

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: 1159/2018

Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO

In the matter between:

ABEL DANIËL FERREIRA

Plaintiff

and

THE MINISTER OF SAFETY AND SECURITY

1st Defendant

CHRISTO PETRUS HORAK

2nd Defendant

Coram: Lever J

JUDGMENT

Lever J

1. The main claim is a claim for damages arising from the conduct of the defendants in seizing and subsequently declaring a commercial vehicle belonging to the plaintiff forfeit to the State. The said vehicle was used to convey granite slabs from a quarry to a particular client for an agreed fee for each kilometre travelled. The said agreement was for a period of five years.

2. The relevant vehicle was seized in the vicinity of Upington. Approximately a year after such seizure the said vehicle was declared forfeit to the state. Subsequently, an application to review and set aside the forfeiture of this vehicle was brought in this court. Such review application was successful, and the said forfeiture order was set aside. The vehicle was returned to the plaintiff approximately ten months after the judgment in the review application.
3. When the said vehicle was returned to the plaintiff, it is their case that the vehicle had been damaged whilst in storage during the period after it was seized and after it was forfeited to the state. The said vehicle needed to be transported to a repair centre and undergo certain repairs before it could be utilised to again generate an income.
4. The plaintiff has two separate claims for damages against the defendants arising from these facts. The first claim is a claim for the income lost from the date of seizure up to the date the repairs on the vehicle had been effected and the vehicle was again suitable and fit to generate an income. The second claim is for the cost of transporting the vehicle from the place where the defendants stored the vehicle to the place where it could be repaired and for the costs of such repairs.
5. The defendants pleaded that both claims had become prescribed by the passage of time in a Special Plea. The plaintiff filed a Replication. The Particulars of Claim, the Special Plea and the Replication were amended on occasion. The plaintiff and the defendants agreed as to which documents constituted the pleadings and this did not create a difficulty.
6. The plaintiff and the defendants wanted the issue of prescription to be decided before the matter proceeded to trial on the merits. They agreed to a stated case as contemplated in Rule 33 of the Uniform Rules of Court (the Rule/s). A statement of agreed facts was filed as contemplated by the rule referred to herein.

7. The said statement of agreed facts sets out the dates relating to the seizure, the forfeiture declaration, the date of the review judgment as well as the date that the vehicle was returned to the plaintiff along with certain other agreed facts and a summation of the legal issues involved from the perspective of the different parties concerned.
8. It is probably best and most convenient to set out the statement of agreed facts verbatim. Certain of the pleadings are incorporated into the statement of agreed facts by reference. Such pleadings will not be quoted herein and only passages directly relevant to an issue being considered by this court will be referred to as necessary.
9. The statement of agreed facts was signed by a duly qualified legal representative of each of the respective parties and reads as follows:

“**WHEREAS** the Plaintiff and Defendants agreed that the Special Plea pertaining to prescription may be determined by way of a special case on the following agreed facts:

1. The Plaintiff is **ABEL DANIËL FERREIRA** t/a **BOSPRUIT TRANSPORT**, a major male businessman, conducting a transport business from 2[...] C[...] Street, Rustenburg.
2. The First Defendant is **THE MINISTER OF POLICE c/o THE STATE ATTORNEY** Woolworths Building, 1st floor, corner of Chapel and Lennox Street, Kimberley.
3. The Second Defendant is **CHRISTO PETRUS HORAK** a Lieutenant General in the employ of the South African Police Service and stationed at The Vehicle Identification Section, Upington.
4. 12 October 2009 (sic) and at Upington, employees of the First Defendant acting within the scope of their employment purported to seize the vehicle driven by the Plaintiff's driver being an International

Eagle 9700i motor vehicle with registration C[...] 1[...] [...] and Chassis number: J[...] 5[...] 9[...] (hereinafter referred to as "**the vehicle**"), whilst transporting goods.

