

SOUTH AFRICA / JUDGMENT

Mofokeng v Du Plessis (13893/2005) [2008] ZAGPHC 242 (20 June 2008)

[2008] ZAGPHC 242**COURT**

High Courts - Gauteng

BEFORE

Mavundla

CASE / FILE NUMBER

13893/2005

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****TRANSVAAL****PROVINCIAL DIVISION****Case****no. 13893/2005****In**

the matter between:

MARIA

NDABA MOFOKENG APPLICANT

And

HESTER

HELENA LEWISA DU PLESSIS DEFENDANT

JUDGMENT

MAVUNDLA, J.

[1] This is an unfortunate case involving prescription. At the beginning of the hearing of the matter the respective counsel for the parties furnished me with a document titled "STATED CASE", in which it is recorded common cause issues and issues to be determined.

[2] AGREED FACTS:

2.1. The plaintiff is Maria Ndaba Mofokeng, an adult female;

The Defendant is Hester Helena Lewis Du Plessis, a major female residing at 172 Radium Street, Proclamation Hill, Pretoria West, Pretoria, Gauteng. Plaintiff was, during April 2002, employed as a domestic employee by Defendant at 11 Heddon Street, Proclamation Hill, Pretoria West, Pretoria Gauteng.

2.4 During the morning of 29 April 2002 and at 11 Heddon Street, Proclamation Hill, Plaintiff was attacked and injured by the two domesticated dogs.

2.5.1 The aforesaid injuries resulted in the Plaintiff being admitted at

Kalafong Hospital at approximately 08h30 on 29 April 2002, where after Plaintiff was hospitalised and treated in the surgical ward at Kalafong Hospital. 2.5.2 The plaintiff "left/discharged herself from Kalafong Hospital on 11 June 2002.

Plaintiff underwent a right above amputation at Kalafong Hospital on 13 November 2002. The summons with all its Annexure was served upon the defendant personally on 29 April 2005 at 11h30. The question of law to be determined is whether Plaintiffs claim has become prescribed in terms of section 11 of the Prescription Act, no 68 of 1969.

[3]. It needs pointed out that the defendant in her special plea pleaded that

"The plaintiffs claim is based upon delict which allegedly took place on 29 April 2002. On that date Plaintiffs claim fell due. At all times material hereto Plaintiff was aware of the Defendant's identity and the facts upon which her action is based.

Plaintiffs summons was served on Defendant personally on 29 April 2005 that is more than three years after the date upon which the claim arose. In the premises, Plaintiffs claim has prescribed in terms of Section 11 of the Prescription Act, no 68 of 1969 Wherefor defendant prays that the plaintiffs claim be dismissed with costs." The defendant further pleaded over. I however deem it not necessary to chronicle the plea over of the defendant.

[4] In the matter of Repub. Pub v Afrikaanse Pers Pub. 1972 (1) SA (AA) at 780E-G Rumpff JA said:

"The purpose of a summons and notice of motion is naturally to involve the defendant or respondent in the matter, and what concerns him, he is first involved when the summons and the notice of motion has been served upon him. So it is stated in Marine and Trade Insurance Co Ltd v Reddinger, 1966 (2) SA 407, by this Court at page 413:

Although an action is commenced when summons is issued the defendant is not involved in litigation until service has been effected, because it is only at that stage that a formal claim is made upon him."

[5] The Prescription Act NO 68 of 19 69 provide that: "12. When prescription begins to run.

Subject to the provisions of subsection (2), (3), and (4), prescription shall commence to run as soon as the debt is due. If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall commence to run until the creditor becomes aware of

the existence of the debt. 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 knowledge if he could have acquired it by exercising reasonable care. " In casu, from the facts agreed upon "Plaintiff was. during April 2002, employed as a domestic employee by Defendant at 11 Heddon Street, Proclamation Hill, Pretoria West, Pretoria Gauteng." In my mind, it is clear that the plaintiff can be deemed to have been aware of the identity of the defendant shortly after she had been injured by the two domesticated dogs. When the defendant discharged herself from Kalafong Hospital she could still have determined the identity of the defendant, assuming that she did not as yet know her identity, by the exercise of reasonable care.

[6] The Plaintiff has alleged that on the morning of 29 April 2002 and at 11 Heddon Street, Proclamation Hill, she was attacked and injured by the two domesticated dogs.

2.5.1 The aforesaid injuries resulted in her being admitted at Kalafong Hospital at approximately 08h30 on 29 April 2002.

