

12FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 3589/2005

In the matter between:

JANET LEE MEREDITH

Plaintiff

and

DR STEPHEN GROBLER

Defendant

JUDGEMENT: LEKALE, J

HEARD ON: 30 MAY 2014

DELIVERED ON: 12 JUNE 2014

INTRODUCTION AND BACKGROUND

- [1] This is an exception against defendant's special plea of unreasonable and prejudicial delay in the prosecution of an action on essentially the ground that such a plea does not set out sufficient facts to sustain the same.
- [2] The plaintiff issued summons against the defendant on the 19th August 2005 for damages in the amount R1 160 000,00 arising from alleged medical negligence. Defendant defends the action and pleadings got closed in January 2006 after the defendant's general plea was served during December 2005.

- [3] In March 2006 defendant served a rule 35 notice on plaintiff's attorneys but they failed to oblige and eventually withdrew as her attorneys of record on the 27th June 2006. Defendant, thereafter, attempted in vain during July 2006 to serve an application to compel the plaintiff to comply with the notice in question.
- [4] On the 13th June 2012 plaintiff's present attorneys placed themselves on record. On the 28th May 2013 plaintiff's attorneys served an application for trial dates on defendant's attorneys. Defendant, thereafter, served a special plea herein on plaintiff's attorneys on the 5th September 2013. On the 6th February 2014 plaintiff's attorneys, on their part, delivered an exception to the special plea in question.
- [5] After hearing the exception on the 30th May 2014 I was left in doubt as to whether or not same was delivered timeously within the time limited by Rule 23(1) of the Uniform Rules of Court. I, therefore, caused a letter to be directed to the parties inviting inputs on the issue. The parties have gratefully since obliged effectively pointing out that the relevant period was extended by agreement.

DISPUTE

- [6] The parties are at variance on whether or not the special plea

discloses a defence with the plaintiff contending that the same lacks sufficient facts to sustain the special defence raised in that the facts proving serious prejudice have not been disclosed. On his part the defendant maintains that the special plea meets the prerequisites for the relevant defence.

CONTENTIONS FOR THE PARTIES

[7] Ms Letzler, for the plaintiff, submits that insofar as the defendant avers, in the relevant pleading, that he is seriously prejudiced by the delay in that he has to testify on an incident which occurred in the period 28th August 2002 to 1st October 2002 without alleging why testifying on such an incident would be prejudicial to him the special plea does not disclose a defence.

[8] On behalf of defendant, Mr Joubert painstakingly points out that the special plea contains all the three averments recognised by law as necessary to sustain the defence of unreasonable and prejudicial delay in prosecuting an action insofar as it, *inter alia*, alleges that the defendant is seriously prejudiced by the delay in that he has to testify about a surgical procedure which was performed during 2002.

APPLICABLE LEGAL PRINCIPLES

- [9] The parties are correctly *ad idem* that, for the relevant plea to be sustained, the defendant needs to prove that there was an inordinate or unreasonable delay in the prosecution of the action, that the delay in question was inexcusable and that the defendant is likely to be seriously prejudiced thereby.

(See: **Cassimjee v The Minister of Finance** 2014 (3) SA 198 (SCA).)

- [10] The duty on the plaintiff, as the excipient, is to show that the relevant pleading discloses no defence on every construction that can reasonably possibly be placed on it.

See: **First National Bank of Southern Africa Ltd v Perry NO and Others** 2001 (3) SA 960 (SCA) at 965C – D.)

APPLICATION OF LEGAL PRINCIPLES AND FINDINGS

- [11] The question in the instant matter is, in my judgment, whether or not the allegations contained in the special plea are such as to sustain the same if and when they are eventually proved at the trial of the matter. In other words the issue is whether or not the elements or pre-requisites of the relevant plea or defence are apparent from the impugned pleading.

(Compare: **Grant v Plumbers (Pty) Ltd** 1949(2) SA 470 (O))

[12] It is common cause between the parties that the cause of defendant's grief, as set out in the relevant pleading, is the alleged abuse of process by the plaintiff in delaying to prosecute the action resulting in the defendant having to give evidence on technical surgical procedures more than 11 years later. All the foregoing can be gleaned from the impugned pleading.

[13] The plaintiff feels that the fact that the defendant has to testify about an incident long after its occurrence is not *per se* prejudicial and that the defendant needed to assert more in order to sustain the conclusion that he is seriously prejudiced. In my view the question as to whether or not the defendant is seriously prejudiced by the delay involved does not arise for determination in the present proceedings and falls to be dealt with at the hearing of the special plea itself. As Mr Joubert correctly and effectively points out, the material facts (*facta probanda*) that must be proved, as opposed to the *facta probantia* necessary to prove the same, are sufficiently set out in the relevant pleading insofar as the prerequisites of the relevant defence are apparent from the pleading itself.

(See: **Makgae v Sentraoer (Koöperatief) Bpk** 1981 (4) SA 239 (T) at 245D.)

[14] I am, thus, satisfied that all the material facts or issues (facta probanda) that the defendant needs to prove in order to sustain his special plea are apparent *ex facie* the relevant pleading.

ORDER:

[15] The exception is dismissed with costs.

L. J. LEKALE, J

On behalf of plaintiff:

Adv M Letzler
Instructed by:
Houghton Harper Inc
c/o Mthembu Van Vuuren
BLOEMFONTEIN

On behalf of defendant:

Adv Salie Joubert SC
Instructed by:
Symington & De Kok
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