5. The Defendants kept the said vehicle in their possession from 12 October 2009 until 13 July 2016.
6. On 15 October 2010 the Defendants purported to declare the vehicle forfeited to the State.
7. On 11 September 2015 this Honourable Court set aside the Defendants' purported forfeiture in terms of a Judgment and Order, annexed hereto marked "**A1**" and "**A2**", the contents of which are incorporated herewith.
8. The Defendants applied for leave to appeal, which was refused on the 4th of February 2016. The Judgment and order dated 19 February 2016 are attached as annexures "**B1**" and "**B2**".
9. Due to the Defendants' purported seizure and forfeiture of the vehicle, the Plaintiff did not have access to its vehicle until its return to the Plaintiff on 13 July 2016. The Plaintiff could not utilize the vehicle in its transport business which is conducted from Rustenburg.
10. The Plaintiff's claims are based on the alleged loss of income suffered and the alleged damages to the vehicle discovered by the Plaintiff on its return to the Plaintiff by the Defendants.
11. The Plaintiff issued Summons on 21 May 2018 and served same on 15 June 2018. The claim set out in the Summons was for the loss of income from the period 12 October 2009 to 30 September 2016 and damages caused to the vehicle whilst it was in the possession of the First Defendant.

LEGAL ISSUES

12. Wherefore the following questions of law require adjudication:
 - 12.1. The Defendants pleaded prescription in terms of Section 12(1) of the Prescription Act 68 of 1969 (hereinafter referred to as "**the Act**");
 - 12.2. The Defendants contend that the debt shall not be deemed due until a creditor has knowledge of the identity of the debtor and of the facts from which the debt rises (sic), provided that the creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care; and
 - 12.3. The Act provides further that the debt shall become extinguished after the lapsing of a period of 3 (three) years from the date on which the debt becomes due;
13. Taking into consideration the date of service of the Summons as well as the date upon which the vehicle was allegedly unlawfully seized and declared forfeited to the State, the Plaintiff should have at all relevant times have knowledge about the identity of the debtor as well as the facts from which the debt arose.
14. As the cause of action/the date the debt become (sic) due was on 12 October 2009 when the vehicle was seized, alternatively when the vehicle was declared forfeited to the State on 15 October 2010, such debt has become prescribed;
15. The Defendants aver that the Plaintiff ought to have issued and served Summons within three years from the date the debt became due. As Summons was only served on 15 June 2018, the Defendants aver that the debt has become prescribed.
16. The Defendants' Special Plea and Plea is incorporated herewith by

reference thereto attached as annexures "C" (sic)

17. The Plaintiff contends that the Defendants conduct constitutes a deprivation of the Plaintiff's undisturbed and peaceful possession of the vehicle which constituted a continuous wrong and which occurred from 12 October 2009 until 13 July 2016. The Plaintiff contends that they only became aware of the facts on which the debt arose after 13 July 2016, being the date upon which the vehicle was returned by the Defendants in terms of a Court Order and the Plaintiff could only become aware of its damage once the vehicle was returned.
18. Until the Court has reviewed and set aside the Defendants' decision to seize and forfeit the Plaintiff's vehicle, the Plaintiff could not obtain possession of its vehicle.
19. The Plaintiff contend (sic) that it issued Summons within three years from the date of 13 July 2016, being the date upon which it became aware of its claim.
20. The Plaintiff herewith incorporate (sic) by reference thereto his reply to the Defendants' Special Plea of prescription and the Particulars of claim. attached as annexures "D" (sic)

The parties will file full heads of argument setting out their legal submissions."

10. The parties did indeed file Heads of Argument. The arguments set out by the plaintiff in the Heads of Argument were not always consonant with the issues as defined in the stated case quoted verbatim above. However, the facts which form the basis of such submissions remain unchanged and undisputed. What this court needs to determine is whether the plaintiff's claims or portions of such claims have become prescribed by virtue of the provisions of Chapter III of the Act.

