IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

12/3/14

CASE NO: 50994/2008

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

6/03/2014 Malindi

DATE SIGNATURE

In the matter between:

JOHANNES PETRUS JANSEN VAN VUUREN Applicant

V

THE MINISTER OF SAFETY AND SECURITY 1st Respondent

THE COMMISSIONER OF POLICE 2nd Respondent

DATE OF HEARING: 6 February 2014

DATE OF JUDGMENT: 12 March 2014

JUDGMENT

MALINDI AJ

INTRODUCTION

[1] This matter has a very convoluted history. However, the real question is merely whether the plaintiff's claim has prescribed.

[2] The plaintiff pleads that he was arrested without a warrant of arrest on 28 June 2002 by members of the South African Police Service ("SAPS"), who were acting within the course and scope of their employment within the SAPS.

[3] He was detained at Hercules Police Station at the instance of a Mr Steenkamp of the SAPS and other members. He was detained from 20h30 on 28 June 2002 until 1h00 on 29 June 2002.

[4] He was transferred from Hercules to Adrian Vlok Police Station at 1h00 on the same day. He remained in detention at the Adrian Vlok Police Station for another 7 days.

[5] He had in his possession his briefcase and a luggage bag.

[6] The plaintiff was brought before a Magistrate for the first time on 5 July 2002 but the prosecutor ordered his release before his appearance.

[7] He alleges that his briefcase and luggage bag were returned without their contents, including his identification document, passport, drivers

licence, cellular telephone and all his business documents including original international trade contracts.

[8] The plaintiff claims a total amount of R18 500 000,00 for damages and damages suffered as a result of loss of business.

[9] The summons was issued on 31 October 2008. He alleges that he had issued a summons in 2002 and that all documents related to the 2002 court file have been lost.

[10] When the defendant pleaded in February 2009 it pleaded a special plea of prescription of the claim in terms of section 11 of the Prescription Act 68 of 1969 (the Act). It also pleaded over.

[11] This matter is before me because the plaintiff seeks condonation for the late delivery of his summons in the event that I hold that the October 2008 summons is in respect of a prescribed claim.

[12] The plaintiff testified as follows:-

12.1. He was assisted by Legal Aid SA to issue the notice in terms of S57 of the South African Police Service Act 68 of 1995 (the Police Act) on 8 October 2002. This constituted a demand that the defendant pays damages suffered as a result of unlawful arrest and detention and special general damages.

12.2. Summons was issued in 2002. In November 2003 the State acknowledged receipt of the summons and indicated that it wished to settle the matter.

12.3. A year passed since he was told that the matter would be settled and that it needed to be set down so that the settlement agreement could be made an order of court. He was even asked to open a bank account for the purpose of paying in the amount.

12.4. He discovered in 2005 that the whole court file had been lost. In between the tender to settle and the loss of the court file, he had been running from pillar to post trying to have his money paid over. He was told that the State Attorney who handled his file had gone on leave or on pension. In 2006 the Bar made counsel available to assist him but he withdrew from the matter as he was emigrating to England and the next counsel could not assist him immediately because he had a commitment in the Constitutional Court.

12.5. On 20 November 2006 the plaintiff directed a letter to Judge Snyders of the South Gauteng High Court setting out the facts of his arrest. He also stated in this letter that he discovered in

2005 that the State Attorney handling his file had retired and that the file could not be recovered.

12.6. In 2006 he was given legal assistance in terms of Rule 40, that is, *informa pauperis* representation. He complained that the appointed attorneys had not attended to his matter as he wrote.

12.7. After making enquiries with the State Attorney he was advised to apply for condonation as his matter had prescribed. He asked the judge to give condonation.

[13] Snyders J responded on 30 November 2006 that it appeared that the plaintiff seeks condonation and advised the Registrar that he/she advise the plaintiff accordingly.

[14] On 20 February 2007 the plaintiff lodged a condonation application on an urgent basis. He sought condonation on the grounds that the Legal Aid Board attorney had been negligent in handling his matter.

[15] On 27 February 2007 he withdrew the application because it had been lodged in the SGHC whereas the summons had been issued out of the NGHC. The State Attorney considered the matter as finalized and closed the file.

[16] On 2 September 2008 the Registrar of the NGHC appointed a firm of attorneys to represent the plaintiff *informa pauperis*.

