SOUTH AFRICA / JUDGMENT

Zungu v Greyling t/a Greyling Attorneys (2014/32381) [2017] ZAGPJHC 267 (18 September 2017)

[2017] ZAGPJHC 267

COURT
South Gauteng High Court, Johannesburg

BEFORE
Nkosi

CASE / FILE NUMBER
2014/32381

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2014/32381

Not reportable

Not of interest to other judges

Revised.

In the matter between:-

ZUNGU MKHULISENI THULEBUKA Plaintiff

And

DELENE GREYLING t/a GREYLING ATTORNEYS Defendant

JUDGMENT

NKOSI AJ

INTRODUCTION

[1] The plaintiff is suing his erstwhile attorney, the defendant, for damages resulting from the breach of mandate. It is alleged that the attorney failed to properly quantify plaintiff's claim against the Road Accident Fund.

[2] The defendant raised a special plea of prescription and set it down for hearing separate from the merits of the action.

ISSUE

[3] The question to be determined is whether the plaintiff's claim has indeed prescribed.

[4] Whether there was an agreement either expressly or tacitly between the parties in terms of which the defendant acknowledges liability resulting in prescription being interrupted.

BRIEF FACTUAL BACKGROUND

[5] It is common cause that on or about 06 January 1999 the plaintiff was involved in a motor vehicle collision and consequently sustained bodily injuries. He subsequently instructed the defendant on or about the 30 September 1999 to investigate and prosecute his claim against the Road Accident Fund.

[6] It is also common cause that the defendant accepted the mandate and submitted the plaintiff's claim to the Road Accident Fund. She thereafter and only on the 17 December 2003 caused the summons to be issued out of the Balfour Magistrate court and served same on the Road Accident Fund. The defendant's mandate was terminated on the 26 August 2010.

[7] The plaintiff's current attorneys, Mr Van Rensburg, took over plaintiff's matter from the defendant. He received plaintiff's file from the defendant and a few days later perused its contents. He there and then realised that the plaintiff's matter ought not to have been prosecuted out of the Balfour Magistrate court because of the nature and the extent of the plaintiff's injuries . His immediate reaction was to transfer the matter to the High court because he believed that the claim was beyond the monetary jurisdiction of the Magistrate Court .He could not withdraw the action and issue a fresh summons in the High court because doing so would have caused the claim to prescribe. Further, he could not transfer the matter from the Balfour Magistrate court to the High court because there was no such procedure allowed by the magistrate court rules at the time. He referred the plaintiff to Dr CT Frey, an Orthopaedic surgeon. Dr Frey examined the plaintiff on the 29 September 2010 and compiled a Medico legal report. His findings suggest that the plaintiff's injuries were of serious nature and that the plaintiff's claim exceeded the monetary jurisdiction of the magistrate court.

[8] The plaintiff instituted the current action against the defendant and served the summons on the defendant on 04 November 2014.

[9] The defendant has raised a special plea to the effect that the plaintiff's claim has prescribed. It is this special plea which is before court for determination, the parties agreed that the issues of liability and quantum shall be dealt with at a later stage depending on the outcome of the special plea.

PRESCRIPTION ACT

[10] Section 11 of the prescription act provides[1]

1. (a)

i. .....

ii. .....

iii. .....

iv. .....

(b) .....

(c) .....

(d) Save where an Act of Parliament provides otherwise, three years in respect of any other debt. ”

[11] Section 12 provides :

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

2. . . . . .

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.

4. . . . . ”.

[12] Section 14 thereof provides

“1. The running of the prescription shall be interrupted by an express or tacit acknowledgement of liability of the debtor.

2. If the running of the prescription is interrupted as contemplated in subsection (1) ; prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at anytime thereafter the parties postpone the due date of the debt, from the date upon which the debt again becomes due .”

[13] In matters of this nature, a claim against the Road Accident Fund constitutes a debt and it is subjected to the provisions of the prescriptions act referred to above. In this case, it is not the prescription period of three

(3) years which is in dispute. Rather, it is the date when prescription commenced to run which the Court has to determine. Once such date is established, it must further be determined whether the running of prescription was interrupted by the alleged agreement between the parties[2]

SPECIAL PLEA

[14] The essence of the special plea raised by the defendant is to the effect that :

14.1 As at 29 September 2010, the plaintiff was aware or ought reasonably to have been aware or ought to have been made aware by his attorneys of record that his claim against the Road Accident fund would exceed the District Magistrate's Court jurisdiction.

