



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Appeal Case No: AR373/2023

In the matter between:

J P CHETTY

APPELLANT

and

GONASAGREE PILLAY

RESPONDENT

ORDER

On appeal from: Magistrates' Court (Chatsworth)

1. The appeal succeeds with costs.
2. The order of the court *a quo* is set aside and replaced with the following order:
'The special plea of prescription is dismissed with costs.'
3. The matter is remitted to the court *a quo* for the determination of the further and outstanding issues at trial.

JUDGMENT

Ngqanda AJ (Chetty J concurring):

Introduction

[1] The appellant, a businessman, is the brother of the respondent. The respondent was married in community of property to the late Mr K Pillay, who passed away on 25 November 2009.¹

[2] During the lifetime of Mr K Pillay, the appellant had successfully obtained two default judgments against him and the respondent jointly and severally and another judgment by default solely against Mr K Pillay. The judgments were obtained over various periods and for different amounts under three case numbers as follows:

- (a) Case number 57362/2006: Judgment for R6 912, obtained against Mr K Pillay on 3 April 2007;
- (b) Case number 2319/2007: Judgment for R30 000 plus costs of R700.92, obtained against Mr K Pillay and the respondent on 29 January 2008; and
- (c) Case number 3856/2008: Judgment for R23 846.69 plus costs of R716.88, obtained against Mr K Pillay and the respondent on 13 October 2008.

[3] Consequently, and as a result of the respondent and her husband being married in community of property, the respondent is jointly and severally liable² for the payment of the judgments obtained by default by the appellant.³

[4] Following the rejection of the appellant's claim lodged with the estate of Mr K Pillay for payment of the amounts reflected under the judgments, the appellant, on 10 April 2017, instituted an action in the court *a quo*, in which the respondent was cited in both her personal capacity and as the executrix of her husband's estate for payment of the amounts in respect of the three judgments.

¹ The issues of the respondent being married in community of property to Mr K Pillay and his date of passing, being 25 November 2009, were conceded and accepted by the parties at the hearing of the matter in the court *a quo* on 19 September 2022 (see pages 66 and 68 of the record).

² Section 17(5) of the Matrimonial Property Act 88 of 1984 permits, where a debt is recoverable from a joint estate, for the spouse who incurred the debt or both spouses to be jointly sued and where a debt has been incurred for necessities for the joint household, for the spouses to be sued jointly and severally.

³ The appellant, in his particulars of claim, claims a total of R63 351.13 against the respondent in her personal capacity, as well as in her capacity as the executrix, jointly and severally, together with interest at 15.5%.

[5] The respondent, in her plea dated 27 August 2019, raised two defences, namely a special plea of prescription⁴ and a special plea of *lis pendens*. The special plea of *lis pendens* was eventually abandoned at the hearing of the matter.

[6] At the commencement of the trial on 19 September 2022, the court *a quo* heard argument in relation to the special plea as raised by the respondent. On 14 December 2022, the court *a quo* upheld the defence of prescription and granted costs on an attorney and client scale, including costs of counsel against the appellant.

[7] The current appeal is against that the whole order of the court *a quo*.

Issues on appeal

[8] The appeal concerns itself with four aspects, namely:

- (a) whether the three judgments obtained have prescribed in terms of section 11(a) of the Prescription Act 68 of 1969 (the Prescription Act);
- (b) whether the appellant is entitled to judgment against the respondent in her personal capacity as well as in her capacity as the executrix of the estate of her husband, as the indebtedness was not admitted in the estate by the respondent;
- (c) whether judgment ought to have been entered in favour of the appellant for the amount of R6 912, being the amount granted under case number 57362/2006 against Mr K Pillay; and
- (d) whether the costs on an attorney and client scale which were awarded, were judicially considered.

Analysis

[9] It is important to consider the reasoning of the court *a quo* in arriving at its decision to uphold the special plea of prescription. The court *a quo* provided the following analysis for its decision:

⁴ The special plea of prescription was not adequately pleaded in the respondent's plea. However, the basis for the special plea became apparent during the hearing of the matter in the court *a quo*. The ground relied upon for raising the defence of prescription was that Mr K Pillay had died on 25 November 2009 and that in terms of section 13(1)(i) of the Prescription Act 68 of 1969, the period of prescription is extended for one year where the claim relates to the debt filed against a deceased's estate. Therefore, it was contended that summons ought to have been issued and served by 24 November 2013. The appellant's summons was served in April 2017 and consequently the claim had prescribed.

'With much respect to the ethics demonstrated by counsel for the plaintiff [sic] she correctly [sic] my view conceded that

- a. The case of the plaintiff is bad in law; and
- b. That the plaintiff took the wrong cause of action.'

