IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2016/11734

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

13 October 2020
DATE


SIGNATURE

In the matter between:

NTSOKE MARIA MAHLASELA Plaintiff

and

KLOPPER JONKER INCORPORATED Defendant

JUDGMENT

LAMPRECHT AJ:

Introduction

[1] The plaintiff claims payment from the defendant of an amount of R1 550 000.00, interest thereon and costs.

[2] Some sixteen years ago, during May 2004, the plaintiff and one Mr J V Machava ("Mr Machava") were passengers in a motor vehicle involved in a collision. They sustained injuries and the plaintiff's brother, Mr N Mahlasela ("the deceased"), who was driving the motor vehicle, was killed in the collision.

[3] Subsequently, during or about August 2004, the plaintiff, Mr Machava, and the deceased's widow, Mrs E R N Mahlasela approached the defendant, a firm of attorneys, for advice regarding any claims that they may have had against the Road Accident Fund ("the RAF").

[4] I will, for the sake of convenience, refer to MRS E R N Mahlasela as "Elizabeth", a designation used by the parties when presenting evidence during the trial of the matter.

[5] It was common cause, during the hearing, that –

> [5.1] the plaintiff, Mr Machava and Elizabeth were at all material times in their dealings with the defendant, assisted and represented by the plaintiff's brother, Mr Meshak Mahlasela (whom I will refer to as "Mr Mahlasela");
>
> [5.2] Mr Mahlasela had been a long-standing client of the defendant's, prior to the defendant having been approached for advice regarding the institution of possible claims against the RAF;
>
> [5.3] the plaintiff and Mr Machava had sustained certain injuries during the collision;

[5.4] the plaintiff's claim against the RAF had become prescribed five years after the collision, during May 2009.

[6] The plaintiff in her summons alleges that her claim had prescribed due to the defendant's professional negligence, in that it failed to timeously lodge or submit her claim to the RAF.

[7] Relying on sections 11(1)(d), 12(1) and 12(3) of the Prescription Act, 68 of 1969 ("the Prescription Act"), the defendant filed a special plea alleging that the plaintiff's claim against it arose during or about November 2012 and that the plaintiff's summons having been served on 15 April 2016, the claim accordingly became prescribed.

[8] Prior to the commencement of the trial, the parties agreed that the prescription issue could conveniently be decided separately from any other issues in the matter. That evidently being the sensible and convenient approach, I on 14 August 2020 made an order directing that the prescription issue be decided prior to any other issue in the matter.

The Defendant's Evidence

[9] The defendant, who had the duty to begin, led the evidence of one witness, Mr Ungerer, to give evidence on its behalf.

[10] Mr Ungerer testified that he is a director of the defendant and has been a practising attorney for many years. He was the partner dealing with the matters on behalf of Elizabeth, Mr Machava and the plaintiff. They approached him during or about August 2004 for advice relating to the institution of possible claims against the RAF. Mr Mahlasela, who had by then been a long-standing client of the defendant's, at all

material times assisted and represented them relating to the claims. He would transport them to the defendant's offices and attend consultations with them and witnesses. A claim was lodged with the RAF on behalf of the plaintiff during April 2007.

[11] It was decided to deal with Elizabeth and Mr Machava's claims prior to the plaintiff's. In respect of Elizabeth's claim, a trial date was allocated for 4 November 2011 and the matter became settled on the day of the trial. Mr Machava's claim was settled shortly thereafter. [1] Mr Mahlasela at the time and also during 2012, on several occasions made enquiries with Mr Ungerer regarding the status of the plaintiff's matter. Mr Ungerer told him that he needed to get hold of the plaintiff's file to check on progress and would then revert. He requested his secretary to locate the file, but the file could not be located. There had been an office move, within the same building, during this period, and it is possible that the file had been misfiled by possibly pushing it into another file. He on several occasions during 2012 told Mr M Mahlasela that the file could not be located.

[12] He eventually told Mr Mahlasela to consult another attorney for the plaintiff to pursue a possible claim against the defendant. Mr Mahlasela was hesitant to do so, in view of their existing good relationship, but Mr Ungerer explained to him that there was insurance cover, that it would not be an issue and Mr Mahlasela understood this. Mr Mahlasela thereafter asked Mr Ungerer whether he could furnish copies of the plaintiff's medical reports to him. Mr Ungerer explained that the file having become lost, he was unable to furnish copies, but suggested that Mr Mahlasela should obtain and furnish the plaintiff's full names and identity number. This would enable the defendant to attempt to obtain copies of documents directly from the RAF for it to then be furnished to such attorney.

