

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO.: 3133/2023

In the matter between:

ODWA MBHIYOZO

PLAINTIFF

and

ESKOM HOLDINGS SOC LIMITED

DEFENDANT

JUDGMENT

ZONO AJ:

Introduction

[1] The plaintiff is a South African citizen of Msintsini Location, Libode born on 09 July 1993. To the Particulars of Claim the plaintiff annexed as annexure “**MO1**” his identity document copy reflecting this Identity Number 9[...]

[2] The defendant is described as a juristic entity defined both in section 1 of the **Eskom Conversion Act 13 of 2001** and defined in section 1 of the **Electricity Regulation Act 4 of 2006**.

[3] The defendant is cited and sued herein on the basis that it is vicariously liable for all the delictual and contractual acts and omissions committed by its employees whilst acting within the course and scope of their employment.

[4] The matter was set down for the hearing of a special plea raised by the defendant. The defendant raised a special plea of prescription. Prescription of debt is governed by the Prescription Act No. 68 of 1969.

Pleadings

[5] The relevant portions of the plaintiff's amended particulars of claim read as follows:

"1. The plaintiff is Odwa Mbhiyozo an adult male, currently residing at Msintsini Location at Libode in the Eastern Cape Province. A copy of the plaintiff's identity document attached hereto annexed as annexure "MO1".

6. On or about the 17th of January 2007, the plaintiff was walking along the nearby farm at Ntlaza, in Libode when he came into contact with an uncovered high voltage electric cable while he was walking, he was electrocuted as a result plaintiff suffered severe third degree burns and severe bodily injuries.

8. The plaintiff was admitted at Life St Mary's Hospital where he was treated for the severe burn wounds he suffered He remained in St Mary's Hospital for a period of three (3) months and he was transferred to Nelson Mandela Academic Hospital where he spent seven (7) months until he was discharged."

[6] It is in these particulars of claim that a special plea of prescription is raised. The special plea in its amended form reads as follows:

*"1. **Prescription***

1.1 The plaintiff's claim is based on an incident which is alleged to have occurred on the 17th of January 2007.

1.2 The plaintiff's summons was served on the defendant on or about the 28th of July 2023 which is more than three (3) years after the date upon which the plaintiff's claim arose. In fact, the action was instituted approximately sixteen (16) years after the alleged incident occurred.

1.3 Accordingly, the action of the plaintiff as against the defendant expired on the 18th of January 2010 and the defendant cannot be held liable for the plaintiff's alleged claim and subsequent damages.

1.4 In the premises, the plaintiff's claim has prescribed in terms of section 11(d) of the Prescription Act.

1.5 Alternatively, the plaintiff became aware of the identity of the debtor as at 17th February 2007. Further alternatively with the exercise of reasonable care he could have acquired such knowledge of the identity of the debtor.”

[7] In his replication the plaintiff disputes that his claim had prescribed. For that he relies on the provisions of section 12(3) of the Prescription Act 68 of 1969 (as amended) and avers that the plaintiff became aware of identity of the creditor and the facts giving rise to the cause of action upon consulting with his legal representatives on the 5th of June 2023. Although the word creditor was used I take it that the defendant was referring to the debtor. Although that the defendant was responsible for payment his medical bills at St Mary's Hospital the plaintiff laboured under the impression that there were no further claims for other heads of damages he would be entitled to.

[8] Parties led evidence on the subject of prescription. The defendant led the evidence of one witness, Makhosandile Malinge who is an employee of the defendant as a Supervisor. The plaintiff testified and no other witness was called and he closed his case.

Evidence

[9] On behalf of the defendant and relevant to the case Mr Malinge testified that on 17 January 2007 he was on duty and was informed by colleagues that a person was electrocuted, and he then proceeded to the scene. Upon arrival at the scene he saw electricity wires on the ground and he took photographs thereof. He then proceeded to St Mary's Hospital where the plaintiff was admitted in his capacity as an Eskom member or employee. After having been allowed to see the plaintiff, he went to him and on arrival he noticed that the plaintiff was bandaged on the areas he was electrocuted. He spoke to the plaintiff although it was difficult for him to speak. He introduced himself to the plaintiff by telling the plaintiff his name and his work-related details as well as the purpose of his visit.

[10] Mr Malinge then took photographs of the plaintiff in his condition and prepared documentation for investigation by Eskom. As Eskom employees they are not allowed to inform the injured persons of their rights to institute claims against Eskom.

