION OF MANDATE". Dated 19 November 2009, this form had been signed by the plaintiff. Its content informed the defendant that the plaintiff had terminated his mandate to handle her claim against the RAF. The covering letter also asked the defendant to forward the contents of the plaintiff's file to her new attorneys. The letter and

written termination of the mandate form part of the bundle of documents handed in as exhibit A.

[13] The letter of 19 November 2009 makes no reference to the prescription of the plaintiff's claim against the RAF. Nor does it make any reference to her dissatisfaction with the defendant or to any alleged negligence or concealment on his part. What followed was an exchange of correspondence between the defendant and the plaintiff's new attorneys which confined itself to the transmission of the contents of the plaintiff's file and the payment of fees claimed by the defendant in respect of the work that he had done. The correspondence ends with a letter dated 9 February 2010 addressed by the defendant to the plaintiff's new attorneys and enclosing the contents of the plaintiff's file. The letter also contains the banking details of the defendant's trust account to facilitate the payment of his fees.

[14] According to the defendant, the first he heard about the prescription of the plaintiff's claim against the RAF was when he was served with a copy of the summons in this matter. A copy of the return of service included in the court file reveals this to have occurred on 26 July 2011. Under cross examination he denied the suggestion that he knew much earlier on that the plaintiff's claim had prescribed and denied the further suggestion that he had deliberately kept this information from her.

[15] It is common cause that the defendant never issued a summons against the RAF in pursuit of the plaintiff's claim. The motor vehicle accident which gave rise to the plaintiff's claim occurred 27 April 2002. Her claim was lodged

with the RAF under cover of a letter written by the defendant on 22 July 2004. The copy of this letter embodied in exhibit B shows that it was stamped upon its receipt by the RAF. The stamp bears the date 27 July 2004. It is further common cause that the defendant would have been able to issue a summons against the RAF in respect of the plaintiff's claim after the expiry of a period of 120 days. This he did not do. In the circumstances, it is common cause that the plaintiff's claim against the RAF prescribed at midnight on 26 April 2007.

[16] In her evidence relating to the special plea of prescription, the plaintiff to a significant degree corroborated the evidence given by the defendant. She explained that she didn't know how long claims took and thought that the process may take years. In 2009 she changed her attorney "because this matter was taking a long time". Her daughter worked in Pretoria and heard about the plaintiff's present attorneys. It was at her daughter's suggestion that she made the change.

[17] The plaintiff confirmed that on 17 November 2009 she signed a written special power of attorney which gave her present attorneys the mandate to pursue her claim against the RAF. A copy thereof has been included in the bundle of documents forming exhibit B.

[18] In answer to a question put to her during her evidence in chief the plaintiff stated that she first heard that her present attorneys were going to claim against the defendant when she received a telephone call from her attorneys "saying the claim had prescribed and they would take the matter further". She was unsure of the date when this occurred and thought that "it could have been

2011 or so". She confirmed in her evidence in chief that she had never worried about her claim against the RAF prescribing.

[19] Under cross examination the plaintiff confirmed that by 26 April 2007 she knew that her claim against the RAF had not been finalised. She said that the defendant told her that he was "waiting for a reply from the RAF". When asked if she went to her present attorneys because she was unhappy with the defendant's service her reply was "yes". When asked if she had lost trust in him she said "yes", by 2009". When it was put to her that she must have thought something was wrong she replied "I didn't think something was wrong but I wanted an opinion from another attorney because I got the same reply from [the defendant]".

[20] The mandate was given by the plaintiff to her new attorneys on 17 November 2009. It was a mandate to pursue to finality her claim against the RAF. The defendant forwarded the contents of her file to her new attorneys on 9 February 2010. The contents of the bundle of documents handed in as Exhibit A reveal that on 6 August 2010 the plaintiff's new attorneys issued summons against the RAF, approximately six months after they must have received the contents of the plaintiff's file from the defendant. It must have been evident immediately upon a consideration of the contents of that file that no summons had been issued previously and that the claim must have prescribed on 26 April 2007. However obvious it should have been, the fact of prescription in all probability only occurred to the plaintiff's new attorneys after receipt by them of a letter dated 28 March 2011 from attorneys instructed by the RAF. A copy of this letter was handed in as exhibit C. Therein it is recorded that the

plaintiff's claim against the RAF had prescribed and that the summons issued against the RAF had been issued and served after the claim had prescribed.