[13] With reference to a file note included in the trial bundle, he testified that the plaintiff's details were so furnished on 15 November 2012. He had prior to this date advised Mr Mahlasela that the plaintiff's file could not be located and to consult another attorney, to consider whether to institute a claim against the defendant. On 29 November 2012, a candidate attorney in the defendant's employ attended the RAF offices, but after waiting in a queue some time without having been assisted by RAF officials, left without having obtained any documents. Although not having a separate file note to this effect, Mr Ungerer testified that he thereafter advised Mr Mahlasela that they were unable to get medical records from the RAF. He stated that he must have told Mr Mahlasela to instruct his new attorney to follow alternative means to obtain the plaintiff's medical records. This would have been shortly after 29 November 2012.

[14] He thereafter, including in early 2013, whenever he saw Mr Mahlasela, enquired from him relating to progress made. He formed the impression that not much progress was being made and told Mr Mahlasela to be careful of prescription. It was in this context that he in January 2013 personally introduced Mr Mahlasela to Mr Francois Du Toit, an attorney practising as a sole practitioner and who was renting office space from the defendant in the same building. He believes Mr Mahlasela then arranged a follow-up consultation for the plaintiff to consult with Mr Du Toit. He was unable to state when this would have been but believes it was at the end of 2012 or the beginning of 2013, in any event soon after 29 November 2012. After introducing Mr Mahlasela to Mr Du Toit, he from time to time made enquiries regarding progress and was eventually informed by Mr Mahlasela that a new attorney had been approached.

The Plaintiff's Evidence

[15] The plaintiff did not testify, but Messrs Mahlasela and Du Toit were called as witnesses on her behalf.

[16] Mr Mahlasela testified that he represented the plaintiff in her dealings with the defendant relating to her claim against the RAF. He transported the plaintiff, Elizabeth and Mr Machava to consultations with the defendant. The defendant had three files, one for the plaintiff, one for Elizabeth and one for Mr Machava, which were kept together in one bundle. Mr Ungerer told him that the matters would be dealt with in sequence, with Elizabeth's matter to be dealt with first, then Mr Machava's and lastly the plaintiff's. Mr Ungerer then told him that the plaintiff's file had become lost. He informed Mr Ungerer that he had a problem with his family, who suspected him of having taken the plaintiff's money. Mr Ungerer then took him to Mr Du Toit's office. Mr Du Toit sent him to the hospital to obtain copies of the medical forms, which he obtained and furnished to Mr Du Toit. He thereafter consulted with Mr Du Toit, he believes on two occasions, but was eventually after about two years told by Mr Du Toit that he could not continue with the matter. He then approached his current legal representatives.

[17] He cannot remember precisely when Elizabeth's and Mr Machava's claims were finalised. Mr Ungerer at some point told him that they were still trying to locate the plaintiff's file. Mr Ungerer then asked him to obtain the plaintiff's identity number, which he furnished. He confirmed, based on a file note in the trial bundle (referred to also in Mr Ungerer's evidence), that this occurred on 15 November 2012. Mr Ungerer told him to sue him because he lost the file. This was after 15 November 2012. He thinks it was 2013 when Mr Ungerer told him to sue the defendant for negligence because the plaintiff's matter had prescribed.

[18] Mr Ungerer on the same day took him to Mr Du Toit's office. Mr Du Toit then told him to obtain the medical certificates, which he obtained and returned to Mr Du Toit on the same day. With reference to a letter from Mr Du Toit to the Natalspruit hospital dated 25 April 2013, requiring copies of the plaintiff's medical records and contained in

the trial bundle, this was the date on which he was introduced to Mr Du Toit by Mr Ungerer. The references in the plaintiff's pleadings to May 2013 as being the first time that he was introduced to Mr Du Toit are accordingly incorrect. With reference to further documents in the trial bundle he stated that he obtained the medical records on 10 May 2013 and furnished it to Mr Du Toit on that day.

[19] He believes he went to Mr Du Toit on two subsequent occasions, who eventually advised him that he could not deal with the matter any longer. He then approached his current attorney of record. After being told by Mr Ungerer to sue the defendant and prior to consulting Mr Du Toit, he never consulted any other attorneys. Mr Du Toit did not furnish reasons for his inability to assist any further. After being told by Mr Ungerer to sue the defendant, he advised the plaintiff accordingly. Since the accident the plaintiff is unable to speak properly, it is difficult to hear or understand what the plaintiff is saying. It was after Mr Machava's matter had been finalised that Mr Ungerer told him that the plaintiff's file could not be located.

