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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 44655/2013

Date: 1/6/2015

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

1/6/2015 Pretoria
DATE SIGNATURE

In the matter between:

A.H. EKMAN

PLAINTIFF

And

VENTER & VOLSCHENK ATTORNEYS

1ST DEFENDANT

STOFFEL JACOBUS VENTER

2ND DEFENDANT

JUDGMENT

PRETORIUS J,

[1] In this action for damages the plaintiff claims damages based on personal injuries sustained by the plaintiff in a motor vehicle accident on 24 October 2003, and a second claim where the plaintiff similarly claims damages based on injuries sustained in a motor vehicle accident on 28 March 2006. These claims are instituted against the defendants, as both claims had become prescribed, whilst the defendants acted as the legal representatives of the plaintiff in both claims. The defendants raised two special pleas of prescription. It was ordered, by agreement by the parties, that the court would first deal with the special pleas and that adjudication of the special pleas will be separated from the remainder of the trial in terms of Rule 33(4) of the Uniform Rules of Court.

[2] It was common cause that the defendant had the onus to begin and the burden of proof to prove the first and second pleas of prescription.

[3] The provisions of section 12 of the Prescription Act, 68 of 1969 apply in the present instance:

> *"(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 would have acquired it by exercising reasonable care."* (Court's emphasis)

[4] Mr Venter, the second defendant, was the attorney who had been instructed by the plaintiff to institute action against the Road Accident Fund, after the plaintiff had sustained injuries in an accident. The accident took place on 24 October 2003 and the claim would have become prescribed on 24 October 2005. The second claim related to an accident which the plaintiff was involved in and instructed the second defendant to institute action against the Road Accident Fund. This accident took place on 28 March 2006 and would have become prescribed on 28 March 2009.

[5] It is common cause that the first and or second defendants had accepted instructions from the plaintiff during November 2003 to perform professional services as a firm of attorneys in relation to the first accident. The instructions to the first and second defendants were to institute a claim and or handle and or expedite and or facilitate the plaintiff's claim against the Road Accident Fund. These instructions were in relation to a motor vehicle accident which occurred on 24 October 2003 where the plaintiff had sustained injuries. It is further common cause that the action was not instituted timeously within two years and that the claim had become prescribed. It is alleged that had the first and second defendants lodged the claim timeously against the Road Accident Fund or any wrongdoer the plaintiff would not have

suffered a loss of damages, due to injuries in the amount of R1 199 275.69.

[6] The second claim relates to a motor vehicle accident which occurred on 28 March 2006 in which the plaintiff sustained injuries. In this instance the driver of the other vehicle involved in the accident was known. The first and second defendants were instructed to institute action against either the Road Accident Fund or any other wrongdoers. Once more the first and second defendants undertook to handle the matter with the required skills and diligence expected by a practicing attorney and or firm of attorneys. It is common cause that the claim was not instituted as the second defendant originally denied that he had received a mandate and instructions to institute a claim.

[7] The plaintiff had a valid claim against the Road Accident Fund in both instances. In the second instance the plaintiff allegedly suffered damages in the amount of R999 103.75 due to injuries sustained in the accident being the amount the plaintiff would have been entitled to claim had the claim not prescribed.

[8] Section 55 of the **Road Accident Fund Act, 56 of 1996** makes provision that in the instance where the identity of a driver or the owner of the other vehicle is known, a right to claim compensation will prescribe within a period of three years from the date upon which the claim arose. It is common cause between the parties that the period within which the 2003 claim would have prescribed, would have been two years from the date of the accident, that is 24 October 2003, as the other party involved was unknown. It is further common cause that

the period within which the 2006 claim would have prescribed was three years, that was on 28 March 2006.

[9] In **Gunase v Anirudh 2012(2) SA 398 SCA** at para 14 Seriti JA found:

> *"Section 12(3) imposes a duty on the creditor to exercise reasonable care to obtain knowledge of the identity of the debtor and the facts from which the debt arises. A creditor is not allowed to postpone the commencement of the running of prescription by his failure to take necessary steps."*

[10] The plaintiff pleaded that the first time he was informed by the second defendant that both his claims had become prescribed was on 26 July 2010. According to the plaintiff the first defendant as represented by the second defendant had breached the agreement, by not instituting and/or lodging the claims with the Road Accident Fund timeously within the prescribed periods.

[11] Mr Venter, the second defendant, gave evidence under oath. His evidence was that he is a practicing attorney who has been practicing in Vereeniging for 37 years. He has known the plaintiff for at least 30 years and had attended to several legal matters for the plaintiff throughout the years.

