

SOUTH AFRICA / JUDGMENT

Trollip v Phatshoane Henney Attorneys (3683/2018) [2022] ZAFSHC 158 (23 June 2022) [2022] ZAFSHC 158

COURT

Free State High Court, Bloemfontein

BEFORE

Loubser

CASE / FILE NUMBER

3683/2018

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IN

**THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN****Case****number: 3683/2018**

Reportable:

YES/NO

Of

Interest to other Judges: YES/NO

Circulate

to Magistrates: YES/NO

In

the matter between:

JUANITA

TROLLIP Plaintiff

and

PHATSHOANE

HENNEY ATTORNEYS

First Defendant

PIETER

LABUSCHAGNE SKEIN Second

Defendant

HEARD

ON: 19,

20 and 22 APRIL 2022

JUDGMENT

BY:

LOUBSER, J

DELIVERED ON: 23 JUNE 2022

[1] This is yet another case where a Court has to determine whether the Plaintiff's claim has become prescribed by the effluxion of time. South African Courts have been seized with this question almost on a daily basis in recent years, with the result that there is a plethora of judgments dealing with the issue. The judgements show that in each case, the applicable legal principles are time and again weighed up against the particular facts to arrive at a justifiable

conclusion. This Court will follow the same course to determine whether the Plaintiff's claim has become prescribed or not.

[2] The Plaintiff issued summons against the Defendants for damages arising from the alleged negligence of the Second Defendant in pursuing a claim for bodily injuries against the Road Accident Fund as a result of a motor vehicle accident in which she was injured on 28 November 2009. It is alleged in the summons that the Plaintiff instructed the Second Defendant, who was then in the employment of the First Defendant as an attorney and therefor acting in the course and scope of his employment with the First Defendant, to pursue her claim. In their respective Pleas filed subsequently, the First and Second Defendant denied all the allegations of negligence on the part of the Second Defendant. In addition, a Special Plea was raised in

the respective Pleas to the effect that the Plaintiff's claim had already become prescribed by the time that the summons was served on both Defendants on 24 July 2018.

[3] In their Special Pleas, both the Defendants pleaded that the delictual debt which is the subject of the Plaintiff's claim had arisen and became due on the 10th June 2015, alternatively the 9th July 2015, being the date on which the Plaintiff acquired a complete cause of action for the recovery thereof. It is pleaded that, in the circumstances, more than three (3) years have lapsed between the delictual debt falling due and the institution of the action, resulting in the prescription of the claim in terms of Section 11(d) of the Prescription Act[1].

[4] Where the Special Pleas rely on the date on which the Plaintiff acquired a complete cause of action, reference is obviously made to the provisions of Sections 12(1), (2) and (3) of the said Act. Those sections provide as follows:

12. When prescription begins to run

- (1) Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due.

[S 12(1) subs by s 68 of Act 32 of 2007.]

- (2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
- (3) 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 such knowledge if he could have acquired it by exercising reasonable care.

[S 12(3) subs by s 1 of Act 11 of 1984.]

- [5] In a surprising turn of events, the First and Second Defendants filed an Amended Plea by the Second Defendant on 1st March 2022, that is some one and a half months before the trial was set to commence. In this Amended Plea, the Second Defendant conceded that he was negligent in his conduct of the Plaintiff's case in three aspects. He persisted in his Special Plea, however, although the following was now inserted: that by 10 June 2015, alternatively the 9th July 2015, the Plaintiff "could by exercising reasonable care have become aware...." and "acquired knowledge of the identity of the debtor and the facts from which the debt arose". It needs mentioning here that in a Replication filed by the Plaintiff subsequent to the filing of the original Pleas, the Plaintiff alleged that she had only become aware of the identity of the debtor and the facts of claim against them after her consultation with her present attorneys on 19 July 2016. In the alternative, it was pleaded in the Replication that the Second Defendant had wilfully prevented her from coming to know of the existence of the debt, causing prescription to commence running only on the second date, namely 19 July 2016.
- [6] Subsequent to the concession made in the Amended Plea, the merits of the Plaintiff's claim became settled between the parties on 9 April 2022 in the amount of R 2 261 204.00, a mere 10 days before the commencement of the trial proceedings. The only dispute remaining between the parties is now whether the Plaintiff can recover the amount agreed upon, or whether her claim against both parties has become prescribed.
- [7] At this point it would be appropriate to turn to the negligence claim against the Second Defendant. It appears to be common cause that after the Second Defendant received his mandate from the Plaintiff, he sent her to a general practitioner, Dr. Khan, on 19 September 2012, who then submitted a medico-legal report. On the basis of this report, Second Defendant issued summons against the Road Accident Fund out of the Bloemfontein Regional Court for an amount of R 223 000.00. During January 2015, and after the five (5) year prescription period against the Road Accident Fund had already expired, the Second Defendant caused the Plaintiff to be assessed by an occupational therapist and an industrial psychologist, and their reports were submitted to an actuary, who assessed her loss of