11. It is convenient to start with the plaintiff's claim relating to the damages to the vehicle and the costs related to transporting the vehicle so that it could ultimately be repaired.
12. Initially, both the defendant and the plaintiff sought to treat this aspect of the plaintiff's claim as an integral part of the plaintiff's claim for loss of income. This suited the different narratives that they were respectively promoting in respect of the prescription or otherwise, of the loss of income claim.
13. However, after debating this issue with both Ms De Kock who appeared for the defendants and Mr Ackerman who appeared for the plaintiff, they both conceded that the claim for the transport and repair of the vehicle was a separate 'debt' or claim. That in terms of section 12(3) of the Prescription Act¹ (the Act) the 'debt' would only have become due once the plaintiff had become aware of the damage to the vehicle that occurred in storage and the need to incur the expense of transporting the vehicle once the vehicle was restored to plaintiff's possession. On the facts as agreed to and set out above, this could only have been on the 13 July 2016.
14. According to the statement of agreed facts, the vehicle was returned to the plaintiff on the 13 July 2016. Also, in terms of the statement of agreed facts summons in this matter was served on both defendants on the 15 June 2018. Accordingly, the relevant period of three years contemplated in section 11(d) of the Act, in respect of the claim for the necessary transport and repairs, had not lapsed from the debt becoming due to the date of service of the summons. Accordingly, this claim relating to the transport and repair of the vehicle has not prescribed.
15. In dealing with the claim for loss of income, Ms De Kock argued on behalf of the defendant that the applicable prescription period of three years contemplated in section 11(d) of the Act begins to run when the plaintiff had knowledge of the minimum 'facts' required to establish their claim. That a distinction needs to be

¹ Act 68 of 1969.

drawn between facts and legal conclusions that might be drawn from such facts. In making this submission, Ms De Kock relied on the following authorities: *Matokonya v Minister of Police*²; *Minister of Finance & Others v Gore N.O.*³; and *Yellow Star Properties 1020 (Pty) Ltd v MEC Department of Development Planning and Local Government, Gauteng*⁴.

16. Ms De Kock submitted, in the context of extinctive prescription, wrongfulness in a delictual claim is not a fact, but a legal conclusion. As authority for this contention Ms De Kock relies upon the following cases: *Matokonyana's case*⁵; and the case of *The President of the Republic of South Africa & Another v Tembani & Others*⁶.

17. Ms De Kock further submitted that legal certainty is not required for extinctive prescription to start running. As authority for this contention Ms De Kock relied upon the judgment of Moseneke J (as he then was) in the matter of *Eskom v Bojanala Platinum District Municipality and Another*⁷.

18. On the facts, Ms De Kock submitted that, the plaintiff himself pleaded in a way that demonstrated that he had knowledge of the facts that were required to prosecute his claim on the 12 October 2009 being the date on which the relevant vehicle was seized near Upington.

19. In support of this contention, Ms De Kock refers to paragraphs 8 and 11 of the latest amended Particulars of Claim dated the 6 June 2024. Paragraphs 8 and 11 of the said Particulars of Claim reads as follows:

“8. On 12 October 2009 and until 13 July 2016 the Defendants unlawfully deprived the Plaintiff of his possession by seizing the vehicle at or near UPINGTON.”

AND

² 2018 (5) SA 22 (CC) at para [36].

³ 2007 (1) SA 111 (SCA) at para [17].

⁴ 2009 (3) SA 577 (SCA) at page 590H-I.

⁵ Footnote 2 above at paras [44] to [45].

⁶ [2024] ZACC 5 (6 May 2024) at para [86].

⁷ 2003 JDR 0498 (T) at para [16].

“11 When the seizure by Warrant Officer Tiedt and subsequent unlawful deprivation by the Second Defendant occurred, the defendants knew or ought to have known:

11.1 That the vehicle was used and ought to have been used by the Plaintiff to undertake transport for a (sic) remuneration.

11.2 The unlawful deprivation of the vehicle will interrupt the plaintiff's business of undertaking transport.

11.3 Such interruption will cause Plaintiff to suffer a loss of income.

11.4 That the storage of the vehicle for the period between 12 October 2009 to 25 May 2016 will damage the vehicle and render it unroadworthy.

11.5 That the repairs to the vehicle would have to be undertaken by the Plaintiff, in order to restore the vehicle to roadworthiness in order to be used for transport purposes.”

20. Ms De Kock submitted that it is evident from the pleadings quoted above that from the date the vehicle was seized, the plaintiff had knowledge of the facts required to pursue their claim.