[12] According to Mr Venter the plaintiff consulted and instructed him in November 2003 to claim from the Road Accident Fund for the injuries that the plaintiff had sustained. Mr Venter conceded that he had made a mistake by not knowing that the first claim would expire after two years. He had sent the MMF1 form to Dr van Dyk, the doctor who had treated the plaintiff, to be completed by Dr van Dyk. Although he had

followed up the request to Dr van Dyk, he never received a reply, although he had provided the plaintiff's consent to the release of his medical records in August 2005.

[13] Mr Venter admitted that he had made a mistake in not ascertaining when the first claim would have become prescribed. He testified that it was not easy to make such an admission. He further conceded that it was his duty to obtain the necessary documents to enable him to institute action. He had realized at the time that any other medical practitioner could have completed the MMF1 form, but did not foresee that he would not get the form timeously from Dr van Dyk despite his numerous enquiries resulting in no reply.

[14] The second defendant had made an appointment with the plaintiff for a consultation on 24 October 2006 to inform him that his claim had become prescribed. Mr Venter did not inform the plaintiff that he could sue the defendants as he did not accept at the time that the claim had prescribed due to a mistake on the defendants' side.

[15] Although the defendants had pleaded that they did not hold instructions for the second claim, Mr Venter, when confronted by the Power of Attorney, conceded that he was specifically given the instruction to institute a claim relating to the accident of 28 March 2006. He conceded that he had done nothing to pursuit this claim, although his mandate had never been terminated by the plaintiff. Mr Venter testified that he had dealt with numerous cases for the plaintiff and that the plaintiff did not make enquiries as to his 2003 Road Accident Fund matter, during the subsequent years.

[16] Under cross-examination he testified that he did not know how it had happened that he did not know that the first claim would become prescribed in 2005. He waited a year before he informed the plaintiff of the prescription of the claim and could give no explanation as to why it took a year before he informed the plaintiff that his 2003 claim had prescribed. The court finds it highly improbable that he would have handled 12 cases for the plaintiff from 2003, consulted on other matters with the plaintiff and that he never informed the plaintiff as to the status of his claims.

[17] In relation to the second claim the second defendant's evidence was that he sent faxes to the plaintiff, but did not know whether he had received these faxes. These faxes were sent to inform the plaintiff during October 2010 that prescription was imminent on the 2006 claim. The question is whether a reasonable lawyer, in these circumstances, would have ascertained whether his communication had reached his client as his client did not respond. Should he not have telephoned his client and alerted him to the imminent prescription of his claim? In any event, even had the plaintiff received the faxes from the first and second defendants on 4 October 2006, the claim had already prescribed.

[18] His evidence was the only evidence on behalf of the defendants. The plaintiff closed its case on the special pleas without presenting any evidence.

[19] The defendants' reply to the plaintiff's pre-trial questions set out:

"1.2 That aside, it is indeed the defendants' case that the

defendants informed the plaintiff that the plaintiff's claim was about to prescribe. The plaintiff was so informed on 4 October 2006.

1.3 ***The defendants, however, erred in law by informing the plaintiff that his claim was to prescribe, as the plaintiff's claim had already prescribed by 4 October 2006.***

1.4 Thereafter and more specifically on 24 October 2006, the defendants informed the plaintiff that his claim had prescribed." (Court's emphasis)

[20] It is thus clear from these answers by the defendants that the second claim had already prescribed on 24 October 2010, although the defendants had erroneously informed the plaintiff on 4 October 2010 that his claim was about to prescribe.

[21] It is admitted in the pre-trial answers that the defendants informed the plaintiff of the prescription of both claims on 24 October 2010. Mr Venter admitted that he had given the plaintiff the wrong information as he had already been aware that the first claim had become prescribed on 24 October 2005 and it was a mistake on his side not to inform the plaintiff immediately of this fact and that it had *"just happened"*. Furthermore Mr Venter's evidence was that he could have told the plaintiff earlier that the claim had prescribed, but gave no explanation as to why he did not.

[22] According to Mr Venter he had told the plaintiff on 26 July 2010 of the prescription of the first claim and advised the plaintiff to go and consult

with another attorney in regards to the 2003 claim.

[23] The 2006 claim was not pursued at all by the defendants and the plaintiff only knew, upon enquiry, on 26 July 2010 that this claim had prescribed. Mr Venter's evidence was that on 24 October 2006, when he informed the plaintiff that the claim had prescribed the plaintiff seemed to be upset and disappointed that the claim had not been instituted timeously and that Mr Venter had not pursued the claim at all.