[10] Unfortunately, nothing further is provided in the judgment, apart from a reliance on the supposed concessions made by the appellant's counsel at the time of upholding the special plea. This court in any event is not bound by legal concessions made which are bad in law.⁵ The judgment of the court *a quo* fails to decide the issue of prescription as raised, but merely relies on the concessions which have no bearing on the issue of prescription. The issue whether or not the appellant's claim has indeed prescribed remained unanswered.

[11] Nonetheless, this court is tasked with considering, amongst the other grounds of appeal, whether or not the three default judgments obtained against the respondent and Mr K Pillay have prescribed.

[12] By virtue of the respondent and her late husband being married in community of property, they shared a joint estate which upon the death of Mr K Pillay, fell to be wound-up, as provided for in the Administration of Estates Act 66 of 1965 (the AEA). The executor, who is the respondent, was then tasked with the duty of winding-up the joint estate. As executrix, she had an obligation to publish an advert calling upon creditors who held claims against the joint estate to lodge their claims.⁶ As executrix, she was entitled to reject claims. A creditor whose claim had been rejected is not deprived of his/her common law right to enforce his/her claim against the deceased by way of an action against his estate.⁷

[13] There was no evidence placed before the court *a quo* as to when the respondent was appointed executrix nor was there evidence in respect of when the appellant's claim was rejected by the respondent. Without knowledge of when the

⁵ *Matatiele Municipality and others v President of the RSA and others* 2006 (5) SA 47 (CC) para 67; See also *Seebed CC t/a Siyabonga Convenience Centre v Engen Petroleum Limited* [2022] ZACC 28 para 49.

⁶ Section 29(1) of the AEA.

⁷ *Nedbank Ltd v Steyn and others* [2015] ZASCA 30; 2016 (2) SA 416 (SCA) paras 10-12.

respondent was appointed as the executrix, it is impossible to establish when prescription commenced to run. The date of her appointment is significant to the issue of prescription, as is the date of the rejection of the appellant's claim by the respondent. Nonetheless, the appellant, on the rejection of his claim by the respondent, instituted legal proceedings in April 2017 for judgment in respect of the three judgments obtained against the respondent and Mr K Pillay.

[14] It is accepted that prescription of a debt is three years in terms of section 11(d) of the Prescription Act. However, the period of prescription applicable to a judgment debt is 30 years.⁸ The three judgments held by the appellant fall under section 11(a), and therefore subject to the 30 year prescription period.⁹ However, due to the appellant instituting action proceedings in respect of the three judgments after the rejection of his claim against the estate, that process is considered as a claim against the estate, with a different prescription period applicable. In the circumstances of a debt claimed against the estate of a debtor who is deceased, or where the debtor is deceased and an executor has not yet been appointed, the prescription period is three years, with the completion of prescription being delayed for a year.¹⁰

[15] Section 13(1)(i) of the Prescription Act provides as follows:

'(1) If -

(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)...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).'

[16] In other words, a debt claimed from an estate of a deceased person or where the debtor is deceased and an executor has not yet been appointed, the debt ordinarily prescribes after three years, like any other debt in terms of section 11 of the Prescription Act, but the completion of prescription of such debts is delayed by a year from the day an executor is so appointed. With respect to the present case,

⁸ Section 11(a)(ii) of the Prescription Act.

⁹ The appellant is able to execute on the three judgments at any stage within the 30-year period provided for in section 11(a) of the Prescription Act before prescription kicks in.

¹⁰ Section 13(1)(g), (h) and (i) of the Prescription Act.

prescription could not have been completed before a year had elapsed after the date of appointment of the respondent as the executrix of Mr K Pillay's estate in respect of the summons issued by the appellant in 2017.

[17] It follows then that the running of prescription continues on a debt but is extended only for a year after the date of the appointment of an executor. The passing of Mr K Pillay, in this instance, is the impediment, as referred to in section 13(1)(i) of the Prescription Act and the appointment of the respondent as the executrix to the deceased's estate, is then the end of the impediment, and thus prescription is completed a year after the day the impediment ceased to exist in terms of section 13(1)(h), read with section 13(1)(i) of the Prescription Act.¹¹

[18] In *Shoprite Checkers (Pty) Ltd v Mafate NO*,¹² the court provided the following clarity on how the period of prescription runs and is contemplated under section 13(1) of the Prescription Act:

'[27] ... Paragraph (i) envisages the possibility — in some instances — of the relevant impediment referred to in paras (a) – (h) ceasing to exist. Since the relevant period of prescription (three years, in this matter) will have been running throughout, there are the possibilities that, when the impediment ceases, the three-year period will, or will not, have expired.

