

KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

REPORTABLE

Case no: 5004/2007

In the matter between:

BELL ESTATES (PTY) LIMITED

Applicant/Plaintiff

And

RENASA INSURANCE COMPANY LIMITED 1st Respondent/Defendant

PETER TAYLOR AND ASSOCIATES CC 2nd Respondent/ Defendant

JUDGMENT

MADONDO J

Introduction

[1] The crisp issue for determination in this matter, is whether or not a Notice of Joinder issued in terms of Rule 10(3) of the Uniform Rules of Court constitutes a process as contemplated in section 15(1) of the Prescription Act, 68 of 1969 (the Act) and the service whereof interrupts the running of the prescription period of a claim.

Background

[2] The applicant has issued a notice in terms of Rule 10(3) for the joinder of the second respondent as a party to the action the applicant instituted against the first respondent. The claim against both the first and second

respondents arose as follows: On 8 May 2007 the applicant instituted an action against the first respondent for the payment of the sum of R222 000 as damages arising out of the breach of the contract of insurance entered into between the applicant and the first respondent on 17 October 2004 in terms of which the applicant caused a 2005 model Toyota Hilux 2.7 litre double cab Raider to be insured against loss, damage and theft.

[3] During the conclusion of the aforesaid agreement the applicant was represented by Peter Taylor of Peter Taylor and Associates CC (the second respondent) and the first respondent by a duly appointed employee of Monitor Administrators (Pty) Limited. The vehicle was insured for the sum of R240.000.

[4] On 6 July 2006 at Umhlali the vehicle was stolen and it was not recovered. The value of the vehicle at the time was R240 000. The applicant then caused a combined summons to be issued and served on the first respondent. In its plea to the particulars of claim the first respondent averred that it was a term of the contract of insurance that no cover would exist for vehicles not fitted with a Vesa/vss – approved or Orbitech tracking device or Nestar tracking device where the sum insured exceeded R150 000.

[5] In amplification of its averment, the first respondent stated that the vehicle in question was not fitted with any of the tracking devices referred to above and that accordingly the applicant was not entitled to any indemnity in respect of the theft of such vehicle. The first respondent was therefore on the said basis entitled to repudiate the applicant's claim for compensation.

[6] On 21 July 2009 the applicant lodged an application for joinder of the second respondent to the action on the grounds that the second respondent, being the applicant's insurance broker dealing directly with the first respondent, was privy to the security requirements necessary in respect of the applicant's vehicle under the insurance policy. Therefore, the second respondent owed the applicant a duty to clearly convey the first respondent's security requirements in respect of the vehicle in question to the applicant in order that the aforesaid vehicle was covered under the insurance policy.

[7] The applicants' claim against the second respondent arises from the second respondent's failure to notify the applicant of the security requirements on the basis of which the first respondent validly repudiated the applicant's claim. The applicant avers that it has therefore recourse against the second respondent.

[8] In the event of the court allowing the joinder of the second respondent, consequential amendments will have to be made to the particulars of claim to make provisions for the applicant's claim against the second respondent.

[9] The notice was served on the second respondent on 30 September 2009. On 2 October 2009 the second respondent gave notice of his intention to oppose the application for joinder. On 30 November 2011 the matter was adjourned on the opposed roll to 31 January 2012.

[10] The second respondent opposes the application for joinder on the

basis that any claim which the applicant may have had against the second respondent has prescribed and there will be no purpose in joining the second respondent to the action which the applicant has instituted against the first respondent.

[11] The second respondent contends that Notice in terms of Rule 10(3) the applicant has served on the second respondent does not constitute a process as contemplated by the provisions of the Act. According to the second respondent the date upon which the applicant became aware that it had not complied with the policy provisions is the date the prescription started running in respect of any claim against the second respondent.

[12] In a letter dated 24 January 2007 which the applicant's attorneys addressed to the second respondent the applicant's attorneys alleged that the inescapable conclusion was that the second respondent failed in its duty and that he was therefore liable for damages the applicant suffered. The second respondent therefore avers that the claim against him became prescribed three years after the 24th of January 2007, Further, that any claim which the applicant seeks to enforce against the second respondent has prescribed and the joinder would therefore be a fruitless exercise.

[13] The applicant contends that the prescription of the applicant's claim against the respondent was interrupted upon receipt of the Rule 10(3) application papers. The applicant submits that the notice in terms of Rule 10(3) is indeed a process as contemplated by the provisions of the Act and that prescription of any claim is interrupted on service or receipt of such

notice.

[14] Rule 10 (3) reads as follows:

“Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action.”

Legal position

[15] The sub sections of section 15 of the Act which are relevant for the determination of the issue before me are; subsections (1), (2) and (6).

Section 15(1) reads as follows:

“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 terms of this sub section three requirements must be met for the prescription to be interrupted:

- a) there must be a process;
- b) the process must be served on the debtor;
- c) by that process, the creditor must claim payment of the debt.

[16] Section 15(2) provides:

“unless the debtor acknowledges liability, the interruption of prescription in terms of sub section (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.”

[17] Section 15(6) reads as follows:

“For the purposes of this section, ‘process’ includes 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.”

