

SOUTH AFRICA / JUDGMENT

Mokau v Eskom Holdings SOC Ltd (A5066/15) [2017] ZAGPJHC 135 (9 May 2017) [2017] ZAGPJHC 135

COURT

South Gauteng High Court, Johannesburg

BEFORE

FHD Van Oosten, CG Lamont, SE Weiner

CASE / FILE NUMBER

A5066/15

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: A5066/15

Reportable: No

Of interest to other judges: Yes

Revised

9 May 2017

In the matter between

MOEKETSI GILBERT MOKAU APPELLANT

and

ESKOM HOLDINGS SOC LTD RESPONDENT

Prescription - Prescription Act 68 of 1969 - Section 13(1)(a) and (i) - Issue on appeal the time at which the 3 year prescription period began running in regard to appellant's claim for damages - date of appellant's constructive knowledge of the identity of the debtor (Eskom)- Special plea of prescription adjudicated on by court a quo as a separated issue - no evidence led by either party - Eskom bearing full evidential burden to prove plea of prescription - whether on the admitted facts Eskom has established a prima facie case for onus to shift to the appellant

- held: Eskom failed to establish prima facie case - trial particulars furnished by the appellant relevant to the consideration of the onus - court a quo erred in excluding trial particulars - Appeal upheld: special plea of prescription dismissed with costs.

J U D G M E N T

VAN OOSTEN J:

Introduction

- [1] The issue in this appeal is whether the appellant's claim for damages against the respondent has prescribed and, in particular, the time at which the period of prescription, in respect of the appellant's claim, began running. The appellant issued summons

against the respondent claiming damages in respect of bodily injuries sustained in an incident when, in climbing a tree, he was

electrocuted. The incident arose from the appellant having come into contact with a live high voltage power line or lines running above the tree, allegedly owned and controlled by the respondent. The respondent filed a special plea of prescription which was heard at the commencement of the trial as a separated issue in terms of rule 33(4), by Keightley AJ (as she then was). The special plea was argued on the papers and no evidence was led by either party. The learned

judge, having heard argument, upheld the special plea and dismissed the plaintiff's claim with costs. With leave of the court a quo the appellant now appeals to this court against the order.

Background

facts relevant to prescription

- [2] On the date of the incident, being 27 March 2004, the appellant was 10 years and 9 months old and living in Phuthaditjhaba, in Qwaqwa. The appellant attained the age of majority on 4 June 2011. In terms of s 13(1)(a) and (i) of the Prescription Act 68 of 1969 (the Act) the appellant's claim became prescribed on 3 June 2012, being one year after the attainment of majority. The appellant's summons was served on the respondent on 3 June 2014 and thus 2 years after the date upon which the respondent submits the claim prescribed.
- [3] In the special plea Eskom sets out the allegations and time periods in support of the conclusion that the appellant's claim has prescribed on 3 June 2012. In the appellant's replication to Eskom's special plea, he admits the allegations in the special plea (the admitted facts) but denies that his claim has prescribed, in amplification of which he avers that 'he only became aware of his right to sue for and claim damages [against Eskom] during or about April 2014 when he met with his present attorney' and further 'that as at June 2014 he was also aware of the extent of the claim that he had against the respondent for the purposes of finalising his summons.'

[4] Eskom subsequently filed a request for further particulars for trial and in regard to the questions relating to the appellant's

replication, the appellant's response thereto can be summarised as follows:

- The appellant had not met with an attorney prior to the April 2014 meeting with his present attorneys of record;
- The appellant was not at any time before that date 'informed of his right to sue for damages and/or the identity of the defendant (being the alleged debtor) and/or the extent of his claim', nor was he approached before that date by a legal representative to assist in claiming damages;
- The appellant 'had no knowledge of his right to sue the defendant and/or the identity of the defendant';
- The only step taken to establish the identity of the debtor for purposes of his claim, was when the appellant's guardian made enquiries at the South African Police Services 'in an effort to report the incident but (he) was offered no assistance or any further information'; and finally,
- The appellant was referred by 'a local doctor who practiced in the area where he resided', to 'seek advice' from his present attorneys.

I shall henceforth refer to these particulars as the trial particulars.

[5] The appellant accordingly relies on the provisions of s 12(3) of the Act which reads as follows:

'A debt shall not be deemed to be due until the creditor has the 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.'

The factual matrix before the court a quo

- [6] As I have already alluded to, the trial of the matter came before Keightley AJ and by agreement between the parties the special plea was heard as a separated issue. Scant attention however was afforded as to precisely on what facts the court a quo was required to adjudicate the issue. Eskom correctly assumed the onus of proof and the concomitant duty to begin. Counsel for the appellant, who also appeared at the trial, was asked by the learned judge a quo whether all the dates were common cause and whether it was common cause that 'but for the issue raised by the plaintiff in the replication, that the facts set out in the plaintiff's (should read defendant's) plea of prescription are admitted' to which counsel responded that 'the dates are common cause'.
- [7] Counsel for Eskom, who also appeared before us, in his opening address in the court a quo, informed the court a quo that no

witnesses would be called by Eskom, and that it was his understanding that the appellant would likewise not call witnesses to testify, that although Eskom bore the ‘overall onus’ the appellant bore the ‘evidential onus’ once Eskom had established a *prima facie* case. Counsel then continued as follows:

‘And I am going to submit that on the basis of the agreed facts and on the basis of what can be inferred from the pleading (sic), that such *prima facie* case is established’.

