

SOUTH AFRICA / JUDGMENT

Rooi v Leon Trichard and Associates (17/2017) [2020] ZAECGHC 21 (6 March 2020)

[2020] ZAECGHC 21

COURT

Eastern Cape High Court, Grahamstown

BEFORE

N P Jaji

CASE / FILE NUMBER

17/2017

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN THE HIGH COURT OF

SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO: 17/2017

Date Heard: 22

October 2019

Date Delivered: 06

March 2020

In

the matter between:

LEON

ROOI

PLAINTIFF

and

LEON

TRICHARD & ASSOCIATES

DEFENDANT

JUDGMENT

JAJI J:

[1]

BACKGROUND**SUMMARY OF PLEADINGS**

1.1 This is an opposed special plea wherein the defendant alleges that:-

1.1.1 The plaintiff's claim against the Road Accident Fund prescribed at the conclusion of 25 July 2011;

1.1.2 The plaintiff's claim against the defendant accordingly rose on 26 July 2011; and

1.1.3 In terms of the Prescription Act 68 of 1969 ("the Prescription Act"), the plaintiff's claim against the defendant prescribed at the conclusion of 26 July 2014.

[2] To this plaintiff replicated that:-

1.1 The plaintiff's claim arose as a result of the defendant's failure to lodge a claim against the Road Accident Fund in terms of the Act on plaintiff's behalf;

1.2 In terms of the Prescription Act, the plaintiff had three (3) years from the date upon which the debt became due, alternatively, three (3) years from the date when the plaintiff had acquired knowledge of the identity of the debtor and of the facts from which the debt arose and which to institute legal proceedings against the defendant.

[3] The plaintiff, accordingly pleaded that his claim would only have become prescribed on 16 September 2017 and in the circumstances the defendant's special plea stands to be dismissed with costs.

[4] The defendant thereafter filed a re-joinder pleading further that:-

1.1 Plaintiff appointed Struwig Hatting Attorneys to act on his behalf during or about September 2012;

1.2 On 27 September 2012, Struwig Hatting Attorneys wrote to the defendant on behalf of the plaintiff to advise the defendant that the plaintiff had terminated their mandate and that Struwig Hatting Attorneys would continue with the matter on plaintiff's behalf;

1.3 By the exercise of reasonable care, the plaintiff could have obtained knowledge that his claim against the Road Accident Fund had not been lodged, prior to 26 July 2014;

1.4 The plaintiff was therefore deemed to have knowledge in terms of section 12(3) of the Prescription Act. In the premises the defendant pleaded that the plaintiff's claim had prescribed.

[5] SUBMISSIONS BY THE DEFENDANT IN COURT

- (i) Briefly, defendant contended that the plaintiff could have obtained knowledge through Struwig Hatting Attorneys that no claim was lodged;
- (ii) Further contended that, it could be accepted that the defendant did not lodge the claim timeously. (It should be noted that this concession is at odds with what is pleaded in the “plea over” page 86 ad para 21 – 24 thereof) (Denial)
- (iii) Indeed, the claim prescribed in defendant’s hand and the question was whether Struwig Hatting Attorneys also allowed the claim to prescribe in their hands, so submitted the defendant’s counsel. It referred to its (defendant’s) time line contending that Struwig Hatting Attorneys from 2012 – 2014, did nothing. When Struwig Hatting Attorneys corresponded with defendant’s requesting plaintiff’s file, defendant was non-responsive;
- (iv) The defendant’s counsel submitted that it was not reasonable for Struwig Hatting Attorneys to leave the file dormant for 1½ year. The defendant submitted that the failure to receive the file by Struwig Hatting Attorneys should have been a warning light warranting closer attention;
- (v) The lack of response in 2012 by the defendant was a warning light to a reasonable attorney. The attorney would not have set back for a period of eighteen (18) months claimed the defendant. The attorney would have realised that no claim had been lodged. It went further and submitted that Struwig Hatting Attorneys could have been deemed to have knowledge that no claim was lodged. The defendant accordingly averred that this constituted negligent inaction;
- (vi) The defendant’s counsel submitted that the defendant compromised Struwig Hatting Attorneys by their inaction. Claimed that this was a question of double prescription in both the hands of the defendant and Struwig Hatting Attorneys. It concluded that the plaintiff would have to issue summons against Struwig Hatting Attorneys and in any event, plaintiff was not non-suited.