[20] Mr Du Toit testified that Mr Ungerer approached and introduced his clients to him. Mr Ungerer told him that the plaintiff was a passenger in a motor vehicle and that her claim had become prescribed because no claim was lodged on her behalf. Mr Ungerer asked him whether he would be able to assist with a claim for damages. He prepared the letter of 25 April 2013 and requested the client to obtain the medical records for him from the hospital. He also prepared a further updated letter dated 10 May 2013 after he was advised that the hospital required written confirmation that they are authorised to hand over the plaintiff's medical records. It is a long time ago, but if his memory serves him correctly, he was introduced by Mr Ungerer to Mr Mahlasela in his reception area a few days prior to 25 April 2013. He believes an appointment was then made, with the plaintiff and Mr Mahlasela coming to see him on 25 April 2013. It is possible that he was only introduced to Mr Mahlasela on 25 April 2013, but it is too long ago, he is unsure. If

it was prior to 25 April 2013, it is difficult to say how much earlier than 25 April 2013. It could have been a few days or a few weeks. The very first time the "Mahlaselas" met him, was on 25 April 2013. As far as he remembers he only saw Mr Mahlasela once thereafter, being on 10 May 2013, which was when the second letter to the hospital was prepared. Mr Ungerer did not follow up with him again after Mr Mahlasela was introduced to him. The Mahlaselas did not want him to pursue the matter any further and as far as he recalls the file was then returned to Mr Ungerer's offices.

The issues and applicable legal principles

[21] In terms of section 12(1) of the Prescription Act prescription commences running as soon as a debt is due.

[22] Section 12(3) of the Prescription Act provides that 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.".*

[23] The plaintiff's claim against the defendant falling within the ambit of "*any other debt*" as envisaged by section 11(d) of the Prescription Act, the relevant prescription period is three years.

[24] The plaintiff's summons having been served on 15 April 2016, the central issue for determination is accordingly whether the defendant, who has the full evidentiary burden in this regard, has proved that the plaintiff had either actual knowledge or deemed knowledge of the identity of the defendant and of the facts from which the debt arose [2], prior to 16 April 2013.

[25] For prescription to commence running it is not necessary for a creditor to have actual or deemed knowledge of all the evidence related to the debt. Knowledge of the minimum facts necessary to institute action is adequate. [3]

[26] In determining the prescription issue, at least in so far as it relates to the actual knowledge issue, the date on which Mr Mahlasela was introduced to Mr Du Toit becomes of cardinal importance. The defendant's version, based on Mr Ungerer's evidence-in-chief, was that this occurred by no later than January 2013. Mr Mahlasela's version, during his evidence-in-chief, was that this occurred on 25 April 2013.

[27] Where there are irreconcilable versions, as there are here, the technique generally employed by courts in resolving factual disputes is to have regard to the credibility of the various factual witnesses, their reliability and the probabilities. [4]

Assessment of Evidence

[28] It is convenient to assess and analyse the evidence of the plaintiff's witnesses first.

[29] Mr Mahlasela, during cross-examination, as well as re-examination, gave evidence which were inconsistent, in several material respects, with his evidence-in-chief. It is unnecessary to list all the instances. He, at one point during cross-examination as well as re-examination, testified that he had met Mr Du Toit during 2012. Even making allowance for the fact that a lengthy time period elapsed between the relevant events and the trial date, this inconsistency is inexplicable. This is so particularly in circumstances where his initial evidence relating to the date on which he met Mr Du Toit was evidently, and understandably, dependent on a reconstruction of events, linked to the date of the 25 April 2013 letter. In response to a question put to him by counsel for the defendant, he stated that he was unable to contradict Mr Ungerer's version to the

effect that he was introduced to Mr Du Toit during December 2012 or January 2013. He even in re-examination testified that he could have been introduced to Mr Du Toit during 2012. It was only, after some prompting by the plaintiff's counsel, that he reverted to the 25 April 2013 date. In cross-examination, he in response to a question by counsel for the defendant, conceded that Mr Ungerer told him as early as September 2012 to investigate a claim for professional negligence against him. Dates on which he was told by Mr Ungerer that the plaintiff's file could not be located, included September, October and November 2012, as opposed to May 2013 as reflected in the plaintiff's pleadings. Materially inconsistent with his version in the pleadings, his version during evidence-in-chief, as well as with what was put to Mr Ungerer during cross-examination, he during re-examination stated that Mr Ungerer never told him that the claim had become prescribed. In the final analysis I am of the view that Mr Mahlasela was a poor and unreliable witness, whose version of what transpired during the crucial period, falls to be rejected.

[30] Mr Du Toit created a favourable impression as a witness, who appeared to properly make concessions where required. His evidence regarding the date on which he was first introduced to Mr Mahlasela, however, does not take the matter much further. He testified that to the best of his recollection it happened, in his reception area, a few days prior to 25 April 2013. He however already in his evidence-in-chief stated that it could have been a few weeks earlier. Although stating that it was possible that he was only introduced on 25 April 2013, he is unable to confirm this, it was too long ago. During cross-examination he conceded that he is unable to deny that he was so introduced during December 2012 or January 2013.