14.2 As at 29 September 2010 the plaintiff had knowledge alternatively is deemed to have acquired knowledge of the identity of the defendant and of the facts from which his debt against the defendant arose.

14.3 In terms of section 11 (1)(d) and 12(1) and 3 of the Prescription Act 68 of 1969, the plaintiff's debt against the defendant arose on or about 29 September 2010 and prescribed on or about 28 September 2013.The

summons was only served on the defendants on 04 November 2014.

ONUS

[15] The parties were ad idem and correctly so, as to which party bears the duty to begin. The Defendant bore such duty in light of the fact that she is the one who raised the special plea. She took the witness stand and thereafter closed her case. The plaintiff called Mr Van Rensburg as a witness and thereafter closed his case.

EVIDENCE

[16] The defendant testified and admitted receiving instructions from the plaintiff to represent the plaintiff in his claim against the Road Accident Fund. She issued the summons out of the Balfour District Magistrate court. She closed her practice sometime in 2008 and handed plaintiff's file over to Mr Van Rensburg. She never discussed at all the contents of the plaintiff's

files with Mr Van Rensburg on the day of the hand over or anytime thereafter .She only had two telephone conversations with Mr Van Rensburg .The first call was sometime between July and August 2014 and the second call was shortly before the summons in the present mater was served on her. When she received the first call she was informed by Mr Van Rensburg that she was to be sued for professional negligence in that she under estimated plaintiff's claim. The second call was a request for her physical address for purposes of serving of summons. When she was cross examined, she denied that she had Dr Frey's report prior to the summons being served on her. She further denied that she discussed Dr Frey's report with Mr Van Rensburg. It was put to her that Mr Van Rensburg advised her that there were issues regarding the Magistrate court matter meaning that she did not handle the plaintiff's claim with such skill and diligence as would be expected of an attorney and that she tacitly admitted liability . She denied having tacitly admitted liability. She further denied that she ever received a correspondence from Mr Van Rensburg.

[17] Mr Van Rensburg was called to testify on behalf of the plaintiff, he testified that he is an admitted attorney and has been in practice for the past 40 years. He served his articles of clerkship under the guidance of the defendant's father. The defendant and himself have a cordial relationship. He is well experienced in third party claims against the Road Accident Fund. He received the plaintiff's file from the defendant and when he had an opportunity to peruse the file which he did after a few days, he then realised that the matter should not have been referred to the Balfour Magistrate court because the plaintiff's injuries were

serious. He further realised that it was late to withdraw the matter from the Balfour Magistrate court, he then made a telephone call to the defendant and advised her of the problem and that he would have to sue her. According to him the defendant replied by saying "ok", "ok". The next occasion when he discussed this matter with the defendant telephonically he told the defendant that "Jy het droe gemaak". He says the defendant replied by saying "ok", "ok"! She sounded apologetic and was submissive .He reads that to mean that the defendant tacitly admitted liability.

[18] Mr Van Rensburg conceded under cross examination that he knew in 2010 that the plaintiff has a claim against the defendant. He also admitted that he perused Dr Frey's report on the 13 November 2010 and on the 27 October 2010 consulted with the plaintiff

regarding the report. He advised the plaintiff during the said consultation that his claim was under-settled by the defendant. At that stage he was of the view that he could not proceed to institute a claim against the defendant before the claim in the Balfour

Magistrate Court was finalised. He has since conceded that his view was mistaken. He further admitted that the alleged admission of liability by the defendant was never reduced to writing.

COMMON CAUSE

[19] The defendant closed her practice and handed plaintiff's file to Mr Van Rensburg sometime in 2009. Mr Van Rensburg received a medico legal report compiled by Dr Frey on the 29 September 2010. In the year 2010, Mr Van Rensburg knew that there was a claim against the defendant for breaching her mandate. He perused Dr Frey's report on the 13 October 2010 and on the 27 October 2010 consulted with the plaintiff. He discussed Dr Frey's report with the plaintiff and advised him that the defendant erred by instituting the action in the Balfour Magistrate Court instead of the High Court.

HAS PLAINTIFF'S CLAIM PRESCRIBED

[20] The need and importance of regulating through the Prescription Act , and the time frames within which a party has to institute an action was succinctly stated in the case of Road Accident Fund v Mdeyide when Van der Westhuizen stated :

"This court has repeatedly emphasised the vital role time limits plays in bringing certainty and stability to social and legal affairs and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the potential to be drawn out for indefinite periods of time bringing about prolonged uncertainty to the parties to the dispute. The quality of adjudication by Courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be able to testify, or their recollection of events may have faded. The quality of adjudication is central to the rule of law[3].

