

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 7470/2022

In the matter between:

M[...] M[...]

PLAINTIFF

And

HENLEY AIR (PTY) LTD

DEFENDANT

JUDGEMENT

KGANYAGO J

[1] The plaintiff has instituted an action against the defendant claiming damages arising out of a helicopter crash that occurred on 6th October 2015. According to the plaintiff's particulars of claim, at the time of the crash the plaintiff was a minor and a pedestrian. Further that prescription paused and started running when the plaintiff reached the age of majority. The plaintiff was born on 8th February 2001, and has reached the age of majority on 8th February 2019.

[2] The defendant is defending the plaintiff's action and has raised a special plea of prescription. In terms of the defendant's special plea, in the ordinary course, the plaintiff's claim would have prescribed on 6th October 2018, being 3 years from 6th October 2015 in terms of section 11(d) of the Prescription

Act, 68 of 1969 (Act). At the time of the incident, the plaintiff was a minor and had attained the age of majority on 8th February 2019. In terms of section 13(1) of the Act, prescription was delayed for one year following the plaintiff attaining the age of majority, being 8th February 2020. The plaintiff's summons was served on the defendant on 20th July 2022. According to the defendant at the time when the summons was served on them, the plaintiff's claim had already prescribed some two years and five months. The plaintiff did not file any replication to the defendant's special plea.

- [3] At the pretrial hearing the parties have agreed that the plea of prescription be separated for hearing prior to the determination of the merits and quantum in terms of Rule 33(4) of the Uniform Rules of Court. The parties' agreement was made an order of court at the commencement of the trial.
- [4] The defendant's only witness to testify was Mokgadi Comfort Raphahlelo. She testified that she is an admitted attorney, employed at Pratt Luyt and de Lange as a professional assistant. Pratt Luyt and De Lange are the correspondent's attorneys of the defendant's attorneys. She is aware of the facts of the plaintiff's case. She is the one who had collected the incident report of the plaintiff's case at Senwabarwana SAPS on 7th February 2024.
- [5] When she went to collect the incident report at the SAPS, she did not make any appointment. She was assisted by colonel Mnisi. Mnisi informed her that the incident report had been created on the same date of the incident which was the 6th October 2015. Mnisi further informed the witness that the report is made available on the same date that it has been requested. Mnisi has also made the entire docket available to the witness for perusal. The witness found that the docket also contained a statement made by the plaintiff to the police on 7th October 2015.
- [6] The witness was cross-examined and she stated that for the members of the public to know about the existence of the incident report they will have to go to the police station. The witness further stated that she will not know that the plaintiff was not aware of who the defendant was until the plaintiff consulted

with her legal representatives. The witness also stated that she will not know whether the defendant had visited the victims of the crash. That concluded the evidence of the defendant and it closed its case.

[7] P[...] E[...] M[...] testified as the plaintiff's first witness. She testified that she is the plaintiff's mother and she knew about the incident of the 6th October 2015. They did not know the owner of the helicopter that was involved in the crash. They knew who the owner was after a long time after they have instructed their attorney to assist them. On they day of the incident the police came to the scene and assisted them in taking the plaintiff to hospital. The defendant never came to the scene of the incident. The defendant never phoned them regarding the incident. The defendant never visited the plaintiff in hospital. They don't even know the defendant.

[8] The witness was cross-examined and she conceded that the plaintiff had made a statement to the police regarding the incident. The witness stated that they have consulted with their attorney before the year 2020 before the plaintiff turned 18 years. The witness stated that she never talked to the police about the incident.

[9] The plaintiff has testified as the second witness for her case. She testified that on 6th October 2015 she was on her way to the shop when a helicopter which was flying towards the mountain crashed and was surprised when she saw herself falling to the ground and could not stand up. Some people came, assisted her and took her to the health centre. Later she was transferred to the hospital. The following day whilst in hospital she was visited by the police who took her statement. At the time of the incident she was still a minor. Her attorney informed her about the details of the defendant during May 2020. Her attorney later reported to them that the defendant had offered to settle her claim in the sum of R150 000.00.

[10] At this stage the plaintiff intended to introduce the defendant's without prejudice letter dated 8th December 2020 in which they have made an offer to the plaintiff's claim. The defendant objected to that arguing that the plaintiff

wanted to prove that the offer had interrupted prescription without the plaintiff having pleaded that in their pleadings. The objection was upheld, and thereafter the parties agreed that the plaintiff will no longer continue leading any further evidence, and also that the defendant will not cross-examine the plaintiff. The parties further agreed that the remaining other issues will be disposed on arguments.