[11] In cross-examination, Mr Malinge confirmed that on 17 January 2007 the plaintiff was still a minor as he was thirteen (13) years of age. He testified that at that age he could not have known the debtor without the existence of a lawyer. He said he does not know if he could not have known of the facts giving rise to the claim. He further confirmed that he was advised that the plaintiff left school in 2009 and was an orphan as he was told by the plaintiff. He stated that the information he took on during his visit at St Mary's Hospital was given to Eskom, and he does not know what happened to that information.

[12] The plaintiff testified to the effect that he was born on 09 July 1993 and he resides at Msintsi Location and he only passed Standard 5 in 2009. On the 17th of January 2007 when in the mealie field with his cousin looking for lost cattle, he was electrocuted by Eskom cables. He was ultimately taken to St Mary's Hospital where he was admitted for three (3) months and thereafter to Mandela Academic Hospital where he spent seven (7) months. He testified that in 2007 he was thirteen (13) years old.

[13] He further testified that he only saw his legal representatives on 5 June 2023 after one Yolisiwe Poswa arranged a consultation for him. Before consultation with his legal representatives he knew nothing about the debtor and the facts giving rise to the claim. He confirmed that Summons was issued on 27 July 2023 and service thereof was effected on 31 July 2023.

[14] In cross-examination he said he had always known that his injuries were caused by Eskom cables and that he was subsequently visited by Eskom member of employee at St Mary's Hospital. He confirmed that Eskom paid his hospital bills. He confirmed that he reached eighteen (18) years of age in 2011.

Discussion

[15] The basic rules governing the incidence of the onus of proof have been subject of much judicial debate and has been settled. In ***Pillay v Krishna & Another***¹ the following three (3) rules were set out:

- “(a) If one person claims something from another in a court of law, then he has to satisfy the court that he is entitled to it;*
- (b) where the person against whom the claim is made is not content with a mere denial of that claim but set up a special defence, then he is regarded ‘quo ad’ that defence, as being the claimant: for his defence to be upheld he must satisfy the court that he is entitled to succeed on it.*
- (c) he who asserts proves and not he who denies since a denial of a fact cannot naturally be proved provided that it is a fact that is denied and that the denial is absolute.”*

[16] Thus the onus to prove prescription rest upon the defendant. It is the defendant that must satisfy the court that it is entitled to succeed on the special plea of prescription. That is supported by the second principle in the judgment of *Pillay* referred to above. Again, on the basis of third principle of that judgment, it is the defendant that asserts a special defence of prescription, therefore it must prove it.

[17] Prescription Act² requires that prescription must be invoked in a relevant document. The actual text section 17(2) of the Act is worded as follows:

- “(2) A party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings: Provided that a court may allow prescription to be raised at any stage of the proceedings.”*

The document referred to in this provision is a plea or a special plea relating to prescription. In simple terms a prescription must be raised in the relevant pleading, which invariably is the defendant's plea.

[18] The defendant has succeeded to invoke a special plea of prescription in its pleading. The nature of the special plea raised by the defendant is as set out in paragraph 6 above. The essence of that special plea is that the prescription commenced to run on 17 January 2007 and on 18 January 2010 the debt had

¹ ***Pillay v Krishna & Another*** 1946 AD 946 at 951.

² Section 17(2) of the Prescription Act 68 of 1969.

prescribed. In so doing, the defendant relied on the provisions of **section 11(d) of the prescription Act 68 of 1969**. The plea of prescription was premised on the date when the cause of action arose or the date when the incident occurred.

[19] Section 11(d) aforesaid provides as follows:

“11. Periods of prescription of debts—

The periods of prescription of debts shall be the following—

(a)

(b)

(c)

(d) *save where an Act of Parliament provides otherwise, three years in respect of any other debt.”*

The debt referred to in (a), (b) and (c) relates to the debt secured by mortgage bonds, debt owed by the State and arising out of an advance or loan of money, a sale or lease of land by the State to the debtor; and lastly to debt arising from bill of exchange or other negotiable instrument or from a notarial contract. The present debt correctly falls within the category of section 11(d) of the Act.

[20] The plaintiff, while having made out a case about his age by reference in paragraph 1 of the particulars of claim to annexure “**MO1**” which is plaintiff’s identity document, he delivered a replication which pertinently states that the plaintiff, during the period spanning from 17 January 2007 to 18 January 2010 was still a minor. That fact was repeated unequivocally in evidence and it became a common cause.

