

REPUBLIC OF SOUTH AFRICA



NORTH GAUTENG HIGH COURT, PRETORIA

CASE NO: 4896/08

(1)	<u>REPORTABLE</u> Yes
(2)	<u>OF INTEREST TO OTHER JUDGES</u> Yes
(3)	<u>REVISED</u>
12 March 2013.	

[Signature]

15/3/2013

DATE HEARING: 2013/02/07

In the matter between:

WESSELS FREDERICK JACOBUS

Applicant

and

COETZEE MARIUS

First Respondent

WARDENS CARTAGE CC

Second Respondent

JUDGEMENT

VICTOR J

[1] The applicant seeks to join the third and fourth respondents to this action. The respondents oppose the joinder on the basis that the claim has prescribed. This raises two questions for determination: whether prescription should run anew in circumstances where a plea is amended to

withdraw an admission that the correct party was before court and whether joinder is a process which interrupts prescription.

[2] The founding affidavit is very detailed. It is deposed to by an attorney. He places on record the full history of the matter. I shall not repeat the exercise, save to deal with the salient points.

[3] The applicant instituted action against the first and second respondents for damages in the amount of R3 867 400 arising out of a sulphuric acid spill on a public road on 21 August 2007. The applicant alleges in his particulars of claim that his motor vehicle was damaged when it drove through the sulphuric acid spilled by a tanker owned by the second respondent. The necessary details pertaining to those damages are fully pleaded in the particulars of claim.

[4] There is a novel element in this matter. The first and second respondents defended the action and on 16 April 2008 and filed a plea to the applicant's particulars of claim, wherein they admitted that: the second respondent was the owner of the tanker, there was a mechanical malfunction, the truck overturned and sulphuric acid leaked from a hatch on the truck. It was not denied that the first defendant was the driver of the truck nor was it denied that the first respondent was acting within the course and scope of his employment with the second respondent.

[5] This plea must have been a source of comfort to the applicant. Some 14 months later the respondent did a complete volte facie. On 23 June 2009 the first and second respondents gave notice of intention to amend their plea in terms of which they allege that the first respondent was the depot manager of third respondent and that the tanker which caused the sulphuric acid spill was then being driven by Mr Tuto the fourth

respondent who was acting within the course and scope of his employment.

[6] The applicant in this joinder application states its cause of claim very fully and avers that it will continue to hold the first and second respondents liable because ultimately there might be an apportionment if they are found to be joint wrongdoers in terms of the Apportionment of Damages Act.

[7] It is undisputed that it was only on 23 June 2009 that the applicant for the first time was advised of the true entities and personae who could be liable for the damages that is the third and fourth respondents. When the plea was received on 16 April 2008, there was no need for the applicant to take any further steps to seek out whoever might in addition have been responsible for the sulphuric acid spill and the consequent damages. It took the first and second respondents 14 months to discover their own error.

[8] The applicant has attached to this joinder application the various pleas as well as the intended amendment and has also set out in great detail in its notice of intention to amend the cause of claim that it intends pursuing against the third and fourth respondents.

[9] In the prayer of the intended amendment to the particulars of claim the following is stated:

"Wherefore the plaintiff prays for judgment against the first and second defendants jointly and severally the one paying the other to be absolved, alternatively, against the third and fourth respondents jointly and severally the one paying the other to be absolved,

alternatively the second and alternatively the third defendant"

[10] It is clear from this joinder application what it is the applicant intends claiming against the third and fourth respondents and includes the amount of money, the rate of interest and the cost of suit. The undisputed time line underpins the factual matrix upon which the legal principles of prescription must be adjudicated.

[11] It is the respondent's case that it had notified and completed the amendment by 29 June 2009 within the three year period of prescription calculated within three years from 21 August 2007. Therefore any amendment which the applicant wishes to effect should have been effected by 21 August 2010.

[12] The issue of prescription must be analysed upon the legal principles emanating from a proper interpretation of both s12 and s15 of the Prescription Act No 68 of 1969. (The Prescription Act). Although s12(3) was not particularly emphasised during argument, it is of importance to the unique facts in this particular matter.

[13] In terms of s12 (1) of the Prescription Act:

'Prescription shall commence to run as soon as the debt is due.'

s12(3) of the Prescription Act provides:

'(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.'

[14] Having regard to the undisputed facts it is important to note that whilst the debt may have become due on the day of the collision in 2007, the applicant clearly did not have knowledge of the identity of the present third and fourth respondents as debtors until the amendment to the plea was launched.