[21] The issue of prescription as raised by the defendant remains relevant and important to the case at hand. The defendant has made very persuasive submissions that the plaintiffs claim has prescribed. The plaintiff contends that if indeed the claim has

prescribed, prescription was interrupted by the admission of liability.

[22] Mr Van Rensburg consulted with the plaintiff on the 27 October 2010. During the consultation he already had the medico report by Dr Frey which was a critical catalyst for a meaningful consultation. He was able to advise the plaintiff about the mistakes which the defendant made when she handled the claim. The plaintiff was at all material times aware of the identity of the defendant. I

am therefore satisfied that in terms of Section 12(3) the plaintiff had knowledge of the identity of the defendant and of the facts from which the debt arose, and on this date prescription commenced to run. The plaintiff had until the 26 October 2013 to institute the action before court. The summons was only served on the 4 November 2014 which is beyond the period of three (3) years.

[23] The plaintiff submitted that he was unable to institute the action against the defendant because he could not establish how much to claim and would have been able to do so after the case in Balfour Magistrate Court had been finalised. I agree with the defendant's submission that, the fact that a precise quantification of the future damages could not be made at the time of the breach did not alter the fact that prescription started to run from the date of the breach and not only when the losses either occurred or could be precisely quantified.

"A debt under the Prescription Act is a right of which the converse is a liability. The quantification of that liability is not necessary before a debt can be said to exist or be due"[4].

WAS PRESCRIPTION INTERRUPTED

[24] The plaintiff argued that there was a tacit agreement between the parties which led to the interruption of prescription. This agreement is said to have been entered between the year 2010 and

2014. The existence of the alleged agreement is denied by the defendant. The plaintiff bases its allegation on the fact that when the defendant was confronted about her mistakes in handling plaintiff's claim and when she was told that she was to be sued she replied "ok",

"ok" at least on two occasions. The plaintiff submitted that the defendant was apologetic and submissive each time she was confronted about the plaintiff's claim. It is her attitude read together with her response namely "ok", "ok" which led the plaintiff to believe that the defendant admitted liability. In Benson v Walters the court had this to say :

"To interrupt prescription an acknowledgment by the debtor must amount to an admission that the debt is existence and that he is liable therefore[5]".

[25] I believe that Mr Van Rensburg at the time must have been aware of prescription in this matter. He also knew the importance of the admission of liability to the issue of prescription. He is expected to have confirmed in writing the admission of liability and its terms, this was not done and no explanation has been furnished. On the other hand the defendant vehemently denied admitting liability .She further denied that her response namely "ok", "ok" had a bearing to the alleged admission of liability.

[26] The plaintiff is the one alleging the existence of admission of liability, therefore he bears the onus of proof .I find nothing in the evidence to persuade me to find in the plaintiff's favour in so far as the existence of the agreement is concerned

.Instead I find it improbable that such an important admission would be left unrecorded for future references by a very senior and seasoned attorney of Mr Van Rensburg's stature. I am not persuaded that the alleged agreement existed. The plaintiff has failed to discharge his onus.

CONCLUSION

[27] The plaintiff's claim against the defendant prescribed on the 26 October 2013. In the absence of an admission of liability, the running of the prescription is not interrupted. The plaintiff had failed to discharge the onus of proving that the prescription was interrupted by an admission of liability.

ORDER

1. The special plea of prescription is upheld.
2. The plaintiff's action is dismissed with costs.

NKOSI, AJ

For Plaintiff

: Advocate JA Kitching

Instructed by

: Leon JJ Van Rensburg

For Defendant

: Advocate L Segeels

Instructed by

: Hogan Lovells SA Inc

Date of Hearing

: 30 August 2017

Date of Judgment

: 18 September 2017

[1] Prescription Act , 68 of 1969

[2] Section 11(1)(d), Prescription Act 68 of 1969

[3] Road Accident Fund v Mdeyide 2011 (2) SA 26 (CC).

[4] Prime Fund Managers (Pty) Ltd v Rowan Angel (Pty) Ltd and Another 2014 2 All SA 227 (GNP) para. 44

[5] Benson v Walters 1984 1 SA 73 (A) at para 90G

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Prepared on 26 October 2026 · Esheria