[21] This therefore leads to the provisions of section 3 and 13 of the Prescription Act. Section 13 of the Act provides for **completion of prescription delayed in certain circumstances**. Subsection 1 provides this:

*“(1) (a) If the creditor is a **minor** or insane or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15 (1) the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).”*

Paragraph 1 refers to the circumstances contemplated in paragraph (a) – (h) as impediments to the running of and completion of prescription periods. Essentially creditor's minority status delays the running and completion of the prescription. Prescription only starts to run once minority ceases to exist³. The age of majority is eighteen (18) years⁴.

[22] Of similar importance and more relevance are the provisions of section 3(1) (a) of the same Prescription Act which read as follows:

“Completion of prescription postponed in certain circumstances—

(l) If-

*(a) the person against whom the prescription is running is a **minor** or is insane, or is a person under curatorship, or is prevented by superior force from interrupting the running of prescription as contemplated in section 4; or*

(b)

(c) the period of prescription shall not be completed before the expiration of a period of three years after the day referred to in paragraph (c).”

Paragraph c referred to herein reads as follows: -

“(c) The period of prescription would, but for the provisions of this subsection, be completed before or on, or within three years after, the day on which the relevant impediment referred to in paragraph (a) or (b) has ceased to exist.”

[23] The plaintiff attained the age of majority in **July 2011**. I accordingly find that prescription of plaintiff's claim would not have started to run before July 2011. The debt was undoubtedly not due before that time, if regard is had to the provision of section 12 of the Act⁵. Accordingly, defendant's pleaded special plea on prescription cannot succeed on that basis.

[24] However, the defendant during the hearing of the matter sought to rely on the fact that (I am paraphrasing) the plaintiff attained the age of majority during July 2011 and the prescription commenced therefrom and accordingly completed three

³ Section 13(1)(a) and (i) of the Prescription Act 68 of 1969.

⁴ Section 17 of Children's Act 38 of 2005.

⁵ Section 12 of Prescription Act No. 68 of 1969 provides as follows: (1) Subject to the provisions of subsections (2) and (3) prescription shall commence to run as soon as the debt is due.

(3) years thereafter before the institution of the section and service of summons. Accordingly, so the version was put to the plaintiff, Summons having been issued on 22 July 2023 and service thereof having been effected on 31 July 2023, plaintiff's claim has been extinguished by prescription. Mr Madokwe, counsel for the plaintiff sternly objected to that version on the simple reason that the plaintiff did not plead those facts or rather did not rely in its papers on those facts as the facts giving rise to a plea of prescription. I agree. Defendant's pleaded case or facts on the special plea of prescription is somewhat different from the one sought to be introduced during the evidence. Defendant's prescription defence was based on the date when the cause of action arose not on the date when the plaintiff attained the age of majority.

[25] Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto⁶. Facts not evidence must be pleaded⁷.

[26] While a pleader's first duty is to allege the facts upon which he relies, his second duty is to set out the conclusions of law which he claims follow from the pleaded facts. Facts and conclusions of law must however be kept separate⁸.

[27] Rule 18(4) of the Uniform Rules of Court referred to above had found expression in many authorities. It is trite that the whole purpose of pleadings is to bring to the notice of the court and the parties the issues upon which reliance is to be placed for rivalling contentions. It has been repeatedly said that the object for the pleadings is to define and ascertain definitely what the question at issue between the parties is, and this object can only be attained when each party states his case with precision. Accordingly, a pleader cannot be allowed to direct the attention of the other party to one issue and then at the trial attempt to canvass another⁹.

⁶ See Rule 18(4) of the Uniform Rules of Court.

⁷ **Moaki v Reckitt & Colman (Africa) Ltd** 1968 (3) SA 98 (A) at 102 A; Erasmus: Superior Courts Practice Vol 2 para D1 -232B.

⁸ Prinsloo v Woolbrokers Federation Ltd 1955 (2) SA 298 (N) at 299 E.

⁹ **Imprefed (Pty) Ltd v National Transport Commission** 1993 (3) SA 19 (A) at 107 C-H; **Absa Bank Limited v Blumberg & Wilkinson** 1995 (4) SA 403 WLD at 409 C-F.

[28] The Supreme Court of Appeal in **Minister of Safety & Security v Slabbert**¹⁰ affirmed the aforesaid position and relied on the judgment of **Moaki** and **Imprefed** referred above and held as follows:

“[11] The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial.² It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.”

