

HIGH COURT OF SOUTH AFRICA



(GAUTENG DIVISION, PRETORIA)

CASE NO: 65646/2011

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	<div style="display: flex; justify-content: space-between;"> <div> <p><u>2014.08.14</u></p> <p>DATE</p> </div> <div> <p><u><i>Latw</i></u></p> <p>SIGNATURE</p> </div> </div>

14/8/2014

In the matter between:

MARY DIEKETSENG BOJOSI

Plaintiff

and

TSIETSI RICHARD BOJOSI

Defendant

J U D G M E N T

MAKGOKA, J:

[1] This judgment has taken unnecessarily long to deliver. The matter was argued before me on 17 April 2014. An administrative error occurred in my office which resulted in the matter not being reflected on my list of reserved judgments. As a result, the matter did not receive my immediate attention. I regret any inconvenience caused by the delay.

[2] The parties are daughter and father. The plaintiff claims from the defendant payment of R1,3 million, interest and costs. The action results from a settlement amount paid by Metrorail to the defendant in respect of injuries

sustained by the plaintiff on 3 February 2003 when she was still a minor. She was pushed by unknown people at a train station. She fell between the train and a platform, and sustained some bodily injuries.

[3] The defendant, in his capacity as natural guardian and father of the plaintiff, instituted action against Metrorail for damages on behalf of the plaintiff - then still a minor. The claim was finalized in 2005 when a settlement amount of R1,3 million was paid to the defendant. Summons was served on the defendant on 19 November 2011.

[4] The parties agreed to have the special pleas adjudicated separately in terms of rule 33(4). In a document titled 'Stated Case' the parties agreed, among others, on the following facts:

- (a) A total amount of R1 300 000 was received by the defendant in two payments, one in October 2005 for R1 200 000 and the second one for R100 000 in 2008. The latter amount was paid to the defendant as an additional amount after he had referred the attorney who handled the claim to the Law Society of the Northern Provinces;
- (b) The defendant bought two properties with the proceeds of the settlement, which properties are registered in the names of the defendant and his wife, the plaintiff's mother, to whom he is married in community of property.

[5] It is the sum of R1 300 000 referred to in (a) above, that the plaintiff claims from the defendant. The defendant raised three special pleas to the plaintiff's action. The first special plea relates to non-joinder of the defendant's wife. The second one concerns the alleged improper citation of the defendant, i.e his representative capacity was allegedly not pleaded. In the third special plea, it is pleaded that the plaintiff's action had prescribed.

[6] With regard to the plea of non-joinder of the defendant's wife, I am of the view that it has no merit. The plaintiff is not claiming the transfer of the immovable properties registered in the names of the defendant and his wife. Had that been the position, the plea of non-joinder would have been well taken, since the properties are registered in both their names. The defendant is sued for payment of a sum of money, which, in principle, has nothing to do with his joint estate.

[7] The second plea is that the defendant has not been properly cited. The plea is inelegantly stated, and it is not clear what the foundation is for that supposition. But if it meant to mean that the defendant has not been cited in his representative capacity as the natural guardian of the then minor child, there is no merit in it. The defendant's capacity as such, came to an end, *ex lege*, upon the attainment of the age of majority by the plaintiff.

[8] I turn now to the defendant's plea of prescription. In her particulars of claim, the plaintiff alleges that she attained the age of majority on 14 February 2006, when she turned 21 years of age, the applicable age of majority then. In his special plea of prescription, the defendant pleads that in terms of s 13 of the Prescription Act 68 of 1969, prescription took place at most three years, and at least one year after the date on which the plaintiff attained the age of majority. He therefore pleads that the plaintiff's claim prescribed on 15 February 2010, as summons was issued and served only in November 2011.

[9] Mr Shabangu, the plaintiff's attorney, contended that prescription does not find application in this matter by reason of s 18(3) (a) of the Children's Act 38 of 2005. The section enjoins a parent acting as a guardian of a minor child, to administer and safeguard the child's property and property interests. I do not quite comprehend this argument. The section does not remotely refer to prescription.

[10] In any event, this sub-section does not find application in the present matter as the plaintiff is no longer a minor. Precisely for the reason of her being major, she was entitled, within the prescriptive period to take action to undo what she perceived as a wrong done to her whilst she was a minor. There is therefore no merit in this argument, and it is mentioned to be rejected.

[11] There is no replication to the defendant's plea of prescription. Where a special plea is raised, especially of a peremptory or permanent nature which potentially can quash the action altogether, such as prescription, as is the case here, it is usually met with a replication of a defence to the claim of prescription, for example an interruption (*Union & SWA Insurance Co v Hoosen* 1982 (2) SA 481 (W) at 482G-H).

[12] However, in my view, the mere fact that the plaintiff has not filed a replication is not fatal to the plaintiff's case. The defendant's special plea of prescription is premised solely on two dates – the attainment of the age of majority by the plaintiff, on the one hand, and the service of summons on the defendant, on the other. When looked from that point of view alone, the plaintiff's claim has prescribed. But prescription can be interrupted, for example, by admission of liability.

[13] In the present case, the plaintiff alleges in paragraph 12 of her particulars of claim that the defendant had, on numerous occasions, promised to transfer the properties purchased with the proceeds of the settlement, into the plaintiff's name. She alleges that the defendant had also undertaken to transfer the monies invested and held in bank accounts, to the plaintiff. Despite numerous reminders, the plaintiff alleges, the defendant failed to do so.

[14] No dates are furnished as to when such undertakings were made, and the allegations would naturally be disputed. The resolution of that factual dispute

can only be made with reference to the evidence. Therefore, only when the evidence has been led on these allegations, would a court be in a position to properly determine first, the veracity of these allegations. Thereafter, depending when were they made, whether they interrupted prescription. Only then, would a court be in a position to adjudicate the defendant's special plea of prescription. No doubt, had these allegation not be made, I would have had no difficulty in upholding the defendant's plea of prescription.

[15] During argument, I invited both legal representatives to consider whether I had all the relevant facts before me to decide the special plea of prescription. Both legal representatives were persistent that the matter be determined on the papers as they stand. As pointed above, the allegations in paragraph 12 of the particulars of claim are important to the question whether prescription had been interrupted or not. The parties appear to have overlooked the importance of that paragraph when deciding on the stated case. That aspect has to be referred to oral evidence.

[16] In the result the following order is made:

1. The defendant's first and second special pleas are dismissed with costs;
2. The defendant's special plea of prescription is referred to oral evidence, to determine, in particular, whether or not prescription had been interrupted;
3. The costs of the defendant's special plea are to be in the cause.

TM MAKGOKA
JUDGE OF THE HIGH COURT

DATE OF HEARING : 17 APRIL 2014

JUDGMENT DELIVERED : 14 AUGUST 2014

FOR THE PLAINTIFF : MR. B. SHABANGU

**FIRM : SHABANGU & BEAUCHAMP
ATTORNEYS, PRETORIA**

FOR THE DEFENDANT : MS C LINDIQUE

INSTRUCTED BY : JUSTICE CENTRE, PRETORIA