[7] The plaintiff's cause of action was completed by the time she was admitted at Kalafong Hospital at approximately 8h30. In the matter of Geldenhuys NO v Diedericks 2002 (3) SA 674 (O) it was held that "s 12 (1) of the Prescription Act 68 of 1969 provided that the prescriptive period of three years began running as soon as the debt became due, but this was qualified by s129 (3), which stated that a debt was not deemed to be due until the creditor had knowledge of the identity of the debtor and the facts from which the debt arose. It was, however, understandable that a creditor would be deemed to possess such knowledge if he could have acquired it by the exercise of reasonable care. It was further held that a distinction had to be drawn between the words 'debt' and 'facts from which the debt arose' in contrast with the words 'cause of action'. 'Cause of action' normally indicated the essential facts set out in the pleadings to establish the right of action in terms of which the debt could be recovered. The words 'facts from which the debt arose' could never be held to mean every allegation made in the particulars of claim from which the debt arose, could never be held to mean every allegation made in the particulars of claim, such as the grounds of negligence, but merely indicated the facts from which the right to institute action originated. The 'cause of action' could be amended after the running of prescription had been completed if the 'debt' or right of recovery was correctly identified in the original particulars of claim. [8] In the matter of Drennan Maud & Partners v Pennington Town Board

[1998] ZASCA 29; 1998 (3) SA 200 (SCA) at 211 F Olivier JA said that "... a debt to pay damages becomes due when loss occurs as a result of a delict (Oslo Land Co Ltd v The Union Government 1938 AD 584 at 590; Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A) at 838H-839G)." In the matter of Oslo Land Co Ltd v The Union Government 1938 AD 584 at 585 it is stated that "A cause of action accrues when all the facts have happened which are material to be proven to entitle the plaintiff to succeed... When once some damage has resulted from the wrongful act, or even if it is probable that damage will result, time begins to run and the plaintiff must bring his action within three years for all his damage

and must claim for all damage once and for all e.g.... Where the wrongful act has ceased and it is not repeated and damages has resulted, the cause of action is complete and time begins to run even though damage may result thereafter or may be recurring; See Aliwal North Municipality and Another v Jeffares (1917, CPD 408 at 426). [9] In casu, as I have already pointed out herein above, the whole cause of action was completed by the time the plaintiff was admitted at Kalafong Hospital on 29 April 2002 at 8h30. The time of the running of prescription commenced at 8h30 on 29 April 2002. The plaintiff had to institute her action within three years from that moment of sustaining her injuries. The plaintiff is deemed to have possessed such knowledge regarding the identity of the defendant. It is deemed that she could have acquired it by the exercise of reasonable care assuming that she did not know the identity of the defendant. [10] The particulars of claim of the plaintiff were settled by counsel on 27 April 2005. The summons were issued with the Registrar of this Court on 28 April 2008. The summons with all its Annexure was only served upon the defendant personally on 29 April 2005 at 11h30. The summons was served beyond the period of three years, starting from 29 April 2002 at 8h30. [11] Having regard to the above mentioned authorities and the above mentioned common facts, I regrettably find that the plaintiff's case had prescribed by the time the summons was served on the defendant on 29 April 2005 at 11h30. I am of the view that, even when I adopt a most liberal method of calculating, the period of three year in casu fluxed on 29 April 2005 at 8h30 when the cause of action had already terminated when she was admitted at Kalafong Hospital. [12] In reaching my conclusion that the plaintiffs action had already prescribed when the summons was served at 11h30 on 29 April 2005, I bear in mind that it has not been pleaded by the plaintiff in her particulars of claim that as the result of the attack by the dogs, she became comatose. Had there been such an allegation in the particulars of claim, then the running of prescription would have been interrupted to the extent of the duration of her comatose state until the time she would have regained her consciousness. Section 12

- (3) would have been suspended for the duration of her being comatose. [13] In my view, the very fact that the attorneys of the plaintiff had as early as on 27 briefed counsel to settle the particulars of claim and issued the summons on 28 April 2008, the red lights ought to have been flashing by the 27 April 2002 and they ought to have been alive to the looming danger of prescription. I do not make any finding in this regard, save to express a view. I have not been called upon to make a finding in that regard. I assume that the attorneys of record of the plaintiff shall acquit their responsibility to the plaintiff, as officers of this Court, to properly advice the plaintiff of her remedies, in the light of my finding that her action against the defendant had already prescribed when she served the summons upon the defendant. [14] It is trite that the unsuccessful party must bear the costs of the successful party because the costs follow the event. The plaintiff is most unfortunately the unsuccessful party in the matrix of this case and she has to bear the costs of the defendant. In the premises the defendant's special plea of prescription is upheld and I therefore make the following order: (1) That the plaintiff's action against the defendant is dismissed with cost calculated on a party and party scale. N.M. MAVUNDLA JUDGE OF THE HIGH COURT HEARD ON THE:

25/04/08 DATE OF JUDGMENT: 20/06/08 PLAINTIFF'S ATT : Mr. A. PHEFADU PLAINTIFF'S ADV : Mr. E. SEIMA. DEFENDANT'S ATT : MR.H GROBLER DEFENDANT'S ADV : Mr. N.C. MARITZ

- [7] The plaintiff's cause of action was completed by the time she was admitted at Kalafong Hospital at approximately 8h30. In the matter of Geldenhuys NO v Diedericks 2002 (3) SA 674 (O) it was held that "s 12 (1) of the Prescription Act 68 of 1969 provided that the prescriptive period of three years began running as soon as the debt became due, but this was qualified by s129 (3), which stated that a debt was not deemed to be due until the creditor had knowledge of the identity of the debtor and the facts from which the debt arose. It was, however, understandable that a creditor would be deemed to possess such knowledge if he could have acquired it by the exercise of reasonable care.