income in amounts far in excess of R 400 000. This amount is mentioned because it represented the monetary jurisdictional limit of the Regional Court at the time. Because the matter could not be transfer to the High court or summons re-issued due to prescription the Second Defendant proceeded with the case in the Regional Court, limiting the amount of the claim to R 400 000. Eventually judgment by default was obtained for such limited amount. After deduction of the Second Defendants fees and disbursements, the Plaintiff received a total amount of some R 290 000.00 for her damages.

[8] In her Particulars of Claim the Plaintiff alleged that the Second Defendant acted negligently in that he –

8.1 Failed to properly quantify the matter;

8.2 Issued summons out of the incorrect forum when the quantum of the matter was above the jurisdiction of such court;

8.3 Despite the Plaintiff having sustained severe orthopaedic injuries, she was not referred to an orthopaedic surgeon timeously for the purposes of a medico-legal report;

8.4 Failed to timeously assess the quantum of the matter before it became prescribed.

8.5 Allowed the matter to become prescribed.

8.6 Disentitled the Plaintiff to fully and properly prosecute her claim for recovery of the quantum of damages occasioned by her injuries, against the Road Accident Fund; and

8.7 Advised the Plaintiff that she had no option but to accept the jurisdiction of the Bloemfontein Regional Court and thereby limited her compensation claimable to R 400 000.00.

It is further alleged in the Particulars of Claim that the Plaintiff suffered damages in the amount of R 3 094 726.97 because of the First, alternatively the Second, alternatively the joint negligence of the First and Second Defendants.

[9] In his abovementioned Amended Plea, the Second Defendant admitted that he was negligent in that he –

9.1 Failed to properly assess the value of the Plaintiff's claim against the Road Accident Fund before instituting action in the prosecution of the Plaintiff's claim against the Road Accident Fund in the Regional Court.

9.2 Failed to timeously either transfer the Plaintiff's action to the High Court, or reinstitute action in the prosecution of the Plaintiff's claim against the Road Accident Fund in the High Court, and