[15] The proviso to subsection 12(3) the Prescription Act defines that a creditor shall be deemed to have knowledge if he could have acquired it by reasonable care. There is ample case law in respect of that proposition. In particular it is quite clear that if a creditor simply remains supine and does not take any further steps to progress the claim the Prescription Act penalises negligence and inactivity.

[16] Heher JA in the case of *Blouberg Meat Wholesalers CC v Anglo Dutch Meats Export Ltd* 2004 (3) SA 160 SCA, para 16 stated:

'There is no unfairness in this conclusion as the Court *a quo* seems to think. Prescription penalises negligence and inactivity. Judged according to the legislative intention the respondent remained absent and inert for more than three years. Both short comings are ascribable to the failure to take reasonable precautions from the time of preparing the summons to the belated awakening. The power of correction always lay with the respondent.'

[17] In this case the applicant did whatever he could to ascertain the identity of the debtor and in fact was reassured that it was the correct debtor based on the plea. It was not necessary for the applicant to take further steps to seek out any other debtors. He did not remain inert or supine and accordingly there is no necessity for the applicant to be penalised for any negligence or any inactivity in the manner in which he has conducted this litigation. The question of knowledge of the new debtor's identity however does not end the enquiry.

Does notification of new debtor within the prescription period cause the prescription period to run afresh?

[18] It is the respondent's case that the applicant should have instituted its claim by 20 August 2010 since it had notified the applicant of the new debtor within the prescription period and on June 2009. This meant that the applicant should have instituted its joinder application then and progressed the matter. In my view s12(3) of the Prescription Act applies and it is only when the knowledge of the debtors comes to the attention of a creditor that prescription begins to run albeit that the first and second respondents provided that information.

[19] I find that the earliest reasonable date upon which the applicant find the true identity of the debtor is of importance and that was 10 June 2009 when the notice of intention to amend the plea was served and is thus the operative date. The finding that I have made means that the prescription period runs from 10 June 2009 until 10 June 2012. The joinder application was launched on 19 January 2011 well within the period of prescription.

[20] The joinder application has now been formally been completed with

the handing down of this judgement in March 2013. The amended summons and particulars of claim must still be served. The final result of the joinder application is well after the date of 10 June 2012. The crisp issue at this stage is whether the launch of the joinder application on 19 January 2011 was sufficient to interrupt prescription or whether the outcome of the joinder application was necessary and the formal procedures thereafter effected before the joinder becomes effective.

[21] Section 15 (1) the Prescription Act provides:

'The running of prescription shall, subject to the provisions of subsection 2, be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.'

In s15 (6) the Prescription Act:

'For the purposes of this Section 'process' includes a petition, a notice of motion a Rule Nisi, a pleading in reconvention, a third party notice referred to in any Rule of Court and any document whereby legal proceedings are commenced.'

[22] There are two conflicting judgements as to whether a joinder application is indeed such a process as envisaged in s 15(6) and thus sufficient to interrupt prescription. The respondents have submitted that the service of the joinder notice was merely an informative step advising the applicant that it intended to join them to the proceedings. It is common cause that the joinder process was incomplete as at 10 June 2012. The applicant on the other hand contends that the service of the joinder application amounted to a service of a process thus interrupting prescription.

[23] In *Naidoo and another v Lane and another* 1997 (2) SA 913 Meskin J held:

‘That a joinder of a defendant did not constitute a process as envisaged by Section 15(2) or subsection (4) of the Prescription Act.’

[24] Meskin J in *Naidoo* looked for support for this interpretation at s15(5) of the Prescription Act ‘If any person is joined as a defendant on his own application, the process whereby the creditor claims payment of the debt shall be deemed to have been served on that person on the date of such joinder.’

[25] The decision in *Naidoo* decision has not been followed by any other court and in this regard there is the matter of *Waverley Blankets Ltd v Shoprite Checkers Pty Ltd and another* 2002(4) SA 166C as well as a more recent case of *Bell Estates v Renasa Insurance Company Ltd and another* 2012(3) SA 296 KZD where Madondo J found that a joinder application is a process and it is a process as envisaged in terms of Section 15(6) of the Prescription Act and thus sufficient to interrupt prescription.

[26] The cases of *Bell Estates* and that of *Waverley Blankets* both indicate that a sufficiently close link between the joinder application and a final judgment sounding in money in the plaintiff's favour is sufficient to interrupt prescription. Any other construction would be artificial and unjust and would tend to defeat the purpose of the statute. I am in respectful agreement with the principles set out in *Waverley and Bell*.