[11] The defendant's counsel had submitted that the plaintiff in her particulars of claim had expressly pleaded that prescription started running when the plaintiff attained the age of majority on 8th February 2019. However, in the opening address and in the plaintiff's heads of arguments the plaintiff submits that she only acquired knowledge of the debtor's identity in May 2020, implying that prescription only started running on that date. The defendant submit that the two versions prejudice the defendant in that the lack of clarity regarding the date on which prescription started to run means that the defendant is uncertain about the case that it is expected to meet.

[12] The defendant argues that the plaintiff's claim must fail on both versions. In the first pleaded version, the plaintiff pleaded that the only reason that prescription did not begin to run on the date of the accident was that the plaintiff was a minor and prescription had paused and started running when plaintiff reached the age of majority on 8th February 2019. Section 13(1) of the Act provides that if a creditor is minor, and the period of prescription would ordinarily be completed before or within one year after the day on which the relevant impediment has ceased to exist.

[13] The defendant further submits that the second new version also lacks merits. The plaintiff had testified that she only learned about the defendant's identity in May 2020. That with this new version the plaintiff seeks to argue that her claim would have only prescribed in 2023. The defendant submits that the new version contradicts the pleaded version of events. The plaintiff cannot be permitted to plead and thus unequivocally admit that prescription started running on 8th February 2019, but, at trial, change this to a new date of May 2020. This version was not pleaded and thus the plaintiff cannot rely on it, and

that the parties are bound by their pleadings. That the plaintiff had ignored the express wording of section 12(3) of the Act of which the deeming provision is applicable in the plaintiff's case.

[14] On the issue of costs, the defendant had made a tender that should the special plea be upheld, it is not seeking a costs order against the plaintiff, but that the tender will not be applicable to further processes should the plaintiff decide to appeal.

[15] The plaintiff's counsel had submitted that the defendant's special plea was initially based on sections 13 and 14 of the Act and not on section 12. The court is required to deal with all the evidence that has been led. That the question is when did the plaintiff become aware of the identity of the defendant, which the plaintiff submits that it is the 20th May 2020. The reasons the plaintiff is saying that the defendant had prevented the plaintiff from knowing its identity is that the defendant never visited the scene of the accident, and the aircraft accidents are unusual. The plaintiff is only a matriculant and would not have known about the existence of the civil aviation regulatory authority. The police only took the plaintiff's statement but never advised the plaintiff to institute a civil claim.

[16] The plaintiff further submitted that the only time she became aware of the identity of the defendant was on 20th May 2020, and that makes prescription of her claim to run up to the 5th October 2023. The plaintiff had led evidence and was not cross-examined, and therefore her version remained unchallenged. That the plaintiff was misled by the defendant when it made an offer to settle her claim, and that led to the plaintiff to relax and thought that her claim will be settled. The plaintiff also relied on the case of *Macolm v Premier, Western Cape Government 2014 (3) SA 177 (SCA)*. On the issue of costs, the plaintiff's counsel submitted that the plaintiff is unemployed and that should the special plea be upheld, each party to pay her or its costs.

[17] This court is called upon to determine whether the plaintiff's claim has prescribed. It is common cause and admitted by the parties that (i) the

plaintiff's cause of action arose on 6th October 2015; (ii) plaintiff was born on 8th February 2001; (iii) at the time of the alleged incident plaintiff was 14 years of age; (iv) the plaintiff turned 18 years on 8th February 2019 and that is the date on which she attained the age of majority; and (v) summons was issued on 8th July 2022 and served on the defendant on 20th July 2022.

[18] Section 12 of the Act read as follows:

“(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.

(2) If the debtor wilfully 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.

(4) Prescription shall not commence to run in respect of a debt based on the commission of an alleged sexual offence as contemplated in sections 3, 4, 17, 18(2), 20(1), 23, 24(2), 26(1) and 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, during the time in which the creditor is unable to institute proceedings because of his or her mental or psychological condition”.

[19] In *Minister of Finance and Others v Gore*¹ Cameron JA et Brand JA said:

“This court has, in a series of decisions, emphasised that time begins to run against the creditor when it has minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes

¹ 2007 (1) SA 111 (SCA) at 119 J-120A

aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case 'comfortably'".

[20] The plaintiff's pleaded case is that at the time of the incident, the plaintiff was still a minor, and therefore prescription had paused and started running when the plaintiff reached the age of majority. It is common cause that the plaintiff had reached the age of majority on 8th February 2019.