[6] In reply the plaintiff submitted as follows:-

- (i) The onus is on the defendant to prove that the plaintiff had knowledge of the date and debt on which it arose from beginning and end. It is so that Struwig Hatting Attorneys is not the plaintiff who is the creditor herein;
- (ii) No evidence before court that the plaintiff was aware that the claim had prescribed or reasonably could have known. The purported letter of lodgement by the defendant militated against the defendant who was before court. The minute of 07 March 2018, defendant admitted that the claim was not lodged same as in court as per its submissions;
- (iii) Strangely, the special plea does not admit that the claim was not lodged. Even the defendant’s rejoinder to bring s 12(3) of the Act does not confirm or admit that the claim was not lodged;

(iv) Plaintiff submitted that the enquiry in s 12(3) of the Prescription Act is not what a reasonable attorney would do but the plaintiff who is the creditor. Further, plaintiff correctly denied that there was inaction from 2012-2014 from Struwig Hatting Attorneys' side. Correspondence in the bundle Index Time Line Prescription at pages 16, 17, 18, 19, 21 and 23 (27/09/12, 14/02/13, 12/09/13, 10/03/14 and 27/05/14) confirmed plaintiff's denial. This is a trail of correspondence herein from 2012 – 2014;

(v) The debtor, being the defendant herein wilfully and deliberately hid the facts relevant to this matter from the plaintiff. The defendant went further and played along with the new attorneys on record (Struwig Hatting Attorneys). By then the matter was nearing prescription. Instead of providing the file contents, on 21 April 2015, the defendant wrote a letter advising that they would provide Struwig Hatting Attorneys with copies of the file contents;

(vi) Nowhere has the defendant shown the onus that the plaintiff had knowledge of the state of affairs. The test herein is that of a reasonable creditor. The defendant discharged no onus resting on them. The test is the innocent inaction of the plaintiff in any event, not Struwig Hatting Attorneys;

(vii) Plaintiff further averred that it was not correct that the plaintiff is not non – suited herein. Its claim against Struwig Hatting Attorneys has also prescribed a year before Struwig Hatting Attorneys came on record. The defendant ought to have advised the plaintiff that his claim had prescribed;

(viii) It is not pleaded by defendant that Struwig Hatting Attorneys ought to have knowledge of the prescribed claim. The essence of the matter was whether the plaintiff had knowledge or not. There was no evidence that the plaintiff failed to diligently proceed with his claim. Plaintiff appointed attorneys all through the matter. Plaintiff submitted that if Struwig Hatting Attorneys was not a creditor, his inactivity in any event (which is denied), is not the yardstick but the plaintiff's inactivity. The defendant in not giving the file to Struwig Hatting Attorneys, as an officer of the court owed duty to both the client (plaintiff) and court. Instead, defendant negligently and intentionally concealed that the claim was not lodged. Plaintiff submitted that defendant did not discharge the onus on a balance of probabilities and as such the special plea stand to be dismissed with costs.

[7] In reply, Mr Cole submitted that when defendant's mandate was terminated, there was no duty on the defendant to tell anybody about the status of the claim.

[8] APPLICABLE LEGAL PRINCIPLES

(i) As a side issue, albeit relevant to the matter at hand, defendant's conclusion, at least as far as the heads of argument are concerned are at odds with the special plea. (See heads of argument, para 20, 21 and 22). The defendant's arguments are with reference to a reasonable

attorney; applies section 12(3) of the Act to “Struwig Hatting Attorneys” and as such “attorneys” “are

deemed to have knowledge of facts. . .” The basic enquiry would have enabled “Struwig Hatting Attorneys to ascertain the identity of the debtor.” It is trite that the “deemed knowledge” as far as Prescription Act is concerned, refers to the “creditor”, plaintiff herein not the attorneys of record.

