

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: LA206/2005

In the appeal between:

PAULOS DHLAMINI

Appellant

and

E M KUBUSHI

Respondent

JUDGMENT:

EBRAHIM, J

HEARD ON:

8 NOVEMBER 2006

DELIVERED ON:

9 NOVEMBER 2006

[1] The applicant applies for leave to appeal to the full Bench of this Division against the whole of the judgement delivered in this matter on the various grounds mentioned in his Notice of Application for Leave to Appeal dated the 21st November 2005.

[2] The gravamen of the applicant's complaint appears to be that this court erred in finding that the defendant/respondent discharged the onus she carried of

showing on a balance of probabilities that the plaintiff/applicant could, with the exercise of reasonable care, have acquired knowledge of the facts from which the debt arose and instituted summons prior to the expiration of the prescriptive period of 3 years.

In this context, Mr. Röntgen who appears on behalf of the applicant referred me to the authority of **DITEDU v TAYOB** 2006 (2) SA 176 (W).

- [3] Mr. Cronje has opposed the application on behalf of the defendant/respondent on the basis that the facts in **TAYOB** are distinguishable from those in the present case where the applicant has a Standard 3 education; was in a position to read and write as was manifest from the letters he had written requesting transfer of his file to his present attorneys of record and that he had waited 8 years prior to making any claim on grounds of negligence against the defendant, and that he only did so, once he found himself in indigent circumstances.

[4] In my view, however, the fact that this matter was decided by me purely on credibility findings based on the probabilities as I saw them, moves me to grant leave on the basis of the very reasonable prospect of another court finding differently on the probabilities and, possibly, finding that they favour the plaintiff rather than the defendant. Leave is accordingly granted to the applicant to appeal to the full Bench of this Division on all of the grounds mentioned in its said notice.

[5] Prior to hearing argument, on this application, I was referred to an application for condonation brought by the applicant in respect of its legal representative's failure to appear in court on the 20th June 2006 when the application for leave to appeal had initially been enrolled for hearing. On that occasion the application was struck off the Roll. The question of the respondent's wasted costs stood over for determination. After hearing submissions today on this aspect of the matter, I have not been able to find any

reason why the applicant should not be ordered to bear those costs.

[6] Accordingly the following order is made:

- 7.1 The application for condonation is granted.
- 7.2 The applicant is ordered to pay the respondent's wasted costs for the 20th June 2006.
- 7.3 Leave to appeal is granted to the applicant to appeal to the full Bench of this Division against the whole of the judgement in this matter on the grounds set out in applicant's notice dated 21st November 2005.
- 7.4 The costs of the application for leave to appeal shall be costs in the appeal.

S. EBRAHIM, J

On behalf of appellant:

Adv. K. M. Röntgen (Snr)

Instructed by:

Bothma Nothnagel & Röntgen

BRAKPAN

On behalf of respondent:

Adv. P. R. Cronje

Instructed by:

Naudes

BLOEMFONTEIN

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