It was further held that a distinction had to be drawn between the words 'debt' and 'facts from which the debt arose' in contrast with the words 'cause of action'. 'Cause of action' normally indicated the essential facts set out in the pleadings to establish the right of action in terms of which the debt could be recovered. The words 'facts from which the debt arose' could never be held to mean every allegation made in the particulars of claim from which the debt arose, could never be held to mean every allegation made in the particulars of claim, such as the grounds of negligence, but merely indicated the facts from which the right to institute action originated. The 'cause of action' could be amended after the running of prescription had been completed if the 'debt' or right of recovery was correctly identified in the original particulars of claim.

- [8] In the matter of Drennan Maud & Partners v Pennington Town Board

[1998] ZASCA 29; 1998 (3) SA 200 (SCA) at 211 F Olivier JA said that "... a debt to pay damages becomes due when loss occurs as a result of a delict (Oslo Land Co Ltd v The Union Government 1938 AD 584 at 590; Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A) at 838H-839G)." In the matter of Oslo Land Co Ltd v The Union Government 1938 AD 584 at 585 it is stated that "A cause of action accrues when all the facts have happened which are material to be proven to entitle the plaintiff to succeed... When once some damage has resulted from the wrongful act, or even if it is probable that damage will result, time begins to run and the plaintiff must bring his action within three years for all his damage and must claim for all damage once and for all e.g.... Where the wrongful act has ceased and it is not repeated and damages has resulted, the cause of action is complete and time begins to run even though damage may result thereafter or may be recurring; See Aliwal North Municipality and Another v Jeffares (1917, CPD 408 at 426).

- [9] In casu, as I have already pointed out herein above, the whole cause of action was completed by the time the plaintiff was admitted at Kalafong Hospital on 29 April 2002 at 8h30. The time of the running of prescription commenced at 8h30 on 29 April 2002. The plaintiff had to institute her action within three years from that moment of sustaining her injuries. The plaintiff is deemed to have possessed such knowledge regarding the identity of

the defendant. It is deemed that she could have acquired it by the exercise of reasonable care assuming that she did not know the identity of the defendant.

- [10] The particulars of claim of the plaintiff were settled by counsel on 27 April 2005. The summons were issued with the Registrar of this Court on 28 April 2008. The summons with all its Annexure was only served upon the defendant personally on 29 April 2005 at 11h30. The summons was served beyond the period of three years, starting from 29 April 2002 at 8h30.
- [11] Having regard to the above mentioned authorities and the above mentioned common facts, I regrettably find that the plaintiff's case had prescribed by the time the summons was served on the defendant on 29 April 2005 at 11h30. I am of the view that, even when I adopt a most liberal method of calculating, the period of three year in casu fluxed on 29 April 2005 at 8h30 when the cause of action had already terminated when she was admitted at Kalafong Hospital.
- [12] In reaching my conclusion that the plaintiffs action had already prescribed when the summons was served at 11h30 on 29 April 2005, I bear in mind that it has not been pleaded by the plaintiff in her particulars of claim that as the result of the attack by the dogs, she became comatose. Had there been such an allegation in the particulars of claim, then the running of prescription would have been interrupted to the extent of the duration of her comatose state until the time she would have regained her consciousness. Section 12
- (3) would have been suspended for the duration of her being comatose.
- [13] In my view, the very fact that the attorneys of the plaintiff had as early as on 27 briefed counsel to settle the particulars of claim and issued the summons on 28 April 2008, the red lights ought to have been flashing by the 27 April 2002 and they ought to have been alive to the looming danger of prescription. I do not make any finding in this regard, save to express a view. I have not been called upon to make a finding in that regard. I assume that the attorneys of record of the plaintiff shall acquit their responsibility to the plaintiff, as officers of this Court, to properly advice the plaintiff of her remedies, in the light of my finding that her action against the defendant had already prescribed when she served the summons upon the defendant.
- [14] It is trite that the unsuccessful party must bear the costs of the successful party because the costs follow the event. The plaintiff is most unfortunately the unsuccessful party in the matrix of this case and she has to bear the costs of the defendant.

In the premises the defendant's special plea of prescription is upheld and I therefore make the following order:

- (1) That the plaintiff's action against the defendant is dismissed with cost calculated on a party and party scale.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

HEARD ON THE: 25/04/08

DATE OF JUDGMENT: 20/06/08

PLAINTIFF'S ATT : Mr. A. PHEFADU

PLAINTIFF'S ADV : Mr. E. SEIMA.

DEFENDANT'S ATT : MR.H GROBLER

DEFENDANT'S ADV : Mr. N.C. MARITZ

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