[21] The occurrence of the letter dated 28 March 2011 ties in with the plaintiff's evidence that it was in 2011 that she was advised telephonically by the plaintiff's new attorneys that her claim against the RAF had prescribed. She confirmed in her evidence that she had never consulted with her new attorneys about prescription. No one had ever said anything about prescription when she gave her new attorneys the mandate to pursue her RAF claim. Accordingly, the content of paragraph 16 of her amended particulars of claim did not emanate from a consultation with her new attorneys. She confirmed again that on 17 November 2009 she did not know that her claim against the RAF had prescribed. This fact is also borne out by the fact that her mandate to her new attorneys was confined to the pursuit of the RAF claim, that in due course her new attorneys issued summons against the RAF and that her new attorneys never raised the issue of prescription with the defendant until summons against him was issued out of this court on 19 July 2011.

[22] Section 12 of the Prescription Act 68 of 1969 (the Act) provides for the commencement of the periods of prescription relevant to the institution of the plaintiff's claim against the defendant. It reads as follows:

> "12(1) Subject to the provisions of ss (2) and (3), prescription shall commence to run as soon as the debt is due.
>
> (2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

> (3) 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."

[23] Mr Erasmus submitted in argument that the word "wilfully" employed in s 12 (2) of the Act means simply "deliberately" or "intentionally" and does not necessarily mean "having the intention to deceive". This interpretation has found judicial confirmation in JACOBS v ADONIS[1]. Under cross examination it was put to the defendant that it was highly improbable that he was unaware that the plaintiff's claim against the RAF had prescribed and accordingly he was not being truthful when he claimed that he had been ignorant of this fact until he received the summons issued against him by the plaintiff's new attorneys. He denied that this was the case. In my view his evidence should be accepted. His statement that he did not know that the claim had prescribed is borne out by the nature of his attention to the matter well beyond the date of prescription and his request that he be paid his fees before handing over the contents of the plaintiff's file to her new attorneys in February 2010. If he did not know that the plaintiff's claim had prescribed in his hands and that in the circumstances he now owed a debt to the plaintiff, how could it ever be said that he deliberately or intentionally prevented the plaintiff from coming to know of the existence of this debt? In my view, on the facts of this matter as they emerge from the evidence the provisions of s 12(2) of the Act are of no assistance to the plaintiff.

[24] Mr Erasmus also submitted that the special plea of prescription raised by the defendant in respect of the plaintiff's claim against him could not succeed

[1] 1996 (4) SA 246 (C) 250 I – 251 A

because the plaintiff was unaware of the identity of the debtor and of the facts from which the debt arises. In these circumstances, he submitted the provisions of s 12(3) of the Act were relevant to her, particularly as she is a lay person who placed her trust in the professional capabilities of the defendant. He sought to align the plaintiff's position with that of the respondent in FLUXMANS INCORPORATED v LEVENSON[2] where delivering the minority judgment of the court Mpati AP, as he then was, stated:[3]

> "In his founding affidavit the respondent averred that he is a lay person and that he relied on the appellant to represent his interests and to advise him properly and fairly…[t]here is nothing in the papers to suggest that he should at any stage have realised that there had been non-compliance with the provisions…which should have led him to believe that he should seek legal advice elsewhere."

[25] The majority of the court in FLUXMAN'S case found differently on the question of the availability of s 12(3) of the Act to the respondent in that matter[4]. In my view, it is not necessary to evaluate the differences between the two judicial views on the point because the entire matter is distinguishable from the present matter on its facts.

[26] In the present matter, the plaintiff stated that she was dissatisfied with the progress in her matter. She wanted to approach another attorney and indeed did so on 17 November 2009. This alone distinguishes her from the respondent in FLUXMAN'S case who was not faced with anything which should have led him to believe that he should seek legal advice elsewhere. Accordingly, unlike the plaintiff, he did not do so.

