

IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 856/2008

In the matter between:-

PASEKA FRANCE MOGWASE

Plaintiff

and

THE MINISTER OF SAFETY & SECURITY
MEC FOR SAFETY & SECURITY

First Defendant

(FREE STATE PROVINCIAL DEPARTMENT)

Second Defendant

JUDGMENT BY: MOLEMELA, J

HEARD ON: 5, 6 & 8 AUGUST 2014

DELIVERED ON: 8 AUGUST 2014

INTRODUCTION

[1] The plaintiff instituted action against the defendant for payment of damages arising from an incident that occurred on or about 7 February 2005. The plaintiff alleges that members of the South African Police Services unlawfully shot him in his neck, shoulder, forearm and thigh, as a result of which he sustained various injuries.

[2] The defendant defended the action and filed a special plea of prescription. The minutes of a meeting held in accordance with the provisions of Rule 37 of the Uniform Rules of Court reflect that the parties agreed that the

adjudication of the special plea should be separated from the determination of liability and quantum. I accordingly granted an order separating the disputes as contemplated in Rule 33(4). This judgment is therefore only in relation to the special plea.

[3] No evidence whatsoever was adduced by any of the parties and no bundle of documents was handed up as an exhibit. The judgment is thus based only on the pleadings and the submissions presented to me by both counsel.

[4] In terms of section 11(d) read with section 12(1) of the Prescription Act 68 of 1969 ("Prescription Act"), civil debts prescribe three years from the date the debt is due. Section 12(3) of the Prescription Act delays prescription in certain circumstances. It provides as follows:

"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."

[5] Mr Mene, on behalf of the defendant, contends that prescription started running on day of the shooting, i.e. 7 February 2005 and maintains that the said date is the date on which the debt arose for purposes of section 12. He submitted that it is evident from the particulars of claim that the facts from which the debt became known to the plaintiff on 7 February 2005.

[6] The issue is whether the plaintiff's claim has prescribed.

[7] It is common cause that summons was served on the defendant on 19 February 2008. Mr Mene contends that if consideration is paid to the fact that the shooting incident happened on 7 February 2005, it is clear that service of the summons occurred outside the three year period contemplated in section 11(d) read with section 12(1) of the Prescription Act.

[8] Mr Cilliers submits that it is clear from the plaintiff's replication to the special plea that prescription did not start running on 7 February 2005 as the plaintiff was hospitalised immediately after the shooting, and had to undergo a number of medical procedures and was in sedation until his discharge on 28 February 2005. Mr Cilliers contends that prescription only started running after the plaintiff's discharge from hospital, the effect thereof being that service of the summons occurred within the three year period envisaged in the aforesaid section of the Prescription Act, with the result that the plaintiff's claim has therefore not become prescribed.

[9] The plaintiff's replication boils down to an assertion that before 24 February 2005 he, due to the continuous administration of sedatives while he was in hospital, not in a position to know the essential facts of the claim, including the assault, which is the basis of his claim. It is apt to quote verbatim from the plaintiff's replication, which reads as follows:-

“1.1 The Plaintiff denies that his claim has become prescribed.

1.2 The Plaintiff specifically pleads:

1.2.1 That he was admitted to hospital on 7 February 2005 in an unconscious state/critical condition following the assault on him and the injuries he sustained;

1.2.2 That he remained unconscious/sedated, alternatively was his cognition seriously affected, as a result of the administration of medication and the performance of various procedures, for an extended period of time up and until at least 24 February 2005 whereafter he was discharged from hospital on or about 28 February 2005;

1.2.3 That he was only able to determine the essential facts relating to his assault, the extent of his injuries sustained and his prognosis, at the earliest following his discharge from hospital on 28 February 2005 alternatively only after 24 February 2005;

1.2.4 That the debt (the Plaintiff's damages) only became due as contemplated in Section 12(1) of the Prescription Act, 68 of 1969 after determination thereof by the Plaintiff following his

discharge from hospital on **28 February 2005 alternatively only after 24 February 2005**;

1.2.5 That the summons was served on the First and Second Defendants on **19 February 2008**;

1.2.6 That the period calculated from date of discharge from hospital, i.e. **28 February 2005 alternatively 24 February 2005 to 19 February 2008** is less than three years and therefore has Plaintiff's claim not become prescribed."