[31] Mr Ungerer also created a good impression as a witness. His version during his evidence-in-chief remained the same during cross-examination, he did not contradict himself in any material respect, he came across as being honest and he answered

questions concisely and without hesitation. He also made concessions where required. His evidence to the effect that he has no reason to fabricate a version was convincing and counsel for the plaintiff, correctly so in my opinion, was unable to during argument cite any reason why Mr Ungerer would give false evidence. It is to be borne in mind that it was Mr Ungerer himself who referred Mr Mahlasela to Mr Du Toit, for a claim to be instituted against the defendant, on the basis that the plaintiff's claim against the RAF had become prescribed. This was the evidence of Mr Ungerer, initially by Mr Mahlasela and also by Mr Du Toit. The referral took place, on any version of events, at a time when prescription of a claim against the defendant could not have played any role.

[32] It is so, as was argued by counsel for the plaintiff, that it was denied, and incorrectly so, in the defendant's special plea and plea that the plaintiff furnished a mandate to the defendant. I however do not believe that this aspect justifies the inference that Mr Ungerer gave a false version to his attorney, that the denial was deliberately framed in a manner calculated to mislead or that Mr Ungerer's evidence during the hearing falls to be rejected for that reason. Ultimately, I disagree with counsel for the plaintiff's submission that Mr Ungerer's version falls to be rejected as being unreliable or improbable. I am of the view that Mr Ungerer's evidence falls to be accepted and do so without hesitation.

[33] Mr Ungerer's version to the effect that he had already during 2012 advised Mr Mahlasela that the claim had prescribed, to consult another attorney and had by no later than January 2013 introduced Mr Mahlasela to Mr Du Toit, is also more probable. Mr Machava's claim had been settled by the end of August 2012. It is common cause that Mr Mahlasela had by November 2012 repeatedly been advised that the file could not be located. Mr Ungerer's version to the effect that Mr Mahlasela was reluctant to approach another attorney, that he had advised Mr Mahlasela to be careful of prescription and that the plaintiff's identity number was requested during November

2012, in order to enable attempts to be made to obtain records from the RAF, to be furnished to another attorney, not only has a ring of truth to it but also appears to be inherently plausible. In circumstances where there was regular contact between Mr Ungerer and Mr Mahlasela and the plaintiff's file could not be located, it is unlikely that the matter was simply allowed to drag on for almost eight months, without any proper communication, after Mr Machava's claim was settled during the end of August 2012 up to the date of Mr Du Toit's letter of 25 April 2013. It is also highly improbable that Mr Mahasela was advised that the claim had become prescribed, introduced to Mr Du Toit with a letter being prepared by Mr Du Toit, all on the same day.

Conclusion

[34] Mr Mahlasela having by no later than January 2013 been advised to consult another attorney, been introduced to Mr Du Toit and advised that the plaintiff's claim against the RAF had become prescribed, the plaintiff had by no later than then, through Mr Mahlasela, gained actual knowledge of the facts from which the debt arose as well as of the identity of her debtor, as envisaged in section 12(3) of the Prescription Act. The debt was accordingly due, as envisaged in section 12(1) of the Prescription Act and prescription commenced running, by no later than January 2013. The summons against the defendant only having been served on 16 April 2016, her claim against the defendant accordingly became prescribed.

[35] Having found that the plaintiff had actual knowledge of the facts from which the debt arose by January 2013, it is unnecessary to deal with the defendant's alternative argument based on "*deemed knowledge*".

[36] The end result is unfortunate for the plaintiff, in circumstances where she sustained injuries in the motor vehicle collision which occurred so many years ago, and where

Elizabeth and Mr Machava's claims were settled by the RAF, whilst her own claim against the RAF was allowed to prescribe, due to no fault of her own. The delay in thereafter timeously instituting action against the defendant, has however resulted in such claim as she may have had against the defendant having become prescribed.

[37] For the reasons above I make the following order:

1. The defendant's special plea is upheld.

2. The plaintiff's action is dismissed with costs.

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André Lamprecht
Acting Judge of the High Court
Gauteng Division,
Johannesburg

Dates of hearing:	12 to 14 August 2020
Date of judgment:	13 October 2020
Counsel for the plaintiff:	Adv DJ Smit
Instructed by:	Selwyn Drobis Attorneys
Counsel for the defendant:	Adv R Shepstone
Instructed by:	Fairbridges Wertheim Becker Attorneys

[1] Despite this evidence, as well as subsequent evidence to the effect that it was settled on the trial date of 5 November 2012, it was ultimately common cause, based on a filed notice of acceptance of offer added to the trial bundle, that Mr Machava's matter was settled on 30 August 2012.
[2] See *Macleod v Kweyiya* 2013 (6) SA 1 (SCA), paras 9 and 10.
[3] *Macleod v Kweyiya*, par 9
[4] *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie* 2003 (1) SA 11 (SCA), para 5