21. Insofar as it goes, Ms De Kock's submissions are correct. However, when I pressed her as to what changed when the forfeiture order was issued in respect of the relevant vehicle, she maintained that nothing had changed. Her position was that both the seizure and the forfeiture orders were administrative steps. She argued that it was still a single incident upon which the plaintiff's claim was based. That the plaintiff had knowledge of the essential facts that made up the basis of their claim on the 12 October 2009. That by the time summons was served on the 18 June 2018 any claim that the plaintiff might have had, had prescribed by virtue of the provisions of section 11(d) of the Act.

22. Mr Ackerman for the plaintiff initially argued that the seizure and forfeiture of the relevant vehicle was a unitary or single ongoing injury to the plaintiff. That the plaintiff could only institute the action once the ongoing injury had been brought to an end by the judgment reviewing and setting aside the forfeiture order. That prescription would only run from the date that the application for leave to appeal the review judgment was refused alternatively from the date that the possession of the vehicle was restored to the plaintiff.

23. I similarly pressed Mr Ackerman as to what changed when the forfeiture order was made. Initially Mr Ackerman maintained that it was an administrative action that deprived plaintiff of his right, title and interest in the vehicle which would only be restored once the forfeiture order had been reviewed and set aside. I did not think that the issue of the plaintiff's right title and interest in the said vehicle was the answer to the problem at hand. As I believed this was a critical issue that needed to be answered one way or the other, I gave Mr Ackerman a short adjournment to gather his thoughts on this question.

24. Mr Ackerman's response after the adjournment changed my perspective on the matter. Mr Ackerman referred me to the word 'debt' as it is used in Chapter III of the Act. He pointed out that 'debt' as it is used in the said Chapter of the act has two elements to it. Firstly, an obligation that must be fulfilled or paid, depending on the circumstances. Secondly, a duty to fulfil that obligation or make the relevant payment as circumstances dictate. Mr Ackerman submitted that after the forfeiture order the defendants were no longer obliged to pay plaintiff any damages he suffered whilst the forfeiture order was in force.

25. Mr Ackerman submitted that in these circumstances prescription could not run against the plaintiff as the defendants would not be obliged to pay the plaintiff's claim while the forfeiture order stood. In other words, no debt as contemplated in Chapter III of the Act existed whilst the forfeiture order was in place. That this remained the position until the forfeiture order was reviewed and set aside.

26. It is necessary to round out Mr Ackerman's argument before proceeding to consider the meaning ascribed to the word 'debt' by Mr Ackerman in the context

of Chapter III of the Act. Mr Ackerman proceeded to argue that the forfeiture order had legal effect until it was set aside. As authority for this proposition Mr Ackerman referred me to a passage in the judgment of *Oudekraal Estates (Pty) Ltd v The City of Cape Town & Others*⁸. The relevant passage of the *Oudekraal* judgment reads as follows:

“For those reasons, it is clear, in our view, that the Administrator’s permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting the extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator’s approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator’s approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.”⁹

27. Turning now to consider the meaning of the word ‘debt’ in the context of Chapter III of the Act. As a point of departure, it must be noted that the Prescription Act intrudes on the right of access to courts. When interpreting the word ‘debt’, in

⁸ 2004 (6) SA 222 (SCA).

⁹ *Oudekraal* judgment., above (footnote 8)., at para [26].

accordance with section 39(2) of the Constitution¹⁰ the interpretation to be used is the one that is least intrusive on the right to access the courts.¹¹

28. The word 'debt' is not defined in the Act. Also, there is no definition of the word 'debt' specific to Chapter III of the Act.

29. Next, in the context of Chapter III of the Act, it seems that the use of the word 'debt' in that chapter contemplates a claim against the debtor either to perform an obligation or pay an amount of money. This aspect of the meaning to be ascribed to the word debt is supported by the use of the word 'creditor' in association with the word 'debt' in sections 12 and 13 of Chapter III of the Act.

30. Also, in the context of Chapter III of the Act, the word 'debt' also contemplates a duty to fulfil the relevant obligation or pay the relevant amount of money claimed. This aspect of the meaning to be ascribed to the word debt is supported by the use of the word 'debtor' in association with the word 'debt' in sections 12 and 13 of Chapter III of the Act.

