

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE	<input checked="" type="radio"/> YES	<input type="radio"/> NO
(2)	OF INTEREST TO OTHER JUDGES	<input checked="" type="radio"/> YES	<input type="radio"/> NO
(3)	REVISED.		
04/11/2016			
DATE		SIGNATURE	

Case No: 41276/2015

17/11/2016

In the matter between:

SIMON THABANG MAKHONDO

Plaintiff

and

PRAGA TECHNICAL (PTY) LTD

Defendant

Date of Hearing: 23 August 2016

Date of Judgment:

JUDGMENT

BARNES AJIntroduction

1. In October 2010, the Plaintiff in this matter, Mr Simon Thabang Makhondo ("Mr Makhondo"), was working in the Defendant's factory when his left hand was crushed by the machine he was operating. As a result of the injury, four fingers on Mr Makhondo's left hand had to be amputated.
2. On 2 June 2015, Mr Makhondo instituted action against the Defendant, Praga Technical (Pty) Ltd ("Praga"), for damages arising out of the incident. Mr Makhondo alleges that the injury to his hand was caused by Praga's negligence in various respects. Mr Makhondo claims R1 205 000.00 in damages.
3. In addition to denying liability on the merits, Praga raised a special plea of prescription in response to Mr Makhondo's claim. At the commencement of the trial, the parties agreed that the special plea would be dealt with as a separate and preliminary issue in terms of Rule 33(4).
4. As will become apparent below, Mr Makhondo defends the special plea on the basis that he only became aware of his claim against Praga on 19 May 2015 and that, in terms of section 12(3) of the Prescription Act 68 of 1969 ("the Act"), prescription only commenced running from that date.

5. This judgment deals with the meaning to be given to the phrase "knowledge of the identity of the debtor" in section 12(3) of the Act and with whether Praga has discharged its onus of proving that Mr Makhondo had actual or constructive knowledge of its identity as his debtor prior to October 2013, which is when Praga contends that the claim prescribed.

The Pleadings

6. Praga raised its special plea of prescription in the following terms:

- "a. The Plaintiff's claim is based on delict, which cause of action or injuring incident took place during October 2010; the Plaintiff's claim arose on this date;
- b. Plaintiff's summons was served on the Defendant during June 2015, which is more than three years after the date on which the claim arose;
- c. In the premises, Plaintiff's claim prescribed in terms of section 11 of Act 68 of 1969."

7. Mr Makhondo anticipated a special plea of prescription in his Particulars of Claim. He pleaded as follows in paragraph 5 thereof:

7.1 At the time that his injury occurred, Mr Makhondo was employed by a labour broker known as Enje Into Labour Solutions ("Enje"). Enje had placed Mr Makhondo at Praga.

7.2 Therefore, at the time of his injury, Mr Makhondo was not employed

by Praga. This meant that a claim by Mr Makhondo against Praga was not ousted by the provisions of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("COIDA").

7.3 Following his injury, Mr Makhondo submitted a Workman's Compensation claim.

7.4 Mr Makhondo only became aware of his right to claim against Praga *"when the newspaper article on the claims against the Defendant were (sic) published on 19 May 2015."*

8. In its Plea, Praga responded as follows to paragraph 5 of Mr Makhondo's Particulars of Claim:

"The Defendant takes note of the allegations contained herein and admits that the Plaintiff was not employed by the Defendant at the time of the incident."

9. Praga therefore did not deny the averments made in paragraph 5 of Mr Makhondo's Particulars of Claim, including Mr Makhondo's averment that he only acquired knowledge of his right to claim against Praga on 19 May 2015.