[28] Paragraph (i) provides that if the relevant period of prescription would, but for the impediments contained in s 13(1)(a) – (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 a year — not three years — within which to institute proceedings. Even where the period of prescription would have been completed within a year after the impediment had 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.'

[19] With no evidence led before the court *a quo*, in respect of when the respondent was appointed as the executrix, it is not possible to determine when prescription began

¹¹ *Knoop NO and others v SAFIC (Pty) Limited* [2024] ZAGPJHC 2 para 31.

¹² *Shoprite Checkers (Pty) Ltd v Mafate NO* [2024] ZACC 16; 2024 (6) SA 337 (CC) paras 27-28.

to run.¹³ The respondent's argument that summons ought to have been issued and served by 24 November 2013, within four years from the date of the passing of Mr K Pillay (25 November 2009), is premised on an incorrect understanding and interpretation of section 13(1)(g) and (h), read with section 13(1)(i) of the Prescription Act.

[20] If the respondent's interpretation is to be accepted, it would mean that the impediment referred to in section 13(1)(g) and (h), read with section 13(1)(i), ceased to exist on the passing of Mr K Pillay, being 25 November 2009. Therefore, the period of one year referred to in section 13(1)(i) would commence the day after his passing, resulting in any legal proceedings having to be instituted by the appellant, to be before 24 November 2013.

[21] It is further unacceptable for the respondent to, in one breath, state that she was appointed as the executrix, yet fail to mention the date of her appointment, and then proceed to contend that the date of her appointment is not relevant to the determination of this appeal. The date of her appointment as executor is the crux on which the issue of prescription hangs. This is a factual determination. Without the specific knowledge of when she was appointed, prescription cannot be determined.¹⁴ Therefore, the argument made by the respondent on prescription is unsubstantiated and accordingly fails.

[22] The respondent, in her heads of argument before the court *a quo* and at the hearing of the trial, alleged that the appellant had attempted recovery of a portion of the debt through execution, unfortunately no further particulars were provided for the submission made. The respondent further held that the appellant did not disclose the

¹³ The respondent, as the party relying on the defence of prescription, bears the full onus of proving her defence - see *Jugwanth v Mobile Telephone Networks (Pty) Ltd* [2021] ZASCA 114; [2021] 4 All SA 346 (SCA) para 6.

¹⁴ In *Katha v Pillay NO and others* 2024 (1) SA 159 (GJ) fn 23, the court quoted the following extract from *Louw v Louw and others* 1933 CPD 163 at 168-169:

'(I)t seems to me that the passage . . . from Voet is decisive of the point which I am considering. Under the Administration of Estates Act the estate of a deceased debtor is administered by his executor. Until his appointment there is no one who can be sued and after his appointment he calls for claims against the estate... It seems to me that these provisions of the law preclude the idea of bringing actions against the estate at any rate until the executor rejects the creditor's claim. Consequently, even if the running of prescription is not completely interrupted by the death of a debtor it is at any rate suspended.'

amount received by him through the sale of the movable assets attached and sold in execution. The court *a quo* failed to establish the veracity of the respondent's contention of the debt amount having been reduced by the amount recovered through the sale in execution. There does, however, appear to be a dispute regarding the actual amount the appellant is entitled to under the judgments but that is not for consideration by this court. In any event, nothing much turns on this, as I find that one cannot even begin to determine prescription in light of relevant information, which would readily assist in deciding the issue of prescription, not being available.

Conclusion

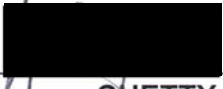
[23] As a consequence, and due to my finding that the appellant's claim cannot be considered as having prescribed without the relevant information relating to when the respondent was appointed as executrix being disclosed, I see no reason to deal with the three remaining grounds of appeal, as raised, because they have become moot by virtue of my finding on the prescription issue.

[24] In the circumstances, the costs granted by the court *a quo* are now reversed by the findings of this court in respect of the issue of prescription of the appellant's claim. I, accordingly, see no reason why costs should not follow the results of this appeal.

Order

[25] In the result, I make the following order:

1. The appeal succeeds with costs.
2. The order of the court *a quo* is set aside and replaced with the following order:
'The special plea of prescription is dismissed with costs.'
3. The matter is remitted back to the court *a quo* for the determination of the further and outstanding issues at trial.


NGQANDA AJ

CHETTY J

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Date of Hearing: 01 November 2024
Date of Judgment: 02 July 2025