[17] In September 2008 Klinkenberg Inc applied for leave to sue *informa pauperis* on behalf of the plaintiff and Ms Kinghorn, who appeared for the plaintiff agreed to represent him on this basis.

[18] Five years have passed since then. The plaintiff testified that he had taken the matter up with the Constitutional Court as well. He was advised by the Registrar that the Constitutional Court is a court of last resort and that he must pursue this matter in the High Court.

[19] The plaintiff also corresponded with the Chief Justice in an "Application for Request". He refers to the matter having been set down for 24 March 2011 and requests the Chief Justice to hold appointed Counsel in terms of Rule 40 to the brief.

[20] The matter was struck off the roll on 24 March 2011 because counsel had withdrawn.

[21] Under cross examination the plaintiff testified that the mooted settlement agreement was merely an agreement that the matter should be settled and there were no terms of the settlement stipulated. He agreed that there was no settlement but only an indication by the State Attorney of its preparedness to settle.

[22] He testified that he reissued summons in 2008 because the 2003 summons had been lost in the circumstances dealt with above.

[23] Section 11 of the Prescription Act provides that:

> "*11 Periods of prescription of debts*
>
> *The period of prescription of debts shall be the following:*
>
> *(d) save where an Act of Parliament provides otherwise, three year in respect of any other debt.*"

[24] Section 12 of the Act provides that prescription commences to run as soon as the debt is due.

[25] Judicial interruption of prescription occurs by the service on the debtor of any process whereby the creditor claims payment of the debt. If the debtor acknowledges liability during the period of judicial interruption and the creditor does not prosecute his claim of final judgment, prescription shall commence to run afresh from the day on which the debtor acknowledges liability.[1]

[26] In this case the plaintiff alleges, and it is common cause, that he issued the demand and notice of intention to sue if the claim is not admitted on 8 October 2002 and the summons in 2003. This

[1] Prescription Act, S15(1), (2) and (3)

interrupted the running of prescription. In addition, he alleges that the State Attorney indicated its preparedness to settle the matter. An inference can be drawn that liability was admitted. In the circumstances prescription would have commenced to run afresh from November 2003 because the plaintiff has not prosecuted his claim to finality.

[27] In order to prosecute his claim to finality the plaintiff had to have the admission of liability made an order of court and the determination of the damages postponed to a later date, or have the whole settlement agreement made an order of court with or without an admission of liability.

[28] Nearly five years passed before the plaintiff took further steps to prosecute his claim. Therefore his claim is hit by prescription. I am mindful that his attempts were frustrated.

[29] On 20 February 2007 he lodged a condonation application in respect of the 2003 summons. This was three years after the admission of liability by the State. This application was withdrawn because it was brought in the wrong court. His claim prescribed in respect of the first summons as a result.

[30] Thereafter the current application was launched for the condonation of the late issue of the 31 October 2008 summons. This had been done some five years after the new summons was issued.

[31] From at least November 2003 ten years have passed before this application was brought. Five years have passed since the new summons was issued in October 2008.

[32] Although there is great doubt that the acknowledgment of liability testified to by the plaintiff went as far as constituting a debt, I will proceed on the assumption that there was one. Debt as been defined as meaning that there is "*a debt immediately claimable by the debtor or, as stated in another way, that there had to be a debt in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately.*"[2]

[33] The interruption lapses if the action is not successfully prosecuted to final judgment.[3]

[34] The fact that the plaintiff laboured under the impression that the matter would be settled does not help him. Prescription would have commenced from November 2003 and despite all the happenings thereafter the defendant would not be estopped from raising

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[2] *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd 1991 (1) SA 525 (A) at 532 H*

[3] *Silhoutte Investment Ltd v Virgin Hotels Group Ltd 2009 (4) SA 617 (SCA) [42]*

prescription as a defence at this stage. In *African Oxygen Ltd v Secretary, Customer & Exercise*,[4] it was said:

"Lastly, Mr Osborn contended that the respondent had lost its right to raise the defence of prescription by reason of waiver or estoppel. In the course of argument reliance upon waiver was abandoned, but reliance on estoppel was not. Counsel was able to point to no representation by the respondent upon which the applicant had acted to its prejudice; but he contended that there was an estoppel because at one stage, when a conflict of views had arisen between the applicant and the respondent as to the payability of duty, there were discussions about the matter and the applicant was led to believe that, as counsel put it, "there would be an endeavour to settle the matter". I am unable to see how that can estop the respondent from raising the defence of prescription. It is a matter of common experience that endeavours are made between persons who later become plaintiffs and defendants to settle claims of various kinds. But that does not suspend the running of prescription or estop the defendant from replying upon it if the settlement negotiations fail and proceedings are instituted."