(ii) PLEADINGS AND ONUS

- (a) Where the special plea is aimed to set a defence based on section 12(3) of the Prescription Act 68 of 1969, prescription of the plaintiff’s claim commenced to run from the date on which the plaintiff had knowledge of the identity of the debtor and facts from which the debt arose, with the proviso that the plaintiff shall be deemed to have such knowledge if he could have acquired it by exercise of reasonable care;
- (b) The defendant had to prove:-
 - The date on which the plaintiff had knowledge of the identity of the debtor and on the facts from which the debt arose; alternatively;
 - The date on which the plaintiff was deemed to have acquired such knowledge.
- (c) The question herein is whether the defendant proved the date when the plaintiff had knowledge of the facts from which the debt arose, alternatively, the date which the plaintiff could have acquired such knowledge by exercise of reasonable care (not the plaintiff’s attorneys but the plaintiff.)
- (d) There is no evidence by the defendant to discharge the onus to prove the date on which the plaintiff became aware of the facts which gave rise to the debt or when he should have been deemed to have been aware. It has been contended that plaintiff could have established that the claim had prescribed by exercise of reasonable care. Once again, no evidence was led as to how that could have been done in the circumstances of the case;
- (e) This is not a case “where a creditor allowed by his deliberate or negligent act to delay the pursuit of his claim. . .” *Uitenhage Municipality v Molloy* 1998 (1) All SA 140(A). Contrary it is the defendant’s own making by failing to act as per the mandate and further exacerbated by the delay or refusal to provide the file;
- (f) Further to the exception in section 12(2) of the Prescription Act which states that prescription does not commence to run against a creditor if the debtor wilfully prevents him or her “from coming to know of the existence of the debt” until the creditor “become aware of the existence of the debt.” Clearly, the defendant herein wilfully concealed and prevented plaintiff from knowing by hiding the true state of affairs regarding

the debt. The facts which a creditor would need to prove in order to establish liability of the defendant, the creditor would not have knowledge if those were concealed by the defendant;

- (g) Tshiqi JA in *Macleod v Kweyiya* 2013 (6) SA 1 (SCA) pronounced “It is the negligent, and not an innocent inaction that section 12(3) of Prescription Act seeks to prevent and courts must consider what is reasonable with reference to the particular circumstances in which the plaintiff found himself or herself.”
- (h) In any event, it was held in the matter of *Van Zijl v Hoogenout* 2004 ZASCA 84, 2005 (2) SA 93 that “where prescription is raised as a defence, it is the defendant who bears the onus of establishing, as a matter of probability, that prescription commenced to run and had expired before the action was instituted, and he or she is not relieved of that burden only because the material facts might be within the exclusive knowledge of the plaintiff.”
- (i) It was held in the matter of *Mtokonya v Minister of Police* 2017 ZACC 33 that “it is the respondent’s special plea, if it fails to establish facts supporting the special plea, it must fail.”
- (j) *Links v Member of the Executive Council, Department of Health, Northern Cape Province* 2016 (ZACC) 10 dealt with the interpretation of section 12(3), in particular the question what the “facts” are from which the debt arises which the creditor is required to know before the debt can be said to be due and before prescription can start running. Therefore, prescription’s determination depends on section 12(3) application to facts. Defendant must show that prescription began to run against plaintiff’s claim not later than the given date; defendant must also show what the facts are that the plaintiff was required to know before prescription could commence running. The defendant must also show that the plaintiff had knowledge of those facts on or before the said date. The defendant in the matter at hand dismally

failed to prove all of the above as directed by the Constitutional Court in *Links* (above).

“In interpreting section 12(3) the injunction in section 39(2) of the Constitution must be borne in mind. In this matter the focus is on the entrenchment in section 34 of the Constitution” (Links para 26).

- (k) At para (30) the court in *Links* matter asked what facts from which a debt arises? These are facts material to the debt. The court held that in case involving personal

negligence, the facts from which the debt arises are those facts which would cause a plaintiff, on reasonable grounds, to suspect that there was fault on the part of the medical staff (attorney’s office herein) and that caused him or her to “seek further advice”. The court held that it would be unrealistic to expect a party, with no knowledge of medicine (law training herein) to have knowledge of the facts of his condition (this case herein) without seeking professional medical (legal) advice.

- (l) At para (47), “That in turn requires that the litigant is in possession of sufficient facts to cause a reasonable person to suspect that something has gone wrong and to seek advice.” The plaintiff in the present matter could not have been in a position to suspect anything. The so-called sufficient facts were hidden from him.