The section does not containing a definition of the word “process” but it merely lists certain documents which will be regarded as “processes” for the purpose of the section. However, what worth noting is that the documents listed therein are all examples of documents “whereby legal proceedings are commenced”.

[18] In *Garrett v Lea Hobbs Milton and Co.* 1979(4) at 924H the word ‘process of court’, in its limited sense was held to connote ‘a mandate, summons or writ by which a person or thing, is brought into court for litigation’. However, the court held that in its wider sense, it may connote any document employed in the process of litigation. In its view the term process should be understood in its wide sense. That the term or word “process” may bear the wide meaning also appears from an Australian case of *Boilermakers’ Society of Australia v Brisbane Welding Works* (1965) QdR 598

[19] Georges CJ in the case of *Mountain Lodge Hotel (1979) (Pty) Ltd v McLouglin and another* 1984(2) SA 567 (ZSC) at 570H – 571A when commenting upon a similar section in the Zimbabwean Prescription Act said the following:

“The definition of ‘process’ in ss (6) is not exclusive in its scope. The section merely enumerates some documents which fall within the ambit of the word. It clearly contemplates that other documents may fall within that ambit. Indeed the fact that ‘process’ includes ‘ any document whereby legal proceedings are commenced’ would indicate that it encompasses something wider than that category of document and could include a document which does not commence legal proceedings. If the intention had been otherwise the draughtsman would have said that ‘process’ meant any document whereby legal proceedings were commenced and included the specific documents listed in (a) to (e).”

[20] In *Mias De Klerk Boerdery (EDMS)Bpk v Cole* 1986(2) SA 284(N) at 286-287A-B, The court subscribed to the view shared by courts in *Mountain Lodge Hotel* and *Garrett* cases, *supra*, and concluded that the word “process” in section 15(1) bears the wide meaning referred to in the aforesaid cases. The court in *Mias* case held that a notice of intention to amend in terms of Rule 28 interrupted the running of the prescription and that its service was sufficient for the purposes of section 15(1) if the means of service employed for this was a proper or legally recognised means of service and that it was not necessary for such notice to be served by the deputy-sheriff.

[21] This court is asked to determine whether the service of Notice of Joinder on the second respondent interrupted the running of prescription in terms of the provisions of section 15(1). Holmes JA delivering the majority judgment in *Southern Insurance Co. Ltd v Vilakasi* 1967(1) SA 246(A) at 253H said:

“In my opinion it is clear that the service referred to in section 6(1) (b) must be a service whereby action is instituted as a step in the enforcement of the claim or right. The underlying reason why such a service interrupts prescription is that the creditor has thereby formally involved his debtor in court proceedings for the enforcement of his claim.”

[22] A notice of joinder by its nature and content constitutes a first step in the effectively commencement of the legal proceedings for enforcement of the claim for debt or compensation. I therefore fully subscribe to the view expressed by Grosskopf AJA in the case of *Murray and Roberts (Cape) v Upington Municipality* 1984(1) SA 571(A) at 578H when he said:

“Where creditor takes judicial steps to recover the debt and thereby to remove all uncertainty about its existence, prescription should obviously not continue running while the law takes its course (515) of the Act.”

[23] In *Waverly Blankets Ltd v Shoprite Checkers (Pty) Ltd and Another*

2002(4) SA 166 (C), where the plaintiff had applied to join an additional defendant in action, the service of notice of motion seeking joinder was held to be undoubtedly a process whereby the plaintiff claimed the payment of debt and therefore interrupting the running of prescription in terms of section 15(1) of Act 68 of 1969.

[24] In *Naidoo and another v Lane and another* 1997(2) SA 913(D), Meskin J held that service of an application for joinder did not interrupt prescription since the said application was not a “process” whereby the creditor claims payment of the debt “in terms of section 15(1)”. In grounding his conclusion in this regard at 919J- 920A-E the learned judge said:

“It is true that the application clearly informed the proposed second defendant of the existence of the obligations allegedly owed to the plaintiffs and therefore of the existence of the rights co-relative thereto. It also clearly informed him of the plaintiff’s intention to ‘claim (performance) of’ such obligations and therefore of the intention to enforce the rights co-relative thereto by means of the substitution of the amended summons and the amended particulars of claim and the service of these documents on the proposed second defendant. But, in the light of my interpretation of s 15(1) of the Act, a process which is merely informative, and which is not one by which per se the creditor purports at all to enforce the right co-relative to the relevant obligation, is not a process for the purposes of such section.

Indeed, the application, given its content, necessarily informed the proposed second defendant that it was not by means of the application per se that the plaintiffs were purporting to enforce the rights co-relative to the relevant obligations, but that it would by means of the substitution of the amended summons and amended particulars of claim and the service of such documents on the proposed second defendant that they would purport to enforce such rights. The proposed second defendant, therefore, was informed that, notwithstanding the intention to join him as a second defendant, he need do nothing until the amended summons and amended particulars of claim were served upon him. In my opinion, a process which is informative in this way is not one, ‘whereby payment is claimed’ within the meaning of s15 (1) of the Act.”