10. Counsel for the Plaintiff, Mr Van den Bogert, led Mr Makhondo in evidence. I set out his evidence below.

The Evidence of the Plaintiff

11. Mr Makhondo was born in 1987 and is currently 29 years of age.
12. Mr Makhondo was born and raised in Maka Village in the North West Province. He attended primary school and high school up to Grade 8. He left school, having completed Grade 8, at the age of 20 and began looking for employment.
13. During 2007 or 2008 – he could not remember precisely when – Mr Makhondo found employment at Praga through Enje. Praga manufactures motor vehicle components. Mr Makhondo was employed at Praga as a press machine operator.
14. On a day in October 2010, again Mr Makhondo could not recall the precise date, while operating Praga's press machine, Mr Makhondo's left hand was crushed. As a result, four fingers on Mr Makhondo's left hand had to be amputated. Mr Makhondo spent five weeks in hospital.
15. The following year, in January 2011, while attending a medical check-up, Mr Makhondo's doctor advised him that he was entitled to claim Workman's Compensation. Mr Makhondo's doctor explained to him how this was done and gave him the necessary forms to complete.
16. In February 2011 Mr Makhondo submitted his Workman's Compensation

claim.

17. On 19 May 2015, Mr Makhondo saw a newspaper article which reported that some of his co-workers had instituted damages claims against Praga for injuries sustained while working there.
18. Mr Makhondo met with these co-workers in order to confirm that the information reported in the newspaper article was correct. They confirmed this and referred Mr Makhondo to their attorneys, Gildenhuys Malatji Inc. Mr Makhondo arranged and attended a consultation with the same attorneys. Summons was issued on 2 June 2015.
19. When asked why he had not instituted action against Praga prior to June 2015, Mr Makhondo stated that it was only when he saw the newspaper article that he became aware that he may have a claim against Praga because of his injury. Prior to this, he had believed that he only had a Workman's Compensation claim. Mr Makhondo stated that this had been confirmed by a superior at Praga, Mr Joe Maravosa, who had told him that Praga was insured through Workman's Compensation and that there was "no way" that a claim could be brought directly against Praga.
20. Cross examination of Mr Makhondo on behalf of Praga was perfunctory. Mr Makhondo was asked to confirm that he had sustained his injury in October 2010 and that he knew that the press machine which had caused his injury belonged to Praga. He did so.

21. Mr Makhondo was not challenged on any aspect of his version set out above, including his testimony as to how and when he became aware of his right to claim against Praga.
22. No evidence was led on behalf of Praga.

The Applicable Law

23. As is apparent from the above, Mr Makhondo sought to defend the special plea on the basis that he only acquired knowledge of the identity of his debtor, as contemplated in section 12(3) of the Act, on 19 May 2015.
24. Section 12(3) of the Act provides as follows:
- "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."
25. As the High Court noted in *Mokau v Eskom Holdings Soc Ltd*:¹

"Section 12(3) of the Act introduces a departure from the ordinary rules of prescription in order to deal with the extraordinary situation of a creditor who does not have knowledge of the identity of the debtor or of the facts giving rise to his or her claim. In that case, even though the relevant factual events have occurred to establish a claim, if the creditor lacks the necessary knowledge, the prescriptive period will not begin to

¹ 2015 JDR 1500 (GJ); [2015] ZAGPJHC 135 (3 July 2015).

run.”²

26. The legal principles applicable in cases where a plaintiff relies on section 12(3) of the Act in defence of a special plea of prescription are well established.
27. With regard to onus of proof, this rests on the defendant who raises the plea of prescription. Importantly, this includes the onus to prove the date on which the plaintiff acquired actual or constructive knowledge of the debt. In *Macleod v Kweyiya*³ the Supreme Court of Appeal (“SCA”) held as follows:

“This court has repeatedly stated that a defendant bears the full evidentiary burden to prove a plea of prescription, including the date on which the plaintiff acquired actual or constructive knowledge of the debt. The burden shifts to the plaintiff only if the defendant has established a prima facie case. In *Gericke v Sack* 1978 (1) SA 821 (A) at 827D – G the court stated

‘It will at times be difficult for a debtor who pleads prescription to establish the date on which the creditor first learned his identity or, for that matter, when he learned the date on which the delict had been committed.

