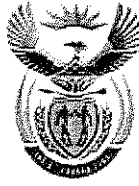


REPUBLIC OF SOUTH AFRICA



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(3) REVISED ✓

2/3/2012

DATE

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SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO. : 22523/2010

NICO ANDREW THEO BOTHA

Plaintiff

and

MARK WILLIAMS

First Defendant

MARK'S DELIVERIES

Second Defendant

PAULO JOSÉ MACARINGE

Third Defendant

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JUDGMENT

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ANDRÉ GAUTSCHI AJ

[1]. The plaintiff is the executor of the deceased estate of Brian Douglas Wegerle ("the deceased"), and in that capacity sues the defendants for damages to the deceased's motorcycle caused in a motor vehicle collision in which the deceased died. The defendants have raised a special plea of prescription, and by agreement between the parties, made an order by me, the special plea is to be adjudicated, in terms of rule 33(4), prior to all other issues.

[2]. No evidence was led. The facts are common cause and very simple :

2.1 The deceased died on 13 June 2007 in a collision between his motorcycle and a vehicle.

2.2 The plaintiff was appointed as executor of the deceased estate on 17 July 2007.

2.3 Action was instituted against the defendants by service of summons on 18 June 2010. (The parties were under the impression that summons had been served on 17 June 2010, but that is in fact the date of issue of the summons, which was served a day later on all three defendants. Nothing however turns on whether it was served on 17 or 18 June 2010).

[3]. From these facts, it will be seen that summons was served more than three years after the date of the collision, but less than three years after the date of appointment of the executor.

[4]. Mr Gouws for the plaintiff submitted that prescription commenced to run on 17 July 2007, at the earliest, whilst Mr Kruger for the defendant submitted that prescription commenced to run on 13 June 2007. It is common cause that the Prescription Act 68 of 1969 ("the Act") applies.

[5]. It is not in dispute that the relevant prescription period is three years<sup>1</sup>.

[6]. It is also not in dispute that the plaintiff is not assisted by section 13 of the Act, in terms of which the completion of prescription is delayed in certain circumstances. The relevant part of that section provides as follows :

**"13. Completion of prescription delayed in certain circumstances.**

(1) If—

...

- (h) the creditor or the debtor is deceased and an executor of the estate in question has not yet been appointed; and
- (i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph ... (h) has ceased to exist,

the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)."

[7]. The effect of this section is that if more than a year remains between the removal of the impediment (in this case, appointment of the executor) and the day on which prescription would otherwise have been completed, then the section has no effect and becomes irrelevant. It is only where there is less than a year between the appointment of the executor and the completion of the relevant period of prescription (but for the section), that the section has any effect. On any basis, there was more than a year after the appointment of the executor and before the three years' prescription period would otherwise have been completed, and the section therefore has no effect.

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<sup>1</sup> Section 11(d) of the Act

[8]. What is however important about section 13 is that it neither prevents the commencement of the running of prescription nor suspends the running of prescription whilst the impediment exists<sup>2</sup>. It deals only with the completion of prescription and does not answer the question as to when prescription commenced. For that one has to look at section 12.

[9]. The relevant parts of section 12 read 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.
- (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) ..."

[10]. It is clear that as at the date of the accident, 13 June 2007, the cause of action as formulated in the particulars of claim existed. At that date, there was a debt immediately claimable or, stated in another way, there was a debt in respect of which the debtor was under an obligation to perform immediately<sup>3</sup>. Knowledge aside, the "debt" was "due" as at that date. Section 12(3) however delays that date until the creditor has actual or deemed knowledge of the identity of the debtor and of the facts from which the debt arises. This is where the true issue

<sup>2</sup> ABP 4x4 Motor Dealers (Pty) Ltd v IGI Insurance Co Ltd 1999 (3) SA 924 (SCA) at 932 para [15]

<sup>3</sup> The Master v IL Back & Co Ltd and Others 1983 (1) SA 986 (A) at 1004G-H; Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd 1990 (1) SA 525 (A) at 532H

in this matter lies. Who is the creditor and when did that creditor acquire actual or deemed knowledge?

[11]. Counsel were *ad idem*, and I agree, that the creditor in this matter is the deceased estate. At first (until 17 July 2007) it was unrepresented, and from 17 July 2007 it was represented by the executor.

[12]. The question then is whether the deceased estate had or could have had knowledge, actual or deemed, prior to the appointment of the executor. A deceased estate, before the appointment of an executor, is not a legal entity or a legal *persona*, and cannot sue or be sued at that time<sup>4</sup>. Until letters of executorship have been granted the estate is unrepresented and can neither sue nor be sued, even though an executor has been nominated in the will<sup>5</sup>. The position is not altered in my view by the fact that a person who, at or immediately after the death of the deceased, has possession or custody of any property, book or document which belonged to the deceased at the time of his death must report his particulars to the Master immediately after the death, and must, unless the court or the Master otherwise directs, retain possession or custody of the property until an interim curator or executor has been appointed or the Master has appointed a person to liquidate and distribute the estate<sup>6</sup>. It must needs be function through a human representative and, until it does, it

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<sup>4</sup> Yoonuce v Pillay, N.O. and Another 1964 (2) SA 286 (D&CLD) at 289E-F; Barker N.O. v Chadwick and Others 1974 (1) SA 461 (D&CLD) at 467D

<sup>5</sup> Muter & Stone v Spangenberg (1834) 2 M 479; Ex parte Jensen 1902 TH 98

<sup>6</sup> Section 11 of the Administration of Estates Act, 66 of 1965


has no mind or personality in law, and cannot, in my view, acquire or have actual or deemed knowledge for the purposes of section 12(3). Accordingly, the debt was not deemed to be due until, at the earliest, the date of appointment of the executor, namely 17 July 2007.

[13]. Mr Kruger sought to get around this problem by taking refuge in section 13(1)(h) read with (i). That reliance is in my view flawed. As I have already pointed out, section 13 deals with the completion of prescription, and not with the commencement thereof. To ascertain when prescription commenced to run, reference must be had to section 12, and section 13 is of no assistance.

[14]. The position would have been different had the deceased survived and been *compos mentis* after the accident, and could be said to have had knowledge of the identity of the debtor and of the facts from which the debt arose at, say, 13 June 2007. Prescription would then have commenced to run on that date, and the death of the deceased thereafter would have had no effect on the continued running of prescription. Section 13(1)(h) read with (i) might or might not have assisted thereafter, depending on what period of incomplete prescription remained after the executor had been appointed. The difference in this case is that the deceased died in the accident, and prescription did not commence to run because there was no actual or deemed knowledge on his part. It could not thereafter commence to run, as I have found, whilst there was a deceased estate without an executor, and it only commenced to run, at the earliest, when the executor was appointed.

[15]. I accordingly find that the plaintiff's claim has not prescribed.

[16]. The special plea of prescription is dismissed with costs.



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**ANDRÉ GAUTSCHI**  
ACTING JUDGE OF THE HIGH COURT

**Date of hearing** : 22 February 2012

**Date of judgment** : 2 March 2012

**For plaintiff** : Adv S G Gouws  
: (instructed by Botha & Sutherland Inc)

**For defendants** : Adv A N Kruger  
: (instructed by D M Bakker Attorneys)