31. Accordingly, the word 'debt' in the context of Chapter III of the Act encompasses both the concept of having a claim and the concept of an obligation to discharge such claim.

32. The majority and the minority judgment in the Makate case seemed to accept and apply the definition provided in the *New Shorter Oxford Dictionary*, which they quoted as being:¹²

- "1. Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another.
2. A liability or obligation to pay or render something; the condition of being so obligated."

¹⁰ The Constitution of the Republic of South Africa., Act 108 of 1996.

¹¹ Makate v Vodacom Ltd 2016 (4) SA 121 (CC) at para [91].

¹² Makate case., above., at pp 149H and 188F

33. The above dictionary definition also encompasses the concepts of having a claim on the one part and having an obligation to discharge that claim on the other part.

34. That being so, I think Mr Ackerman is correct whilst the forfeiture order stood, there can be no question of the defendants having an obligation to pay the plaintiff's claims. It follows then that Chapter III of the Act can have no application whilst the forfeiture order stood. Extinctive prescription could not run whilst the forfeiture order was in place.

35. This has several consequences. Firstly, from the date of seizure, being the 12 October 2009, to the date that the vehicle was declared forfeit. There was both a claim and an associated obligation hence a debt as contemplated in Chapter III of the Act. Mr Ackerman argued, without conviction, that the review application interrupted prescription under section 15 of the Act. In my view this cannot be correct. Section 15 of the Act contemplates "any process" whereby the creditor claims payment of the debt. The review application did not by any means contemplate the payment of the debts currently claimed. Accordingly, the plaintiff's claim for the loss of income for the period commencing from the 12 October 2009 up until the 14 October 2010 has become prescribed as contemplated in section 11(d) of Chapter III of the Act. To this extent, the defendants' special plea succeeds.

36. Secondly, the claim for the period from the 15 October 2010 up until the vehicle was returned to service to generate an income has not become prescribed because the existence of the forfeiture order meant that the defendants were under no obligation to pay the plaintiff's claim whilst such forfeiture order existed as a fact. Under these circumstances Chapter III of the Act could not and did not operate against the plaintiff because no debt as contemplated by Chapter III of the Act was due.

37. I do not have to decide whether the extinctive prescription began to run again from the day that the judgment in the review was handed down or from the date that the application for leave to appeal that judgment was dismissed. As

summons being served on the 15 June 2018, both dates fall within the three-year period contemplated by section 11(d) of the Act. This renders a decision on this question unnecessary. The claim for loss of income from the 15 October 2010 until the relevant vehicle was repaired and returned to service by the plaintiff has not prescribed.

38. What remains is to determine the question of costs. In my estimation the defendants have only been 20% successful in pursuing their Special Plea. In the circumstances the plaintiff is entitled to 80% of their costs. The question raised before this court was a novel one. Senior counsel drew up the plaintiff's Heads of Argument. Given the novelty I think the use of senior counsel to draw up the plaintiff's Heads of Argument was reasonable. Also based on the novelty of the question put before the court, I believe these costs should be taxed on scale C. Such costs to include the costs of senior counsel where senior counsel was actually engaged.

In the circumstances the following order is made:

- 1) The plaintiff's claim for loss of income generated from the relevant vehicle for the period from 12 October 2009 up until the 14 October 2010 has become prescribed. To this extent the Special Plea is upheld.
- 2) The plaintiff's claim for loss of income from the 15 October 2010 up until the vehicle was returned to service has not prescribed. To this extent the Special Plea is dismissed.
- 3) The plaintiff's claim for transport of and repairs to the relevant vehicle has not prescribed. To this extent the Special Plea is dismissed.
- 4) The plaintiff is entitled to 80% (eighty per centum) of their costs in respect of the special plea and the stated case. Such costs are to be taxed on scale C and are to include the costs of senior counsel where senior counsel was actually engaged.

Lawrence Lever

Judge
Northern Cape Division, Kimberley

Representation:

For The Plaintiff: Mr Ackermann

Instructed by: Van De Wall Inc.

For The Defendants: Adv D De Kock

Instructed by: Office of the State Attorney

Date of Hearing: 31 July 2024

Date of Judgment: 16 August 2024