

SOUTH AFRICA / JUDGMENT

Wiese N.O and Another v Coetzee N.O and Others [2023] ZAGPPHC 444; 21988/2020 (20 June 2023) [2023] ZAGPPHC 444

COURT

North Gauteng High Court, Pretoria

BEFORE

van der Westhuizen

CASE / FILE NUMBER

21988/2020

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IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO.: 21988/2020

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER

JUDGES: NO

(3) REVISED.

20/06/2023

In the matter between:

MINETTE WIESE N.O.

First

Plaintiff

MINETTE WIESE

Second Plaintiff

and

MARISKA MARTHA COETZEE

N.O.

First Defendant

MARISKA MARTHA COETZEE

Second Defendant

THE MASTER OF THE HIGH

COURT OF SOUTH

Third Defendant

AFRICA, PRETORIA

STEPHAN COETZEE

Fourth Defendant

MINé COETZEE
Fifth Defendant

JUDGMENT

van der Westhuizen, J

- [1] In this matter the plaintiffs seek relief in the form of payment of damages suffered as a result of the alleged conduct of the first and/or the second defendants. The summons, dated 5 May 2020, was served during 2020 upon the defendants.
- [2] The first and second plaintiffs relate to one individual cited respectively in a representative, allegedly as representative of the BMC Family Trust (the trust), and in a personal capacity. The first and second defendants similarly relate to one individual also cited in a representative and a personal capacity. The other defendants did not defend the action. The third defendant is the Master of the High Court, Pretoria.
- [3] The defences raised by the first and second defendants included three special pleas and a plea over. By agreement between the parties the special pleas were separated and be adjudicated separately and distinctly from the merits of the matter. It was submitted on behalf of the first and second defendants that upholding each or all of the special pleas would be decisive of the action. The special pleas were: a form of lack of locus standi; prescription; and res iudicata. The third special plea was not pursued by the first and second defendants.
- [4] The issue of locus standi appeared to relate to the belated institution of this action. The second plaintiff issued an application in her name during September 2015 in which relief was sought for the return of trust funds. On 13 March 2017, an order was granted by agreement between the parties, directing the first and second respondents (the first and second defendants in this action) to deliver certain records, inter alia bank statements of the trust) within a specified period, after which the first respondent (first defendant) was ordered to debate the said documents with the applicant (second plaintiff) within a specified period. That order further provided that should a dispute arise during the debate, the applicant (second plaintiff) was obliged to refer the matter for adjudication to the High Court by means of an action or application for final determination. That action or application was to be issued within 30 days after the debatement. This is that action.
- [5] The debatement rendered no finality. It was concluded on 24 October 2018. This action was instituted as recorded earlier on 5 May 2020. Far outside the 30 day period ordered in terms of the order of 13 March 2017. The first and second defendants submitted that the leave to institute the intended action or application lapsed and consequently it could not be pursued belatedly. No extension of that period was ever sought by the first and second plaintiffs. Accordingly, they lacked the necessary locus standi to institute this

action.

- [6] It stands to be recorded that after the concluding of the debatement, the second plaintiff, as applicant, filed a supplementary affidavit in the initial application. This occurred on or about 10 January
2019. The apparent intention of the second plaintiff was to comply with the order of 13 March 2017. On 9 January 2020, this court set that supplementary affidavit aside as constituting an irregular step. In the judgment delivered by Seima, AJ., the court held that the order of 13 March 2017 was dispositive of the application brought in which that agreed order was made. Seima, AJ., further held that the matter was consequently *res iudicata*. The filing of a supplementary affidavit was further not the action or application directed by the agreed order of 13 March 2017. That order clearly intended a separate and distinct action or application from what had proceeded before. Accordingly, it was held to constitute an irregular step and was consequently set aside.
- [7] In my view, the agreed order of 13 March 2017 clearly directed a distinct and separate institution of an action or application for the final adjudication of the disputed debatement of the return of alleged trust funds. That order, on a purposive reading thereof, clearly did not grant leave to file supplementary affidavits, but to institute afresh an action or application for final adjudication. That did not happen within the
- stipulated period. The filing of the supplementary affidavit occurred outside the 30 day period set by the agreed order. The first special plea stands to succeed.
- [8] The second special plea, as recorded earlier, relates to the issue of prescription. The first and second defendants pled that the plaintiffs' claim constituted a claim for damages. In that regard, the first and second defendants pled that the relevant period of prescription prescribed in the Prescription Act, 68 of 1969, was 3 years from the date upon which the debt arose, or the plaintiffs became aware of the debt, or was presumed to have become aware thereof.[1]
- [9] The plaintiffs concede that their claim relates to damages in respect of the amount appropriated by the first and second defendants during
2008. The plaintiffs further admit that the summons was only served in May 2020.
- [10] However, the plaintiffs alleged that prescription could only have commenced on 16 May 2017, as the first and second defendants had "wilfully prevented" them from becoming aware of the existence of the debt. This submission is without merit. The plaintiffs were acutely aware, prior to the launch of the application in which the aforementioned agreed order was granted, of at least the existence of the life policy forming the bone of contention. The second plaintiff clearly alleged in that application that the said policy was an asset of the trust. That application was launched during September 2015, although it was only concluded on 13 March

2017. The said application was primarily directed at the recoupment of the said policy, but as a consequential result following on a debatement of all monies that were found to be assets of the trust.

[11] On the second plaintiff's own version, her attorney of record, and thus the second plaintiff, became aware of the fact that the trust was the

beneficiary of the said policy. That fact was conveyed to the second plaintiff's attorney on 7 June 2016. Consequently, prescription commenced at least on 7 June 2016. The three year period thus ended prior to the issuing of this action, which was served on 5 May 2020.

[12] There is no merit in the submission on behalf of the plaintiffs that prescription could not have commenced whilst the second plaintiff was a minor. At the time when the 2015 application was launched during September 2015, she admitted being a major and had full legal capacity.

[13] This action is premised upon the fact that the benefits of the said policy were paid into the account of the trust as far back as 2008. It follows that any determination of the commencement of prescription, the plaintiffs' claim prescribed at least during

2019. Consequently, the second special plea stands to be upheld.

[14] There is no reason why costs should not follow the event.

I grant the following order:

1. The first and second special pleas of the first and second defendants are upheld;
2. The plaintiffs are to pay the costs, jointly or severally, the one paying the other to be absolved.

C J VAN DER WESTHUIZEN

JUDGE OF THE HIGH COURT

On behalf of Plaintiffs: C B Garvey Instructed by: Otto Krause In. Attorneys On behalf of First and Second Defendants: S Reinders Instructed by: Rossouws Attorneys Date of Hearing: 02 May 2023

Judgment

Handed down: 20 June 2023

[1] Section 11 of the Prescription Act. >

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Prepared on 12 October 2026 · Esheria