[2] 2017 (2) SA 520 (SCA); [2017] 1 ALL SA 313 (SCA)
[3] Par [23]
[4] Par [42]

[27] It is difficult to form an opinion that the present attorneys for the plaintiff should have realised that something was amiss with the plaintiff's claim against the RAF when she first approached them on 17 November 2009. It would be with the undoubted benefit of hindsight that it might be said that her complaint of "undue delay" should immediately have alerted her present attorneys to assess with vigilance the status of her claim against the RAF in relation to the prospect that it may have prescribed. However, when the plaintiff's new attorneys received the content of the plaintiff's file in early February 2010 this should certainly have been uppermost in the research and enquiry required of them as her new legal representatives. It is clear from the evidence that there was no summons issued by the defendant against the RAF and accordingly there was not a copy a summons in the plaintiff's file. The date of the motor vehicle accident giving rise to her claim and the date that the claim had been lodged with the RAF were facts immediately evident from the contents of her file. The identity of the defendant was also known. A diligent enquiry by the plaintiff's new attorneys would have revealed that her claim against the RAF had prescribed in the hands of the defendant on 26 April 2007. In my view, it is entirely reasonable to expect that acting diligently, the plaintiff's new attorneys should have realised that she had a claim against the defendant arising from his failure to prevent her RAF claim from prescribing and that the resultant claim against the defendant would prescribe in approximately two months time.

[28] As her duly appointed agents, the knowledge of the existence of the debt owed by the defendant to the plaintiff which her new attorneys ought reasonably to have had on receipt of the contents of her file from the defendant is knowledge which ought to be imputed to the plaintiff. In these circumstances, any belief held on behalf of the plaintiff that she is entitled to an extension of the time before the commencement of the prescription until 28 March 2011,

when the RAF attorneys advised her attorneys that the claim against the RAF had prescribed, is a belief held without foundation.

[29] Moreover, in my view, there is room for the expectation that the plaintiff ought to have taken reasonable steps to acquire knowledge of the debt owed to her by the defendant at an even earlier stage. The spaces between the dates upon which the defendant addressed letters of enquiry to the RAF got gradually larger. By October 2005 they were large enough lapses of time, without any indication that the defendant's litany of almost identical and unthreatening enquiries were productive of progress in the matter, to prompt concern in the mind of a reasonable lay person. If the plaintiff continued with her habit of calling on the defendant every two or three months, then by December 2005 she would have found that he had done nothing since October 2005. Visits in February 2006 and April 2006 would have revealed the same thing, for the next letter was only written to the RAF in June 2006. The next was only written seven months later on 29 January 2007 and the one thereafter a whole year later on 9 January 2008. In my view, it is not unreasonable to expect that a person in the position of the plaintiff, in the exercise of reasonable care, should have contacted another attorney well before she did on 17 November 2009. Inasmuch as she did not do so, her circumstances are hit by the *proviso* to s 12(3) of the Act. The plaintiff's inability to acquire the prerequisite knowledge of the circumstances giving rise to the debt owed to her by the defendant was the result of her failure to exercise reasonable care in respect of taking a decision to seek alternative legal advice. It has been held [5]that the underlying object of s 12 (3) of the Act is to ensure that it is negligent rather than innocent inaction that is penalised. With this view I am in respectful agreement. The concept that a layperson is required to exercise reasonable care when in

[5] BRAND v WILLIAMS 1988 (3) SA 908 (C) 913

circumstances such as the plaintiff faced in the hands of the defendant is no stranger in our law. See, for example, HAROLD GUNASE v RAMESH ANIRUDH.[6]

[30] No evidence was led from any member of the firm acting currently as the plaintiff's attorneys. Accordingly, in the light of the plaintiff's evidence that she did not consult with them on the issue of the prescription of her claim against the RAF, the origin of the erroneous allegation made in paragraph 16 of plaintiff's amended particulars of claim remains a mystery.

[31] I am satisfied that the defendant had discharged the *onus* of proof resting upon him in respect of the special plea of prescription.

[32] In the circumstances, the following order will issue:

> "1. The defendant's special plea is upheld.
>
> 2. Judgment is granted in favour of the defendant with costs."

RWN BROOKS

JUDGE OF THE HIGH COURT

[6] (826/10)[2011]ZASCA231 (30 November 2011)

Appearances

For the plaintiff:	Adv DJ Erasmus
Instructed by	Mgweshe Ngqeleni Inc.
	1st Floor
	Old Mutual Building
	Cnr York Road and Leeds Street,
	MTHATHA
For the defendant:	Adv JA Ploos van Amstel
Instructed by	T Qina & Sons
	Clublink Building
	28 Maderia Street
	MTHATHA
Date heard:	14 February 2018
Date delivered:	22 February 2018