[29] In this case, there are no facts pleaded by the defendant premised on the fact that the prescription of plaintiff's debt commenced to run in July 2011 when the plaintiff attained the age of majority. A pertinent case pleaded by the defendant is that the prescription commenced to run on 17 January 2007 when the incident of plaintiff's electrocution took place and accordingly completed and the claim expired on 18 January 2010. The case based on the plaintiff's attainment of age of majority was an afterthought and sought to be introduced by ambush.

[30] Theron JA (as she then was) in **Fischer v Ramahlele**¹¹ held that:

“[13] Turning then to the nature of civil litigation in our adversarial system it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for ‘it is impermissible for a party to rely on a constitutional complaint that was not pleaded’. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for

¹⁰ **Minister of Safety & Security v Slabbert** 2010 (2) ALLSA 474 (SCA) para 11.

¹¹ **Fischer v Ramahlele** 2014 (4) SA 614 (SCA) at 620 – 621 C para 13.

the parties to identify the dispute and for the court to determine that dispute and that dispute alone.”

The Constitutional Court affirmed and relied on this decision in ***Public Protector v South African Reserve Bank***¹².

[31] There are, however, instances in which a party may be allowed to rely on an issue which was not covered by the pleadings¹³. A court is not bound by pleadings if a particular issue was fully canvassed during the trial by both parties¹⁴. The next issue is whether this issue was fully canvassed by both parties at the trial or in evidence.

[32] When the defendant's witness, Mr Malinge was giving evidence being led by defendant's counsel, he did not say anything at least about plaintiff's age. The witness testified at length about what happened on 17 January 2007, which is the date of incident, and what he subsequently did for purposes of igniting defendant's investigation of that incident.

[33] It is only during cross-examination that plaintiff's age was introduced to the witness by plaintiff's counsel to show that at the time of accident the plaintiff was a young village boy who left school after having passed Standard 5 and accordingly lacked cognitive abilities to know the identity of the debtor and the facts giving rise to the debt. That was as far as the issue of plaintiff's age was introduced by plaintiff's counsel in cross-examination of defendant's witness. That line of questioning still had to do with the case made out in the special plea about the prescription which has been have been alleged to have commenced on 17 January 2007 or thereabout.

[34] It was during plaintiff's case, after defendant's witness had been excused that defendant's counsel in his cross-examination of plaintiff attempted to canvass a

¹² ***Public Protector v South African Reserve Bank*** 2019 (6) SA 253 CC para 234; ***Damons v City of Cape Town*** 2022 (10) BCLR 1202 CC para 117.

¹³ ***South British Insurance Co. Ltd v Unicorn Shipping Lines (Pty) Ltd*** 1976 (1) SA 708 A at 714 G.

¹⁴ ***Minister of Safety & Security v Slabbert*** 2010 (2) ALL SA 474 (SCA) para 12 and 22.

version that the plaintiff attained his age of majority in July 2011 and that debt prescribed three (3) years after. That line of questioning was objected to.

[35] The plaintiff, when he was led by his counsel in chief said nothing about his age of majority and the reason to delay to institute the instant proceedings from that date of age of majority. The gravamen of this evidence was that he became aware of the identity of the debt on 05 June 2023 and he was questioned at length about that.

[36] I therefore have no doubt in my mind that the issue of prescription premised on the fact that the plaintiff attained the age of majority on July 2011 and the prescription commenced to run therefrom was not fully canvased. Accordingly, on this basis I cannot find in favour of the defendant.

[37] In conclusion, I agree with the defendant's counsel's written submissions that *"the prescription special plea is fact based and therefore the issue of the date which prescription began to run is a factual issue which has to be traversed."* A conclusion of law about prescription follow pertinent facts pleaded in the plea, which are about the date of incident, which is the date when prescription allegedly commenced to run.

[38] Having been informed by Theron JA (as she then was) in ***Fischer v Ramahlele***¹⁵ where she held that *"there may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence..."* I requested during hearing of the matter parties to make submissions about the power of court to *mero motu* raise questions of law. No submissions were made on behalf of the defendant. Counsel for the plaintiff held an opinion that the court does not have power to raise point of law as that would amount to creating defence for the other party. I invited parties to submit heads of arguments or written submissions, *inter alia*, dealing with the judgment of ***CUSA v Ta Ying Metal Industries & Others***¹⁶ vis-à-vis the provisions of Section 17(1) of the Prescription Act.

¹⁵ ***Fischer v Ramahlele*** 2014 (4) SA 614 (SCA) para 13.

¹⁶ ***CUSA v Ta Ying Metal Industries & Others*** 2009 (2) SA 204 CC para 67.

