

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 37172/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

25 April 2024

In the matter between:

MAFOKO NICKER MAKWALA

Plaintiff

And

FLUXMANS ATTORNEYS

First Defendant

PHILLIP VALLET

Second Defendant

JUDGMENT

MDALANA-MAYISELA J

Introduction

[1] The plaintiff has instituted a claim for damages against the defendants, Fluxmans attorneys and Phillip Vallet, an attorney and senior partner at the fluxmans for breach of mandate, alternatively, breach of legal duty. The claim is based upon the allegation that the defendants negligently caused the plaintiff's claim against the Road Accident Fund ("RAF") to prescribe. The defendants have pleaded to the particulars of claim and filed a special plea, raising a defence of prescription.

[2] By agreement between the parties I granted an order in terms of rule 33(4) of the Uniform Rules of Court separating a determination of the defendants' special plea of prescription from the other issues in the action. I heard evidence on the special plea. The plaintiff testified and closed his case. The defendants called no witnesses.

Background facts

[3] The plaintiff testified that in July 2004 he was involved in an accident when an unidentified motor vehicle collided with him. At the time of the accident, he was working as a caddy at the Houghton Golf Club in Johannesburg. During the same year of the accident at Houghton Golf Club parking lot, he instructed the second defendant to lodge a RAF claim on his behalf for compensation as a result of the injuries he sustained from the accident. He furnished the second defendant with the case number and his medical documents relating to the accident. Thereafter, he visited the defendants' offices for about 15 times to enquire about progress in his claim. He did not give the details of those visits.

[4] In 2009, at the offices of the defendants he was informed by the second defendant that his documents were misplaced, and the RAF claim had not been lodged on his behalf. He was advised to seek assistance at the Wits Law Clinic. He went to Wits Law Clinic, but he did not receive any assistance.

[5] In 2010, he went to RAF offices to enquire about the status of his claim. He was informed that there was no record of a claim being lodged on his behalf. In 2014, he lodged a complaint with the Law Society against the second defendant for misplacing his documents and failing to lodge his RAF claim. The Law Society advised him to seek legal assistance.

[6] During 2019, while listening to radio he overheard an advert about Ndou attorneys. He went to their offices and mandated them to handle his matter.

Prescription

[7] The plaintiff averred in his amended particulars of claim dated 9 October 2023, that on 25 July 2004 he was involved in an accident when an unidentified motor vehicle collided with him. In terms of section 17(1)(b) of the Road Accident Fund Act of 1996("the RAF Act"), read with Regulations 2(3) of April 1997 a claim for compensation where the identity of neither the owner nor the driver of the motor vehicle has been established must be lodged within two years from the date upon which the claim arose. It is common cause that the plaintiff's RAF claim was not lodged within the prescribed two-years period. In the result his RAF claim prescribed on 24 July 2006.

[8] The defendants pleaded that in terms of section 11(d) of the Prescription Act 68 of 1969 ("the Prescription Act") read together with section 12(1) and (3) the debt against the defendants became due on 24 July 2006, alternatively 2012, further alternatively 2015, further alternatively, 2016. By the time the summons was served on them on 12 August 2021, any claim that the plaintiff may have had against them had prescribed.

[9] Section 11(d) of the Prescription Act provides that a debt shall prescribe after three years unless the Act of Parliament provides otherwise. It is common cause that the three-year prescription period does apply in the debt involved in this case. The relevant parts of section 12 of the Prescription Act read as follows:

“(1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.

(2) If the debtor willfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(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.”

[10] The plaintiff has not pleaded or testified that the defendants prevented him from coming to know of the existence of the debt. Therefore, section 12(2) does not apply in this case. In his replication the plaintiff contended that he only became aware of the debt after consulting with Ndou attorneys on 1 August 2019, and prescription did not commence to run against him until that date.