- (m) In applying the above principles to facts before court (Links case above), same as in the present case, the plaintiff would have to have knowledge of the facts which would have led him to think that possibly there had been negligence (professional herein) and this had caused prescription of his claim, he lacked knowledge of the necessary facts (para 45, Links case).
- (n) At para (42) the court in Link's case, the main finding was that ". . . However, in cases of this type, involving professional negligence, the party relying on prescription must at least show that the plaintiff was in possession of sufficient facts to cause them on reasonable grounds to think. . ." "Until there are reasonable grounds for suspecting fault so as to cause plaintiff to seek further advice, the claimant cannot be said to have knowledge of the facts from which the debt arises." This is precisely what had happened in the present matter because the damages were due to the fault of an attorney unknown to the plaintiff.
- (o) The above was further confirmed in the matter of Loni v Member of the Executive Council, Department of Health, Eastern Cape, Bhisho [2018] ZACC 2. At para (11) that "knowledge of facts upon which a claim is based was an objective assessment of a reasonable person. Claimant's conduct should be tested by reference to the steps which a reasonable person in his position would have taken to acquire knowledge of the facts. The plaintiff in the present matter acted reasonable despite the fact that facts were hidden from him, he went and saw a set of attorneys, Struwig Hatting Attorneys. A reasonable man would have done so in the circumstances.
- (p) The letter purporting to lodge the claim would have had a calming effect on the plaintiff even if he had confronted the defendant. The letter was designed to mislead the plaintiff of the true state of affairs. If it was not the case, an explanation would have come forth from the defendant's side, instead, there was no acknowledgement in the pleadings that the claim was not lodged

and no reasons for such failure were advanced.

[1]

[2]

[3]

[4]

[5]

[6]

[7]

[8]

[9]

CONCLUSION

- (a) On facts, applying the objective test and having regard to the onus resting on the defendant, it is an inescapable reality that the defendant failed to discharge the onus and as such the defence raised of special plea should be dismissed with costs.

[10] COSTS

- (i) It is trite that courts have discretion to exercise when dealing with costs. The courts have to consider the whole case in totality when looking at the issue of costs.
- (ii) It would have been amiss of me not to make the following comments regarding the conduct of the defendant herein:-

- The troubling effect of delay in finalising this matter;
- Plaintiff sustained severe bodily injuries and consulted with the defendant almost eleven (11) years ago;
- The defendant failed to lodge plaintiff's claim despite the duty of care owed to plaintiff and despite them having been in possession of medical reports by the doctors, Dr PA Olivier, Dr Fazel Dudhia, Dr Munro and Dr Karen Pirlo confirming seriousness of plaintiff's injuries;
- Defendant never advised plaintiff that his claim was not lodged. Instead, they misled him by purporting to have lodged the claim under cover of letter dated 05 July 2011;
- Plaintiff's new attorneys on record wrote to them requesting the file contents to no avail. Correspondence dated: 27/09/2012, 14/02/2013, 12/09/2013, 10/03/2014, 27/05/2014, 02/04/2015, 27/05/2015, 08/06/2015, 24/07/2015, 01/12/2015 and 14/03/2016.

(iii) In compounding all of the above, defendants instead of being frank with plaintiff and advise him to sue for professional negligence, not only because it is the right thing to do, but because defendants are insured for these kind of eventualities;

(iv) Instead, a vexatious litigation ensued with some trumped up defence bereft of any merits. Can it not be said that justice was delayed herein? The defendant blamed the plaintiff and his new attorneys for the defendants' ineptitude. Even at this late stage, there was no explanation proffered why the claim was not lodged;

- (v) The conduct displayed here by the officer of the court was unethical and unprofessional. Indeed, a towering conduct unbecoming of a law firm worthy of its salt;

(vi) In South Africa the system of professional values is embedded in the Constitution and the fundamental rights and freedoms entrenched therein. Courts must therefore uphold and protect the Constitution, the human rights entrenched in it and administer justice to all persons alike without fear, favour or prejudice in accordance with the Constitution and the law. Judges are no longer there to merely give voice to the law, they also make law;

(vii) Public should have trust that there is fairness in the administration of justice. There is a need therefore to have equitable outcome in dispute resolution. It is further so that the protection of the legal profession is the responsibility of a Judge and as such, a Judge must report inappropriate or unprofessional conduct to the relevant professional body. Lawyers have a responsibility to their clients, the court, legal profession and society at large. There is an obligation from the profession to ensure that lawyers' duties are discharged faithfully. Lawyers have the responsibility to exercise due diligence and ensure that they keep their clients advised of any proceedings and further steps. The classical breach of duty of care in the present matter amounted to failure to act with the competence reasonably expected of ordinary member of the attorney's profession;

(viii) What has been said by R. P. B. Davis J in the foreword to the first edition of "Civil Practice of the High Court of South Africa, fifth edition" (Herbstein and Van Winsen) captures the moment herein. He asked "What is the nature of this honourable profession to which we all, Bench, Bar and Side-Bar alike belong?" He went on "Barristers and attorneys are as much a part of the court in which they practise as the judges who preside over them. It is an honourable profession, one to which it is an honour to belong. And it is of the highest importance that those who do belong to it should always keep the fact clearly before them."