[25] Section 14 of the Act provides that the running of prescription is interrupted by an express or tacit acknowledgment of liability by the debtor. In *Murray & Roberts case*, *supra*, at 579A and 578F, it was stated that the reason is clear, if the debtor acknowledges liability there is no uncertainty

about the debt. The main practical purpose is to promote certainty in the ordinary affairs of people. It appears from above that what matters most is the communication of the existence of the debt to the debtor. The court in Naidoo cases seemed to have adopted a too legalistic approach to the issue at hand. Giving the word “process” liberal interpretation a notice of motion seeking joinder is undoubtedly a process. It should also be regarded as a document whereby legal proceedings are commenced against the second respondent. In *Waverly* case, *supra*, at 174 E-G and 175D, it was held that the application for joinder was the first step whereby the plaintiff (as creditor) claimed payment of the debt from the second defendant. The joinder application leads to joinder order which in turns leads to further pleadings and eventually to trial. But for prescription, it is open to the plaintiff to prove its case on the merits and to secure a final judgment if he or she succeeds on merits.

[26] In *Cape Town Municipality and another v Allianz Insurance Co.* 1990(1) SA 311 (C) at 334H, Howie J said:

“It is sufficient for the purposes of interrupting prescription if the process to be served is one whereby the proceedings begun there under are instituted as a step in the enforcement of claim for payment of debt.”

[27] In *Chauke v President Insurance Co. Ltd* 1978(2) SA 947(W) at 950 Theron J said the following:

“As die dagvaarding (proses) nie verder gevoer word nie, verval sy stuitende kraag met betrekig tot verjaring ”

In the said case at 950G it was held that the use of the word “under the process in question” in section 15(2) meant in terms of the Rules of Court governing the process.

[28] In the present case the applicant's claim against the second respondent would have arisen on receipt of the letter of repudiation dated 11 November 2006. However, it is common cause that the notice of joinder was served on the second respondent before the applicant's claim against the second respondent prescribed.

[29] It has been contended on behalf of the second respondent that the interruption of the prescription period only takes place on the order of joinder, for it is only when a party to be joined becomes party to a process which can be prosecuted to judgment as envisaged in section 15(2) of the Act.

[30] To the contrary, it has been argued on behalf of the applicant that the person upon whom notice in terms of Rule 10(3) is served becomes party to the process when the notice of motion is served upon him or her. In other words, the moment the debtor becomes aware of his or her debt.

[31] The notice of joinder commences an action against a person who is sought to be joined in the action almost in the same way the third party notice in terms of Rule 13 does. The only difference is that the third party notice states the nature and grounds of the claim of the party issuing it, the question or issue to be determined, and any relief or remedy claimed (Rule 13(2)).

[32] As shown above, the notice of joinder serves almost the same purpose as the third party notice specified in section 15(6) as constituting the process. The notice of motion is also listed therein. It has been argued on behalf of the second respondent that on the plain wording of section 15(1) the process that interrupts prescription must be a claim for payment of debt that is capable of

being prosecuted to obtain a final judgment. On proper construction that does not mean that a particular document in question must be the only document in the process right up to the stage a final judgment is obtained (see Chauke case, *supra*, at 950 G). A simple summons, for instance, a document initiating action against the defendant does not contain all the details pertaining to a claim. Such details are contained in a declaration which follows a simple summons.

[33] Similarly, a notice of joinder initiates an action against the party to be joined. Therefore, it follows that being a document which initiates an action against a person to be joined as a party; it constitutes a process whereby the plaintiff claims payment of its debt. In the circumstances, a notice of motion for an application for joinder is a first step in the enforcement of a claim sounding in money against the person sought to be joined as a party to the existing action, aimed at finally obtaining a judgment against the debtor. On granting a joinder order the plaintiff is only granted leave to amend its particulars of claim to make provisions for the inclusion of the party joined to the action. From there, the claim is prosecuted to a final judgment.

[34] In the circumstances, I fully agree with Comrie J in Waverly case, *supra*, at 175 D-E where he says that “there is a sufficient link between the joinder application and a final judgment sounding in money in the plaintiff’s favour, if such is granted on merits. The joinder application leads to the joinder order which in turn leads to further pleadings and eventually to trial. If it can be said that the joinder application does not interrupt the prescription that will be artificial and unjust outcome tending to defeat the purpose of the

statute.”

Conclusion

[35] In the premises, I respectfully come to the conclusion that the learned judge, Meskin, in Naidoo case, *supra*, was clearly wrong when he held that an application for joinder was not a process contemplated in section 15(1) of the Act. It therefore follows that I am not bound by such decision. Accordingly, I hold that a notice of joinder in terms of Rule 10(3) for the joinder of the second respondent as a party to the action the applicant instituted against the second respondent, constitutes a process as contemplated in the provisions of section 15(1) and its service on the second respondent interrupted the running of the prescription period of its claim against the second respondent. It is common cause that the debt had not extinguished at the time the notice was served and accordingly the claim had not elapsed.

Order

[36] In the result, the question raised in this case is decided in favour of the applicant with costs.

Date reserved on: 31 January 2012

Date delivered on: 2 March 2012

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