But that difficulty must not be exaggerated. It is a difficulty which faces litigants in a variety of cases and may cause hardship – but hard cases, notoriously, do not make good law. It is not a principle of our law that the onus of proof of a fact lies on the party who has peculiar or intimate knowledge or means of knowledge of that fact. The incidence of the burden of proof cannot be altered merely because the facts happen to be within the knowledge of the other party. See *R v Cohen*, 1933 TPD 128. However, the courts take cognisance of the handicap under which a litigant may labour where facts are within the exclusive knowledge of his opponent and they have in consequence held, as was pointed out by Innes J in *Union Government v (Minister of Railways) v Sykes*, 1913 AD

² At para 24.

³ 2013 (6) SA 1 (SCA).

156 at p 173 that:

'less evidence will suffice to establish a *prima facie* case where the matter is peculiarly within the knowledge of the opposite party than would under other circumstances be required.

But the fact that less evidence may suffice does not alter the onus which rests on the respondent in this case."⁴ (emphasis added)

28. Thus, in order to discharge its onus, a defendant who raises a plea of prescription must establish, at least on a *prima facie* basis, that the plaintiff had actual or constructive knowledge of the identity of the debtor and the facts necessary to bring his or her claim more than three years prior to the institution of the action.
29. This was confirmed by the Constitutional Court in the recent case of *Links v Department of Health, Northern Province*.⁵

"The question for determination is whether the applicant's claim had prescribed by 6 August 2009 when he served summons. That in turn depends upon the interpretation of the provisions of s 12(3) of the Prescription Act and the application of those provisions to the facts of this case. The respondent bears the onus to prove that the applicant's claim had prescribed by the given date. In order for the respondent to prove that, he must show that prescription began to run against the applicant's claim not later than 5 August 2006. This is so because the period of prescription applicable is three years. In the context of s 12(3) the respondent must show what the facts are that the applicant was required to know before prescription could commence running. The respondent must also show that the applicant had knowledge of those

⁴ At para 10.

⁵ 2016 (4) SA 414 (CC).

facts on or before 5 August 2006.⁶ (emphasis added)

30. Thus, in the matter at hand, it was necessary for Praga to establish, at least on a *prima facie* basis, that Mr Makhondo knew or ought reasonably to have known that Praga was his debtor prior to October 2013. If Praga succeeded in doing this, then an evidentiary burden would shift to Mr Makhondo to rebut the *prima facie* case against him.⁷ If, however, Praga failed to establish a *prima facie* case in this regard, then its special plea cannot succeed.

The Parties' Submissions

31. At the outset, Ms Mentz, who appeared for Defendant, submitted that the Plaintiff had been obliged to file a replication in order to plead reliance on section 12(3) of the Act and, not having done so, was not entitled to rely on this section in order to defend the special plea. Ms Mentz submitted further that the Defendant was prejudiced by the Plaintiff's failure to file a replication because it did not know what case it had to meet.
32. There is no merit in this point. Proof of actual or constructive knowledge on the part of Mr Makhondo of the identity of his debtor formed part of the onus resting on the Defendant. There was no duty on the Plaintiff to file a replication in these circumstances. Furthermore, as has been set out above, the Plaintiff anticipated the special plea in his Particulars of Claim and pleaded that he

⁶ At para 24.

⁷ It is clear that this would be an evidentiary burden only. See in this regard *Mokau v Eskom Holdings* (supra) at paras 11 and 12.

only acquired knowledge that he had a claim against Praga on 19 May 2015. The Defendant therefore knew precisely what case it had to meet.

33. On the merits, Ms Mentz submitted that this was a matter in which a *prima facie* case establishing prescription could be inferred from the pleadings and that it was therefore unnecessary for the Defendant to lead evidence in order to discharge its onus.
34. Ms Mentz submitted that it was clear from the pleadings and from Mr Makhondo's evidence that, on the date of his injury, Mr Makhondo had been aware of the identity of Praga and of the fact that it was Praga's machine which had caused his injury. Therefore, submitted Ms Mentz, at the time that the injury occurred, Mr Makhondo had knowledge of the identity of the debtor for purposes of section 12(3) of the Act. The fact that Mr Makhondo may not have known that he was entitled to claim against Praga did not assist him. Ms Mentz made the point in her heads of argument in the following terms:

"A distinction should be drawn between whether the plaintiff knew the identity of the defendant, and his awareness of his right to claim against the defendant. The plaintiff is attempting to merge these two issues into one concept, whilst it is in actual fact two very distinct issues."