[24] Summons was issued on 22 July 2013 against the first and second defendants. It is thus clear that the present action was launched timeously. The onus to prove prescription is on the two defendants. Mr Venter could not deny that he had informed the plaintiff on 26 July 2010 that the claim had prescribed and could not provide any date when, according to him, the claim had become prescribed.

[25] In **Nedcor Bank Bpk v Regering van die Republiek van Suid-Afrika 2001(1) SA 987 SCA** at paragraphs 9 and 10 Schutz JA held:

> *"[9] Wat die Wet nastreef, is 'n gulde middeweg tussen die onbillikheid, aan die een kant, dat 'n potensiële skuldenaar 'n ewigheid na die plaasvind van die gewraakte gebeure skielik met hofverrigtinge bedreig word en die onbillikheid,* ***aan die ander kant, dat 'n potensiële skuldeiser sy aanspraak op regshulp bloot vanweë tydsverloop verbeur waar hy, sonder enige verwyt aan sy kant, nie oor die nodige inligting beskik om sodanige hofverrigtinge inmiddels van***

stapel te stuur nie.

[10] Hou mens dit alles in gedagte, bestaan daar geen dwingende rede waarom 'n skuldeiser volkome oor alle aspekte van sy beoogde litigasie ingelig moet wees alvorens verjaring teen hom kan begin loop nie. Die skuldenaar se belange moet immers ook in ag geneem word." (Court's emphasis)

[26] At the end of para 13 Schutz JA comes to the conclusion:

"Wat beoordeel moet word, is nie of die eiser oor voldoende feite beskik het om sy saak teen die einde daarvan te bewys nie, maar of hy oor die minimum feite beskik het om daarmee te begin."

[27] The court has to decide as to how section 12(2) of the Prescription Act, No 68 of 1969 should be applied in conjunction with section 12(3) of the Act.

[28] The courts have not had occasion to clarify what constitutes conduct that prevents the creditor from coming to know of the existence of the debt. In this instance Mr Venter did not inform the plaintiff in both instances that the two claims would become prescribed. The plaintiff only knew about it when Mr Venter informed the plaintiff after the fact. In these circumstances, section 12(2) of the Act should apply where the defendants are an attorney and a firm of attorneys. These inactions by the defendants by preventing to let the plaintiff know timeously of the prescription of both claims makes section 12(2) of the Act applicable.

[29] In **Brand v Williams 1988(3) SA 908 (C)** at 913 Scott AJ held:

> *"The main object of extinctive prescription is no doubt to create legal certainty and finality between parties after a lapse of time. But prescription does not simply serve as a blunt instrument to achieve finality regardless of the circumstances of the creditor (M M Loubser "Toward a Theory of Extinctive Prescription" (1988) 105 SALJ 34 at 53). This is recognised not only in s 13 of the Prescription Act but also s 12(3) which is clearly aimed at* ***preventing prescription from running against a creditor who, by reason of a lack of knowledge and the inability to acquire it by the exercise of reasonable care, is unable to institute action. The underlying object of s 12(3) is accordingly to ensure that it is negligent rather than innocent inaction that is penalised****."* (Court's emphasis)

[30] In **Administrator, Cape v Olpin 1996(1) SA 569 (C)** the Full Bench found:

> *"...the provisions of s 2(2)(c) of the (Limitation of Legal Proceedings (Provincial and Local Authorities)) Act and of s 12(3) of the Prescription Act 68 of 1969 require a creditor to do no more than what could reasonably be expected in the circumstances of a reasonable man".*

[31] In **Drennan Maud & Partners v Pennington Town Board 1998(3) SA 200 (SCA)** at p209 F-G, Olivier JA explained the meaning of section 12(3) as follows:

> *"Section 12(3) of the Act provides that a creditor shall be*

deemed to have the required knowledge 'if he could have acquired it by exercising reasonable care'. In my view, the requirement 'exercising reasonable care' requires diligence not only in the ascertainment of the facts underlying the debt, but also in relation to the evaluation of significance of those facts. This means that the creditor is deemed to have the requisite knowledge if a reasonable person in his position would have deduced the identity of the debtor and the facts from which the debt arises."

[32] The test to determine whether the defendants exercised reasonable care is an objective test as set out at para 18 in **Leketi v Tladi NO and Others [2010] 3 All SA 519 (SCA)**.