[11] The words ‘debt’, ‘debt is due’ and ‘knowledge of ... the facts from which the debt arises’ contained in section 12(1) and (3) are not defined in the Prescription Act. The Constitutional Court in *Mtokonya v Minister of Police*¹ majority judgment stated as follows:

“Section 12(3) does not require the creditor to have knowledge of any right to sue the debtor nor does it require him or her to have knowledge of legal conclusions that may be drawn from “the facts from which the debt arises”. Case law is to the effect that the facts from which the debt arises are the facts which a creditor would need to prove in order to establish the liability of the debtor.”

[12] The plaintiff testified that he was involved in the accident in 2004. During the same year he mandated the second defendant to lodge the RAF claim on his behalf. In 2009 he was informed by the second defendant that his documents were misplaced, and the RAF claim had not been lodged on his behalf. These are the minimum facts that are necessary to institute action against the defendants. He is not required to have knowledge of any right to sue the defendants nor to have knowledge of legal conclusions that may be drawn from the minimum

¹ *Mtokonya v Minister of Police* [2017] ZACC 33; 2017(11) BCLR 1443 (CC); 2018(5) SA 22 (CC) at para 36; *Johannes G Coetzee & Seun and Another v Le Roux and Another* (969/2020) [2022] ZASCA 47 (8April 2022).

facts. The running of prescription is not postponed until a creditor becomes aware of the full extent of his or her legal rights².

[13] The plaintiff also testified that in 2009 he was advised by the second defendant to go to Wits Law Clinic to seek legal assistance. He went to Wits Law Clinic to seek legal assistance. He furnished his contact details. He did not receive a call from Wits Law Clinic, and he also did not make a follow up on his request. From that time, he did nothing about his matter until 2014 when he lodged a complaint with the Law Society against the second respondent. The Law Society advised him to seek legal assistance and he did not, until 2019 when he mandated Ndou attorneys to handle his matter.

[14] It is clear from his evidence that his failure to institute action timeously against the defendants was caused by his inaction and not by the lack of knowledge of the identity of the debtor and the facts from which the debt arises.

Conclusion

[15] In terms of section 12(1) read together with section 12(3) prescription starts to run as soon as the creditor has or ought to have knowledge of the identity of the debtor and the facts from which the debt arises. The plaintiff's evidence reveals that he became aware of the debtors' identity and the facts from which the debt arises in 2009 when the second defendant informed him that his documents were misplaced, and the RAF claim had not been lodged on his behalf. The facts from which the debt arises had been confirmed by RAF in 2010 before his claim against the defendants prescribed.

[16] I find that the debt against the defendants became due in 2009 when he acquired actual knowledge of the identity of the debtor and the facts from which the debt arises. More than three years has elapsed since the debt became due before summons was issued and served. In the result, the debt has been extinguished by prescription. In the light of the conclusion that

² Minister of Finance and Others v Gore NO [2006] ZASCA 98; [2007] 1 ALL SA 309 (SCA); 2007 (1) SA 111 (SCA).

I have reached, it is unnecessary to consider the alternative dates the debt became due pleaded by the defendants in the special plea.

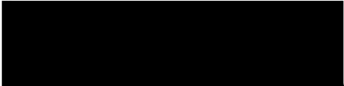
Costs

[17] With regard to costs, the defendants have sought *de bonis propriis* costs on an attorney and client scale on the basis that the plaintiff's attorneys persisted with a case that can be described as vexatious and abuse of process. This case is mainly about the interpretation of the legislation. I am not satisfied that there has been negligence in a serious degree on the part of the plaintiff's attorneys which warrants an order of costs *de bonis propriis* being made as a sign of the court's displeasure.

ORDER

[18] I make the following order:

1. The special plea of prescription is upheld with costs and the plaintiff's action is dismissed with costs.



MMP Mdalana-Mayisela
Judge of the High Court
Gauteng Division, Johannesburg

(This judgment is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge's secretary. The date of this Order is deemed to be 25 April 2024)

Appearances:

On behalf of the Plaintiff: Mr T Khanyile

Instructed by: Ndou Attorneys

On behalf of the Defendants: Adv M Sethaba

Instructed by: Eversheds Sutherland South Africa Inc.