- [8] The appellant, relying on the fact that Eskom bore the onus, called no witnesses. Both parties closed their respective cases. On this shaky foundation, the arguments proceeded. Counsel for Eskom made no reference in his main argument to the trial particulars. Appellant’s counsel in response however, extensively dealt with the trial particulars. In his reply, counsel for Eskom challenged the admissibility of the trial particulars which counsel submitted could not be taken into account as evidence. Counsel further submitted that the ‘common cause facts’ establishing a *prima facie* case were to be extracted from the particulars of claim.
- [9] In regard to the trial particulars, Keightley AJ held that that they did not constitute evidence and could not ‘serve to add ballast to the pleadings as they stand’. The learned judge held that in any event the trial particulars did not take the appellant’s case any further. The paucity of the trial particulars lacking essential details, the learned judge reasoned, did not ‘have the effect of dislodging the case made out in the pleadings’.

Discussion

- [10] Before dealing with the relevance and admissibility of the trial particulars, I consider it necessary to dispose of the issue whether on the admitted facts Eskom has established a *prima facie* case, which it is now well-settled, is required for the onus to shift to the appellant (*Gericke v Sack* 1978 (1) SA 821 (A) 827D-E).
- [11] Eskom placed reliance on the appellant’s constructive knowledge, which is established ‘if the creditor could reasonably have acquired knowledge of the identity of the debtor and the facts on which the debt arises by exercising reasonable care’

(Macleod para [9]). The crucial question is whether the admitted facts include an admission of the appellant’s knowledge of the identity of the debtor. Eskom’s contention that such admission was made is premised on an interpretation of paragraph 2.2 of the replication, which reads as follows:

‘The plaintiff avers that he only became aware of his right to sue and claim damages against the defendant during April 2014.’

[emphasis added].

- [12] The italicised words in paragraph 2.2, at best for Eskom, are ambiguous as to whether they refer to the appellant’s right to sue and claim damages juxtaposed to the appellant’s right to sue and claim damages from the defendant. In giving effect to all words used, the proper

interpretation to be afforded to those words, absent a clear and unambiguous admission by the appellant, in my view, would consist of the appellant only becoming aware of the identity of the debtor, Eskom, during April 2014, when he met with his attorneys. In any event, such ambiguity as there may be, does not avail Eskom, as it was required in order to discharge the onus resting on it, to prove the date on which the plaintiff obtained constructive knowledge of the identity of the debtor, which it clearly failed to do.

- [13] For these reasons Eskom, in my view, failed to establish a *prima facie* case and the onus of proof accordingly did not shift to the appellant. The finding effectively disposes of the appeal but I do consider it necessary to briefly deal with the issue relating to the trial particulars, which was comprehensively debated before us.

The trial particulars

- [14] As correctly pointed out by the learned judge a quo with reliance on the judgment of the Supreme Court of Appeal in *Ruslyn Mining and Plant Hire (Pty) Ltd v Alexkor Ltd* [2012] 1 All SA 317 (SCA) para [18], further particulars for trial are not pleadings. The purpose of particulars for trial, Heher JA held in *Ruslyn*, 'is to limit waste of time and costs by providing the other party with additional insight into the case which has been pleaded, thus avoiding, where possible, delays or postponements to seek evidence to meet a case' [emphasis added]. Applied to the present matter, Eskom was apprised of the additional facts set out in the trial particulars which enabled it to seek and obtain evidence in rebuttal thereto, bearing in mind that at all times it bore 'the full evidentiary burden to prove a plea of prescription, including the date on which the plaintiff obtained actual or constructive knowledge of the debt.' (per Tshiqi JA, writing for the court, in *Macleod v Kweyiya* (365/12) [2013] ZASCA 28 (27 March 2013) para [9]).
- [15] In regard to the hearing of the special plea of prescription, Eskom was *dominus litis* and therefore under a duty to ensure and apprise the court a quo of exactly what facts were common cause and to be taken into account as evidence for purposes of deciding the special plea. Apart from the agreed facts no reference was made to a statement of other agreed facts. The parties were obviously not entitled to argue selectively on the documents before court which is precisely what happened in the court a quo. Loose references to common cause facts were made in argument and the learned judge a quo's enquiries as to the precise facts that were common cause, did not provide any clarity. Counsel for the appellant, without any objection raised by Eskom, proceeded to deal with the trial particulars. It was only in reply that the submission was advanced that the trial particulars did not constitute evidence. This submission, in the context of the present case cannot succeed. Whilst trial particulars may not be considered pleadings, their purpose is to provide, as I have already referred to 'the other party with additional insight into the case which has been pleaded, thus avoiding, where possible, delays or postponements to seek evidence to meet a case' (*Ruslyn supra*).

[16] The trial particulars supplemented the terse allegations in the replication. Eskom was not taken by surprise, it was acutely aware of the further particularity before the matter went on trial. The learned judge a quo, with ample justification I should add, criticised the paucity of information furnished in the replication and trial particulars. But, pieced together sufficient information was furnished to enable Eskom to meet the challenge. I did not understand counsel for Eskom to contend that, on the assumption that the trial particulars were relevant and/or that the ambiguity in the replication placed Eskom on notice that it had to disprove the allegations relied upon by the appellant, a prima facie case has been made out by Eskom.

Conclusion

[17] The court a quo in my view accordingly erred in excluding the trial particulars from consideration and further in holding against the appellant on the basis of the paucity of information furnished in the replication and the trial particulars. The finding conflates the nature of the onus on Eskom and the shifting of the onus to the appellant only once a prima case was established. Eskom having failed to establish a prima facie case leads to the conclusion that the appeal must succeed.

Order

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

1. The appeal is upheld.
2. The order of the court a quo is set aside and replaced with the following:

‘The defendant’s special plea of prescription is dismissed with costs.’

3. The respondent is to pay the costs of the appeal.

FHD VAN OOSTEN

JUDGE OF THE HIGH COURT

I agree.

CG LAMONT

SE WEINER

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