[33] The court has to deal with the meaning of the word "wilfully" as set out in section 12(2) of the Act.

[34] In **Loubser, Extinctive Prescription** at p101 the learned author explains:

"Wilful concealment of the existence of the debt by the debtor may not be the only factor precluding commencement of the running of the prescription period. Sometimes mere ignorance on the part of the creditor without wilful concealment may preclude the commencement of the prescription period in terms of Section 12(3) [in terms of which a debt is not 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]."

[35] In **Jacobs v Adonis 1996(4) SA 246 (C)** at 250 J to 251 A, Foxcroft J finds that the wording of section 12(2) *"wilfully prevents the creditor from coming to know of the existence of the debt" does not include the proof of fraud".*

[36] Foxcroft J furthermore held at 250I to 251A:

> ***"I have no doubt that the words 'wilfully' or 'opsetlik' mean simply 'deliberately' or 'intentionally' and do not require there to have been a fraudulent intention to deceive."*** (Court's emphasis)

[37] Counsel for the plaintiff referred the court to section 32(1)(b) of the Limitations Act, 1980 in England where the section is similar to section 12(2) of the Act and provides:

> *"(1) [...] where in the case of any action for which a period of limitation is prescribed by this Act, either*
>
> *(a) The action is based upon the fraud of the defendant; or*
>
> *(b) Any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or*
>
> *(c) [...]*
>
> *The period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment [...] (as the case may be) or could with reasonable diligence have discovered it.*
>
> *References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent."*

[38] In the English Act lack of reasonable diligence trumps concealment. In English law it is set out that lawyers have a duty to report to the client matters which go wrong. If they fail to do so they will be acting in breach of a professional duty which may be regarded as concealment for purposes of section 32(1)(b) of the English Act.

[39] I must agree with counsel that section 12(3) should be interpreted that negligence and inaction should be penalised. I can think of no reason why the same principles as set out in English Law should not apply in South African Law.

[40] Mr Venter, the second defendant, conceded that the first time he mentioned to the plaintiff that he could, or should consult with another attorney due to the prescription of the 2003 claim was on 26 July 2010. At the time the plaintiff was still the defendants' client in other matters. The second defendant admitted that he had deliberately not told the plaintiff of the option to consult another attorney prior to 26 July 2010.

[41] I cannot find, in these circumstances that the defendants proved prima facie evidence of the date which they alleged prescription began to run. Furthermore it is clear from Mr Venter's evidence that he had only informed the plaintiff that this claim had prescribed on 26 July 2010. This is thus the date that prescription started in the present case.

[42] In regards to the 2006 case, he conceded that he only told the plaintiff on 26 July 2010 that the 2006 claim had become prescribed and on that date he informed the plaintiff of the option of seeking another attorney to deal with the matter. The failure to disclose the prescription immediately, as well as the consequences thereof was a duty which

the first defendant conceded he had had, but did not comply with. The defendants did not act in this matter in a manner that is expected from a diligent, hardworking attorney. A reasonable attorney would have seen to it that he pursued both claims diligently, whilst keeping the plaintiff up to date on the progress of his claims. A reasonable attorney would immediately have informed the plaintiff of the prescription of his claims and would have advised the plaintiff how to deal with it. Due to the first defendant's concession in this regard the court finds that the first and or second defendants are guilty of not acting as a reasonable attorney or firm of attorneys would have acted under these circumstances.

[43] The defendants' counsel argued that there was a duty on the plaintiff to adduce evidence. I must agree that considering the admissions and concessions the second defendant had made under oath, that it was not necessary for the plaintiff at all to give evidence. I have considered the evidence, pleadings, arguments and authorities. I find that the provisions of section 12(2) and (3) of the Prescription Act applies. I find that the defendants wilfully prevented the plaintiff from discovering that the claims had prescribed by not informing the plaintiff immediately during 2005 and 2009 that his claims had become prescribed. The result is that the defendants special pleas should be dismissed.

[44] Therefor I make the following order:

1. The first and second special pleas are dismissed;
2. The defendants to pay the costs, including the cost of senior

counsel.

Judge C Pretorius

Case number	: 44655/2013
Matter heard on	: 11-12 May 2015
For the Plaintiff	: Adv. J Du Plessis SC
Instructed by	: Elmarie De Vos Inc
For the Respondent	: Adv. De Jager
Instructed by	: Van Zyl Le Roux Inc
Date of Judgment	: 1 June 2015