[10] Mr Cilliers, contends that the special plea ought to be determined on the basis of the pleadings as they stand bearing in mind where the onus in respect of the special plea lies. It is evident from the minutes of the Rule 37 conference that the parties were agreed that the defendant accepted the duty to begin and the onus of proof in respect of the special plea in accordance with trite principles regarding the onus in respect of the special plea.

[11] During my engagement with counsel I asked them to address me on whether they want this court to decide the special plea purely on the basis of pleadings without a shred of evidence having been adduced and they assured me that they both wanted to proceed on that basis.

[12] Mr Mene contended that although the overall onus in respect of the special plea was on the defendant, the plaintiff carried the evidentiary burden in respect of the replication and he had accordingly failed to prove that he was unconscious or sedated at some stage and that this interrupted the running of prescription.

[13] In **McLeod v Kweyiya**¹ the respondent was injured in a motor vehicle accident when she was 3 years old and a claim was instituted on her behalf by an attorney on her mother's instructions. The claim was settled when the respondent was 13 years old. She became aware of the settlement amount fortuitously when she was 25 years old. She instituted a claim against the

¹ 2013 (6) SA 1 (SCA)

attorney who had lodged the claim with the Road Accident Fund, alleging that the settlement was a significant under-recovery of her damages and that the acceptance of the offer by the attorney in question constituted negligence. The respondent stated in her particulars of claim that she only became aware of his negligence when she consulted her attorneys, at which stage she was already 25 years of age. The attorney's special plea of prescription was dismissed by the High Court. On appeal, the Supreme Court of Appeal considered whether the respondent could reasonably have known facts from which her debt against the attorney arose before the date she claims she first became aware of it and secondly, whether an adverse inference should be drawn from the respondent's failure to give evidence about her state of mind, circumstances or conduct during that period. As to the first issue the court held that the question was not whether she could or could not have obtained the documents from her mother or the attorney but whether she was negligent or innocent in failing to do so. The court concluded that there was no basis to arrive at a conclusion that the respondent had been negligent.

[14] In respect of the second issue the court found that where there is no evidence to rebut, no negative inference ought to be drawn from the creditor's failure to testify. The court emphasised that in order to invoke section 12(3) of the Prescription Act either actual or constructive knowledge must be proved.

[15] I am aware of the fact that the facts of this case are distinguishable to those of the Macleod case. The principles reiterated in that case are applicable all cases involving the proof of actual or constructive knowledge and are thus equally applicable to this case.

[16] It was contended on behalf of the defendant that the plaintiff had actual knowledge of all the facts and the identity of the plaintiff on the date of the shooting. This, notwithstanding the content of the replication, in terms of which the plaintiff asserted that he was only able to determine the essential facts relating to his assault, injuries and prognosis after his discharge from hospital on 28 February 2005, alternatively on 24 February 2005.

[17] Mr Mene contended that since the plaintiff had not adduced evidence to show his mental condition while he was in hospital, he acquired knowledge of the facts and thus of the debt on the date of the shooting, from which date prescription started to run. This argument clearly misconceives the evidentiary burden.

[18] It is apt to quote verbatim from the Macleod judgment on the aspect of the evidentiary burden. The court stated as follows at paragraph [10]:

“This court has repeatedly stated that a defendant bears the full evidentiary burden to prove a plea of prescription, including the date on which a plaintiff obtained actual or constructive knowledge of the debt. The burden shifts to the plaintiff only if the defendant has established a *prima facie* case.”

[19] It is clear that the burden to prove actual knowledge of the facts was on the defendant. I have already alluded to the fact that the defendant adduced no evidence in these proceedings. Clearly then, the defendant has not established a *prima facie* case, with the result that the burden did not at any stage shift to the plaintiff. The fact that the plaintiff adduced no evidence is therefore of no consequence.

[20] The appropriate order is to dismiss the special plea. There is no reason for a deviation from the ordinary rule that the costs must follow the result.

ORDER

[21] The special plea is dismissed with costs.

M. B. MOLEMELA, J

On behalf of the plaintiff: Adv. H. J. Cilliers
Instructed by:
Phatshoane Henney Attorneys
BLOEMFONTEIN

On behalf of the defendants: Adv. B. S. Mene
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