[21] Section 13(1) of the Act read as follows:

"If-

(a) the creditor is a minor or insane or 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); or

(b) the debtor is outside the Republic; or

(c) the creditor and debtor are married to each other; or

(d) the creditor and debtor are partners and the debt is a debt which arose out of the partnership relationship; or

(e) the creditor is a juristic person and the debtor is member of the governing body of such juristic person; or

(f) the debt is the object of a dispute subject to arbitration; or

(g) the debt is the object of a claim filed against the estate of a debtor who is deceased or against the insolvent estate of the debtor or against a company in liquidation or against an applicant under the Agricultural Credit Act, 1966 (Act No, 28 of 1966); or

(h) the creditor or the debtor is deceased and an executor of the estate in question has not yet been appointed; and

(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist.

the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)".

[22] In *Shoprite Checkers (Pty) Limited v Mafate N.O.*² Madlanga J said:

"Paragraph (i) provides that if the relevant period of prescription would, but for the impediments contained in section 13(1)(a) to (h), be completed before or on, or within one year after, the day on which the relevant impediment has ceased to exist, the period of prescription shall not be completed before a year has elapsed after the day of cessation of the impediment. That means if, on or before the date of cessation of the impediment, the period of prescription would have been completed, the claimant has only one year – not three – within which to institute proceedings. Even where the period of prescription would have been completed within a year after the impediment has ceased, the claimant still has a year from the date of cessation of the impediment to bring action. If, by the date of cessation of the impediment, the period still remaining was more than a year, the claim must be instituted within that remaining period".

[23] Ordinarily the plaintiff claim would have prescribed 6th October 2018 which is 3 years after the date of the incident. Since the plaintiff was still a minor at the time of the accident, that is the impediment that is envisaged by section 13(1)(a) of the Act, and therefore prescription of her claim was delayed for 1 year after she had attained the age of majority. Ordinarily the plaintiff's claim

² [2024] ZACC 16 (15 August 2024) at para 28

would have prescribed on 8th February 2020. That is also in line with the plaintiff's pleaded case.

[24] The plaintiff's evidence which has been tendered before court and also in the plaintiff's heads of argument are not line with her pleaded case. The plaintiff has testified that she only became aware of the identity of the defendant on 20th May 2020, and argues that it is the day on which prescription started to run. Counsel for the plaintiff has submitted that the defendant's failure to visit the scene of the accident and the plaintiff, amounted to the defendant preventing the plaintiff to know the existence of her claim and the identity of the defendant. Plaintiff's counsel has further submitted that the plaintiff's educational level is that of a matriculant and would not have known about the existence of the Civil Aviation Regulatory Authority. However, all these issues are new and have not been pleaded by the plaintiff. The plaintiff has raised these new issues for the first time in her heads of argument and at the trial of the special plea.

[25] The defendant's plea together with its special was served on the plaintiff's attorneys on 23rd August 2022. The plaintiff has been aware of what the defendant was raising in their special plea from the date of service, and despite that, the plaintiff has failed to file a replication to the defendant's special, or seek an amendment to her particulars of claim.

[26] In *Phakula v Minister of Safety and Security*³ Mocumie JA said:

"It is trite that the whole purpose of pleadings is to define the issues between the parties, to confine evidence of the trial to the matters relevant to those issues, and ensure that the trial may proceed to judgment without either party being disadvantaged by matters not fairly ascertainable from the pleadings. In other words, a party should know in advance, in broad outline, the case they will have to meet at trial".

³ [2020] ZASCA 109 (23 September 2020) at para 12

[27] What the plaintiff has raised during the trial of the special plea is not ascertainable from her pleadings. It seems also as if the plaintiff is not sure of what defence to raise in order to ward off the defendant's special as she had raised more than one defence which does not appear in her pleadings and also without substantiating them. As per the plaintiff's pleaded case, the only impediment to delay the running of prescription was that she was still a minor. The plaintiff's pleadings do not state any other impediment which the plaintiff has encountered after she had attained the age of majority. As the plaintiff's pleadings stand, her claim has prescribed. It follows that the defendant's special plea of prescription stands to be upheld.

[28] In the result the following order is made:

28.1 The defendant's special plea of prescription is upheld and plaintiff's claim is dismissed.

28.2 Each party to pay its/her own costs.

KGANYAGO J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
LIMPOPO DIVISION,
POLOKWANE

APPEARANCES:

Counsel for the plaintiff

: Moitsi MA

Instructed by

: Moitsi and Associates

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Instructed by

: Bowman Gilfillan Inc

Date heard : 22nd August 2024

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POLOKWANE HIGH COURT