[35] In *Road Accident Fund v Mothupi*[5] it was said:

"[37] *For a variety of reasons the question posed must in my opinion be answered in the negative. In the first place an acknowledgment of liability for the purpose of s 14 of the Prescription Act is a matter of fact, not a matter of law. Thus it*

[4] *1969 (3) SA 391 (T)*
[5] *2000 (4) SA 38 (SCA) at [37] and [38]*

was stated in Agnew v Union and South West Africa Insurance Co Ltd 1977 (1) SA 617(1) SA 617 (A) at 623A-B:

"Of daar in 'n bepaalde geval 'n erkenning van aanspreeklikheid was, is 'n feitlike vraag wat betrekking het op die bedoeling van die persoon wat as skuldenaar aangespreek is. In dié verband het BROOME, R.P., die volgende gesê in Petzer v. Radford (Pty.) Ltd., 1953 (4) SA. 314 (N) op 317 en 318:
'To interrupt prescription an acknowledgment by the debtor must amount to an admission that the debt is in existence and that he is liable therefor.' "

It is by no means inconceivable that in a particular case the Fund may be disposed, either because of difficulties of proof or because the amount in issue is not substantial, not to contest negligence, without necessarily admitting or conceding that the insured driver was in fact wholly or partly to blame for the collision.

[38] *Secondly, and more importantly, the dictum, presented as a statement of law, is against the tenor of authority. It is inconsistent with Benson and Another v Walters and Others 1984 (1) SA 73 (A) to which no reference was made in the judgment. That case expressly approved the dictum from Petzer v Radford (Pty) Ltd, quoted in the passage cited above. It was also approved in the earlier case of Markham v South African Finance & Industrial Co Ltd 1962 (3) SA 669 (A) at 676E-F. The debt in question is the payment of an amount of compensation to an injured party in accordance with the provisions of the Act. An acknowledgement of negligence on the part of the insured driver, coupled with a willingness to seek a settlement of the quantum if such can be reached, is not an acknowledgment of the existence of a debt or of a present liability (cf Markham's case, supra, at 676F; Benson and Another v Walters and Others, supra, at 87C-D); at most it is*

an acknowledgment of a potential liability if certain conditions are fulfilled (a settlement of the quantum), failing which litigation would have to follow. In Benson's case, supra, the majority of the court at 86H put it on the footing that the Act "requires an acknowledgment of liability ('aanspreeklikheid') and not merely an acknowledgment of indebtedness". And in the minority judgment, in that case, it is further stated at 90G:

"For an acknowledgment of the debt to be effective as an interruption of prescription it is not necessary that it should be quantified in figures. It is sufficient if it is capable of ascertainment by calculation or extrinsic evidence without the further agreement of the parties".

In this case there is not even common ground on a minimum amount which is acknowledged by the Fund. The admission, in short, must cover at least every element of the debt and exclude any defence as to its existence. An admission relating solely to the negligence of the insured driver does not comply with that requirement." (My emphasis).

[36] I am therefore satisfied that the application stands to be dismissed for the reason that the plaintiff failed to prosecute his claim to final judgment from November 2003. The same reasoning applies to the 2008 summons.

[37] The Act is designed to promote certainty in the affairs of people and is aimed at fairness towards a debtor.[6]

[38] I make the following order:

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[6] Christie: The Law of Contract in SA (6th Ed) LexisNexis 2011

1. The application for condonation of the late issue of the summons dated 31 October 2008, is dismissed.

2. No order as to costs.

SIGNED AT PRETORIA ON THIS 12TH DAY OF MARCH 2014

MALINDI AJ
Acting Judge of the High Court

Appearances:

For Applicant:	Adv G Kinghorn
Instructed by:	Klinkenberg Inc.
For Respondent:	Adv M.S. Mangolele
Instructed by:	State Attorney