[27] A proper reading on the various subsections of s15 is also decisive. The applicant in this case is not a person who is joined as a defendant in his own application as stated in s15 (5). The meaning of the remainder of the subsection cannot be construed as imposing the appropriate date in all

cases of joinder as being the date of the court order of joinder. This extrapolation is incongruent with the import and purpose of s15 (6) of the Prescription Act. I do not agree that one has to look to the meaning and further interpretation of s15 (2) and 15(4) to give meaning to s15(6). In my view one cannot take separate words from other subsections in a statute to construct a restrictive meaning so as to construe s15 (6) to only mean service of an amended summons and amended particulars of claim pursuant to the joinder application.

[28] Section 15(1) the Prescription Act provides for service of a process whereby creditor claims payment of a debt. The applicant served an application of joinder whereby payment of a debt was claimed. The joinder application was framed and served in accordance with the Uniform Rules of court and thus constitutes a lawful process. The essential elements of s 15(1) were present in the joinder application served on 19 January 2011 thus within the prescribed period which I determined to be 10 June 2012.

[29] I agree with the interpretation of what a debt is considered to be in the context of the Prescription Act as set out in *Cape Town Municipality and Another v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C) at 331:

'One must bear in mind that a "right" and a "debt" are, after all, merely opposite poles of one and the same obligation. . . . Essentially, therefore, claiming payment of the debt is no different in principle from enforcing the right to payment of the debt.' Meskin in *Naidoo and another v Lane and another* agreed with this definition of a debt. I am also respectfully in agreement with this aspect. I do not however agree with Meskin J that the service of the joinder application was an informative process. This with respect runs contrary to the purpose and context of s15(1) read with ss(6)

[27] Once there is an acceptance that the only way the applicant could

commence to enforce his debt is by way of joinder then that must constitute the commencement of the legal process in the substantive sense and not only in the procedural or informative sense of the process.

[28] The use of the word 'inclusive' and the word 'any' in s15 (6) denotes a generous and wide description of documents which may commence legal proceedings. It does not direct that a closed numerus clausus of documents can be used. To test this wide interpretation it is noteworthy that the words 'only the following documents' was not used in an attempt to fix the category of documents. The section must therefore be given a purposive interpretation.

[28] Section 15(6) the Prescription Act refers to a process such as a third party notice. In substance as opposed to form, such a notice does bring a third party not yet a party to the litigation process into the process as does a joinder application. When general words are used in a statute it is a settled principle they must receive a general construction. It is also permissible to examine other words of like import in the same statute to ascertain whether limitations are imposed. (*Kellaway Principles of Interpretation 1995*) The use of the word 'third party notice' in s15(6) of the Prescription Act is a word of like import as joinder.

[29] Nicholas J in *Garrett v Lea Hobbs Milton & Co* 1979 (4) SA 922 (W) in dealing with the words 'processes of the court' in s 36 (1) of the Supreme Court Act 59 of 1959 held that those words had to be interpreted in the wide sense connoting any court document employed in the process of litigation. I am not suggesting that the word 'any' must be read into s 15(6) of the Prescription Act for such a broad interpretation. It does not require the reading in of a word. The subsection is already wide and clearly the

purpose and context is to be inclusive of a wide range of documents.

[30] In *Standard Bank Investment Corporation Ltd V Competition Commission And Others; Liberty Life Association Of Africa Ltd V Competition Commission And Others* 2000 (2) SA 797 (SCA) In (*Liberty Life Association of Africa Ltd v Competition Commission and others*) 2000 (2) SA 797 (SCA) Schutz JA at para 21 stated:

'However, as I have endeavoured to show, our law is an enthusiastic supporter of 'purposive construction' in the sense stated by Smalberger JA in *Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others* 1990 (1) SA 925 (A) at 943G – H - "Mindful of the fact that the primary aim of statutory interpretation is to arrive at the intention of the Legislature, the purpose of a statutory provision can provide a reliable pointer to such intention where there is ambiguity.'

[31] Heher JA in *Blouberg Meat Wholesalers CC v Anglo Dutch Meats Export Ltd* supra has already referred to the purpose of the Prescription Act as being a deterrent to absence and inertia. S15 (6) specifically introduced words introducing and denoting an interpretation of wideness and inclusiveness of a wide variety of documents. The inclusion of a joinder application as a document commencing legal process is the appropriate interpretation.

In the result I make the following order:

1. An order of joinder is granted in terms of Prayers 1, 2, 3, 4 of the notice of motion dated 18 January 2011.

2. The respondents who have opposed this application shall bear the costs jointly and severally the one paying the other to be absolved.

Victor J

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