9.3 Caused the Plaintiff's claim against the Road Accident Fund to be limited to the monetary value of R 400 000.00.

- [10] When the remaining issue of prescription came before this court, the First and Second Defendants called only one witness to testify, namely the Second Defendant himself. This was done in view of the legal principle that the party alleging that a claim has become prescribed, bears the onus of proving that the Plaintiff's claim has prescribed by the given date. No other witness was called to testify, by either of the parties.
- [11] In his testimony the Second Defendant explained the relevance of the dates of 10 June 2015 and 9 July 2015, being the dates relied upon by the Defendants in their Special Plea. He testified that on 10 June 2015 he merely notified the Plaintiff by e-mail of the calculations of the actuary, and that the limit of the monetary jurisdiction in the Regional Court was only R 400 000.00. On 9 July 2015 he informed her, again by e-mail, that he had discussed the issue of the transfer of her claim to the High Court with two advocates, and it now appears that it cannot be done. He advised her that they would therefore have to stand by the claim of R 400 000.00 in the Regional Court. The Plaintiff was upset about this, he testified.
- [12] The Second Defendant further testified the following, which is relevant to the present enquiry:
- 12.1 He conceded that the date of 10 June 2015 can be disregarded because the Plaintiff was then still under the impression that the case was going to be transferred to the High Court.
- 12.2 The Plaintiff is a lay person as far as the law is concerned.
- 12.3 When he received the calculations from the actuary in July 2015, he realised that the action instituted in the Regional Court was due to his own negligence.
- 12.4 He therefore knew in July 2015 that he would be liable should the Plaintiff claim from him.
- 12.5 In the e-mail of 9 July 2015 he did not inform the Plaintiff that the limited claim was the result of his negligence, because he did not regard it as his duty to inform her accordingly. He was not aware of such a duty.
- 12.6 He also did not regard it as his duty to refer the Plaintiff to another attorney in the circumstances.
- 12.7 On 9 July 2015 the Plaintiff was therefore unaware that she could claim from him, but she was aware that she had a bigger claim than the R 400 000.00.
- 12.8 The Plaintiff did not know on the 9 July 2015 that she could also claim from the First Defendant, because he did not inform her as such. He was not aware of a duty to inform her accordingly.
- 12.9 He created the impression with the Plaintiff that the limited claim was the result of circumstances beyond his control, and he failed to inform her of his omission relating to the obtaining of reports.

12.10 As a result of her dissatisfaction with the situation, the Plaintiff consulted with another attorney on 19 July 2016, where after she was advised that she potentially had a claim against the Defendants.

[13] This is then the evidence and the facts of the matter, which must now be weighed up against the legal principles applicable to the issue of prescription.

[14] Probably the decision most quoted when it comes to determining when a debt becomes due in terms of the Prescription Act, is the unanimous decision of the Constitutional Court in *Links v Department of Health*[2]. In that case, the Plaintiff's thumb was amputated in hospital, and he was apparently not aware that the amputation was due to the negligence of the hospital staff. When he was later advised of the negligence, he instituted action, but prescription of the claim was raised as a defence.

[15] Firstly, the Court referred with approval to the following passage in the case of *Truter and another v Deysel*[3]. "Debt due' means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim." The court also referred to another passage[4] in the *Truter* case where "cause of action" for the purposes of prescription was defined as: "...every fact

which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

[16] The court further quoted the following passage in the case of *Minister of Finance and others v Gore NO*[5] to explain the meaning of "knowledge" in relation to prescription: "The defendants' argument seems to us to mistake the nature of 'knowledge' that is required to trigger the running of prescriptive time. Mere opinion or supposition is not enough: there must be justified, true belief. Belief on its own is insufficient. Belief that happens to be true is also insufficient. For there to be knowledge, the belief must be justified."

[17] The court then came to the following conclusions:

17.1 "Until the applicant had knowledge of facts that would have led him to think that possibly there had been negligence and that this had caused his disability, he lacked knowledge of the necessary facts contemplated in Section 12 (3)"[6]

17.2 "A firm finding that the applicant did not know what caused his condition as at 5 August 2006 can, therefore, be justifiably made. That was a material fact a litigant wishing to sue in a case such as this would need to know."[7]

17.3 “Without advice at the time from a professional or expert in the medical profession, the applicant could not have known what had caused his condition. It seems to me that it would be unrealistic for the law to expect a litigant who has no knowledge of medicine to have knowledge of what caused his condition without having first had an opportunity of consulting a relevant medical professional or specialist for advice. 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.”[8]

[18] These principles now have to be applied to the facts, and especially to the evidence of the Second Defendant, to arrive at a justifiable conclusion. The Defendants rely on the very same facts and evidence in their contention in this Court that the Plaintiff had known by 9 July 2015 that her claim was limited in the Regional Court while the actuarial calculations obtained after issue of summons in the Regional Court, suggested that her claim was much higher than the limit in that Court. She also knew on the date that her action could not be transfer to, or reinstituted in the High Court. On the basis of this knowledge, the Plaintiff knew or must have known on 9 July 2015, or could have established it by exercise of reasonable care, that she had a claim against the attorney, the argument went.