(ix) Quoting Dr C. M. van Zyl, in his Judicial Practice, quoting an English author: - "The tone of your professional character, intellectually and morally, will depend on the estimate which you form of the nature of the duties which you have undertaken, and of the spirit which ought to actuate you." Importantly and further quoting Justinian at the beginning of the Institutes regarding the precepts of the law; "to live honourable, to injure no-one and to give everyone his due." "It is obviously impossible for anyone, who is not himself prepared at least to try to order his life in accordance with those precepts, to make even a pretence of practising law."

"The learning and ability of a lawyer is like a gun, it may be misused, but in proper hands it is used as the protection of those who are oppressed or wronged by their fellow men. Indeed, what other protection has 'the common man' against the injuries done to him by those more powerful than he is, save only the legal profession . . . That is a fact which 'the common man', too prone today as often in the past to gird at the profession because of its few black sheep, might do well to ponder."

(x) The learned Judge continued and stated that "No honourable and honest legal practitioner will accept a client's money for doing his work to the best of his ability, and then not do it. And before he even accepts it, he will have qualified himself to do the work properly, for, where skill is required, lack of it is equivalent to negligence. Indeed, to undertake to do something and then not do it with reasonable efficiency, either because of unskillfulness or [because] of lack of diligence, is something very closely akin to obtaining money by false pretences."

(xi) Fidelity expected in an advocate just like an attorney is "specially meant the due carrying out of his duty to his client, including, of course, industry and care . . . for we must not think that that quality, so requisite in an attorney, is not necessary in an advocate." The honourable Judge

averred that “the legal profession has centuries of tradition behind it. . . But an honourable tradition . . . The person is to be pitied who does not possess the knowledge that something is not done, in the sense that it is not done by decent people: he lacks one of the most reliable standards by which to judge the correctness of any proposed course of conduct. In conclusion, “Honesty is the best policy’: in the long run it actually pays a barrister or an attorney that it should be known that he is scrupulously

honourable. Would any sane and honest person not rather put his affairs into the hands of a solicitor whom he knew to be completely

reliable than into those of one who, no matter how able he might be, was not entirely to be trusted?”

(xii) As stated above, the defendants’ litigation herein was clearly vexatious. “In its legal sense ‘vexatious’

mean a frivolous, improper and instituted without sufficient ground to serve solely as an annoyance to the defendant (plaintiff herein);

(xiii) Vexatious proceedings (special plea herein) would also no doubt include proceedings which although properly instituted, are continued with the sole purpose of causing annoyance to the defendant (plaintiff herein) “abuse” connotes “misuse an improper use”, a use mala fide, a use for an ulterior motive”. “. . . That even if the application (special plea herein) was not intended to be vexatious if it had that effect, a punitive costs order would be justified.” (See Agriculture, Land and Weveel Trust and others, 2007 (SCA) page 153);

(xiv) Now, in the context of a punitive costs order, Gardiner H in Re Alluval Greek Ltd CPD (at 532 –

535) said “Now sometimes such an order is given because of something in the conduct of a party which the court considers should be punished, malice, misleading the court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear.”

(xv) Plaintiff herein clearly has been put to unnecessary trouble, expenses, delay without any justifiable reasons. It is on the above basis that a punitive cost order will be justified in the circumstances of this case.

[11] Accordingly, I make the following order:-

[11.1] Defendant’s special plea is dismissed with costs on an attorney and client scale.

N P JAJI

JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the plaintiff : Adv Ayerst

Attorneys for the plaintiff :

NETTELTONS ATTORNEYS

118A High Street

GRAHAMSTOWN

(Mr Nettelton)

Counsel for the defendant : Adv Cole

Attorneys for the defendant :

Huxtable Attorneys

26 New Street

(Ref: Mr O Huxtable)

Tel: 046 622 2692

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2020/21.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/rooi-v-leon-unknown-topic-aecghc-2020>

Prepared on 11 October 2026 · Esheria