[39] Paragraph 67 of the aforesaid judgment is as follows:

“[67] ... Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, mero motu, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality.”

It emerges from plaintiff's papers that he was born on 09 July 1993. It is by the exercise of simple arithmetic calculations that the plaintiff turned eighteen (18) years on 09 July 2011 and became major. It is the Prescription Act that provides that prescription commences to run when minority ceases to exist¹⁷ hence that point is a point of law.

[40] However, that is not the end. Section 17(1) finds application in instances where a special plea has to be raised. I next quote the full text of section 17 of the Prescription Act,

“17. Prescription to be raised in pleadings

- (1) A court shall not of its own motion take notice of prescription.*
- (2) A party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings: Provided that a court may allow prescription to be raised at any stage of the proceedings.”*

[41] These provisions are couched in peremptory terms. If a provision is couched in a negative form, it is to be regarded as peremptory rather than a directory mandate. A statutory requirement construed as peremptory usually need exact compliance for it to have the stipulated legal consequences¹⁸. As a general rule non-compliance with peremptory provision results in nullity¹⁹.

[42] The net effect of the above sentiments is that, if peremptory provisions of section 17(1) of the Prescription Act may be breached any act that may follow may

¹⁷ Section 3 and 13(1)(a) of Prescription Act 68 of 1969.

¹⁸ GM Cockram: Interpretation of Statutes, 3rd Ed page 163.

¹⁹ LAWSA Vol 25 Part 1 page 399 para 366.

not only be unlawful but also be null and void. Even though it is permissible for a court to raise any point that is apparent from the papers, that general principle does not apply in the case of prescription. Section 17(2) of the Prescription Act requires that a special plea with clear and concise facts supporting it must pertinently be raised in the relevant pleading, a plea in this case. The court is expressly prohibited to *mero motu* raise any point relating to prescription if it is not raised in the plea filed of record.

[43] It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. Innes CJ aptly puts it thus:

*“What is done contrary to the prohibition of the law is not only of no effect but must be regarded as never having been done – and whether the lawgiver has expressly so decreed or not, the mere prohibition operate to nullify the act.”*²⁰

This principle pass constitutional muster as the aforesaid judgment was affirmed and heavily relied on by the Constitutional Court²¹. It is the prohibition which operates to nullify the act performed contrary to it. This court is prohibited to *mero motu* raise a point of prescription and deal therewith if not raised in the plea.

[44] Section 165(2) of the Constitution provides:

“The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.”

In interpreting this provision, Jafta J remarked as follows in **Cool Ideas 1186 CC v Hubbard & Another**²²:

“[99] In our democratic order, it is the duty of courts to apply and enforce legislation If the validity of legislation is not impugned, there can be no justification for not enforcing it, let alone giving legal effect to prohibited conduct.”

Applying and enforcing the law includes refraining from doing what the law prohibits and to do what the law prescribes and requires.

²⁰ **Schierhout v Minister of Justice** 1926 AD 99 at 109-110.

²¹ **Cool Ideas 1186 CC v Hubbard & Another** 2014 (4) SA 474 (CC) paras 53, 77, 90 and 91.

²² **Cool Ideas 1186 CC v Hubbard & Another** 2014 (4) SA 474 (CC) para 99.

[45] Court themselves are subject to the fundamental principle of legality as they are bound to uphold the Constitution²³. Courts are constrained by doctrine of legality to exercise only those powers bestowed upon them by the law²⁴.

[46] In the Amalgam of all the circumstances discussed above, I come to a conclusion that special plea of prescription cannot succeed. I see no reason why costs can not follow the result.

Order

[46] In the result I make the following Order:

1. The defendant's special plea of prescription is hereby dismissed.
2. The defendant is hereby ordered to pay all costs occasioned by raising and hearing of the special plea.

A.S ZONO

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the PLAINTIFF:

Instructed by:

ADV MADOKWE

MSITSHANA INC.

NO.47 CUMBERLAND STREET

MTHATHA

TEL:047 004 0031

For the DEFENDANT:

Instructed by:

ADV RUSI

SMITH TATABA INC.

34 STANFORD TERRACE

MTHATHA

TEL: 043 703 1876

EMAIL:ginaf@smothtabata.co.za

²³ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 28; *Cool Ideas 1186 CC v Hubbard & Another* 2014 (4) SA 474 (CC) para 58.

²⁴ *Lester v Ndlambe Municipality* 2015 (6) SA 283 (SCA) para 26.

Matter heard on

18 June 2024

Delivered on

25 June 2024