[19] In my view, however, this argument is undermined by the evidence of the Second Defendant. His testimony that the Plaintiff is a lay person as far as the law is concerned, and that he created the impression with the Plaintiff on 9 July 2015 that the limited claim was the result of circumstances beyond his control and that he failed to inform her of his omissions relating to the obtaining of reports, is decisive. It conveys the message that the Plaintiff did not have all the facts, nor did she know that the Second Defendant was responsible for her predicament. This brings to mind what was stated in the Links-case, namely that until the applicant had knowledge of facts that would have led him to think that possibly there had been negligence and that this had caused his disability, he lacked knowledge of the necessary facts contemplated in Section 12 (3) of the Prescription Act.[9]

[20] A firm finding that the Plaintiff did not know what caused her predicament on 9 July 2015, can therefore justifiably be made. That was a material fact that a litigant wishing to sue in a case such as this, would need to know. In this respect the Court is also mindful of what “knowledge” entail, namely that mere opinion or supposition is not enough. For there to be knowledge, the belief must be justified.

[21] The Second Defendant further testified that, on 9 July 2015, the Plaintiff was not aware that she could claim from him or the First Defendant. She was only aware of the fact that she had a bigger claim than the R 400 000.00. He testified that he did not inform her that her limited claim was the result of his negligence, and that she could seek the assistance of another attorney in the circumstances. He did not regard it as his duty to inform her as such, he testified.

- [22] As for the duty to inform, I cannot agree with the Second Defendant. When there is a conflict between an attorney's own interest and the interest of a client, the interests of the client must certainly prevail.[10] This is not the point however. The point is that the Second Defendant did not inform the Plaintiff, therefore wilfully preventing the Plaintiff to know of the existence of the debt.
- [23] In the premises, I find that the Defendants have failed to prove that the Plaintiff's claim had become prescribed. Only the question of costs remains to be decided.
- [24] A feature that stands out in this respect, is that the Defendants persisted in the Special Plea of prescription while the Second Defendant was well aware of the fact that he had withheld crucial information from the Plaintiff on 9 July 2015, which caused her to lack the necessary knowledge on that day to realise that there had been negligence and that this had caused the claim to be limited. It speaks for itself that the Plaintiff had to incur costs to resist the Special Pleas and, in the prevailing circumstances, I can find no reason why the Plaintiff should be left out of pocket.
- [25] The following orders are made:
1. The Special Pleas of Prescription entered by the First and Second Defendants are dismissed.
 2. First and Second Defendant are liable to compensate the Plaintiff in the amount R 2 261 204.00 plus interest a tempore morae.
 3. First and Second Defendant shall pay the Plaintiff's taxed or agreed costs on an attorney and client scale, which will include the following, but will not be limited to:
 - 3.1 The costs of the assessment of the Plaintiff, preparation of the medico-legal reports, reservation, preparation and consultation costs, which includes consultations with counsel of Dr. Versveld, Ms. Donaldson, Mr. Wittaker and Mr. Weideman.
 - 3.2 The travel, accommodation and attendance fees for purposes of trial for Mr. Weideman for the trial on 19 to 20 April 2022.
 - 3.3 The costs of both junior and senior counsel for trial on 19, 20 and 22 April 2022.
 - 3.4 The costs for the travel and accommodation of the Plaintiff's attorney and counsel for the trial on 19 and 20 April 2022.

P. J. LOUBSER, J

For the Plaintiff:

Adv. J.J. Wessels SC with Adv. C Vallaro

Instructed by:

Munro, Flowers & Vermaak Attorneys

c/o Lovius Block Attorneys, Bloemfontein

For the Defendants:

Adv. F. Grobler SC

Instructed by: Ditsela

Inc.

c/o Phatshoane Henney Attorneys, Bloemfontein

[1] Act 68 of 1969

[2] 2016(4) SA 414 (CC)

[3]

[2006] ZASCA 16; 2006 (4) SA 168 at par 16

[4] Par 19 in the Truter case

[5] 2007(1) SA 111 (SCA) par 18

[6] Par 45 of the Judgement

[7] Par 46 of the Judgement

[8] Par 47 of the Judgement

[9] See Par 17.1 above

[10] See for instance Ekman v Venter & Volschenk Attorneys and another ZAGPPHC 358

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Prepared on 11 October 2026 · Esheria