35. Ms Mentz submitted, in the alternative, that if Mr Makhondo had not known the identity of his debtor at the time of his injury, he ought reasonably to have acquired this knowledge prior to October 2013.
36. Mr Van den Bogert, for the Plaintiff, submitted that there was no evidence to

show that Mr Makhondo had knowledge of the identity of Praga as his debtor prior to 19 May 2015. For that reason alone, submitted Mr Van den Bogert, the Defendant's special plea had to fail.

37. Mr Van den Bogert submitted further that the Court should take account of:

37.1 the purpose of the Act, and section 12(3) in particular, which is to prevent negligent and not innocent inaction; and

37.2 the fact that the Act is required to be interpreted in accordance with section 39(2) of the Constitution with due regard to the right of access to Courts.

38. Mr Van den Bogert submitted that the effect of the above considerations is that:

"A court should be hesitant to come to a finding that a creditor had knowledge of the identity of the debtor and/or the facts from which the debt arises, if doubt exists in this regard, on the evidence presented to court and if such a finding would effectively oust the plaintiff's claim due to the operation of the Act."

Analysis

39. Mr Van den Bogert is correct in his submission that the Act, and in particular section 12(3) thereof, seeks to prevent negligent rather than innocent inaction.

40. The SCA has held that *"the statutory prescription periods are meant to protect defendants from undue delay by litigants who are laggard in enforcing their rights"*⁸ and that *"prescription penalises unreasonable inaction, not inability to act."*⁹

41. In *Macleod v Kweyiya*, the SCA made the point with specific reference to section 12(3) of the Act:

"It is the negligent and not an innocent inaction that s 12(3) of the Prescription Act seeks to prevent...."¹⁰

42. It is also correct that the Act, like all legislation, must be interpreted in accordance with section 39(2) of the Constitution. This means, in the context of section 12(3) of the Act, that due regard must be had to the fundamental right of access to courts.

43. In *Links v Department of Health, Northern Province* the Constitutional Court held as follows:

"The provisions of s 12 seek to strike a fair balance between, on the one hand, the need for a cutoff point beyond which a person who has a claim to pursue against another may not do so after the lapse of a certain period of time if he or she has failed to act diligently, and, on the other, the need to ensure fairness in those cases in which a rigid application of prescription legislation would result in injustice. As already stated, in interpreting s 12(3) the injunction in s 39(2) of the Constitution must be borne in mind. In this matter the focus is on the

⁸ *Minister of Finance and Others v Gore* N.O. 2007 (1) SA 111 (SCA) at para 16.

⁹ *Van Zijl v Hoogenhout* 2005 (2) SA 93 (SCA) at para 19.

¹⁰ At para 13.

right entrenched in s 34 of the Constitution."¹¹ (emphasis added)

44. In my view, however, the narrow construction which the Defendant seeks to place on the phrase "knowledge of the identity of the debtor" in section 12(3) of the Act is untenable on its own terms. It fails to take proper cognisance of the use of the word debtor in the subsection. If accepted, the Defendant's interpretation would mean that creditor (A) who is aware of the existence of B but has no knowledge that B is his or her debtor has knowledge of the identity of B as a debtor simply by virtue of his knowledge of the existence of B. This cannot be correct. Knowledge of the identity of the debtor must logically include an awareness on the part of the creditor that the party concerned is his or her debtor.
45. In my view, the construction contended for by the Defendant is also not supported by the case law. Instructive in this regard is the SCA judgment in *MEC for Education, KwaZulu-Natal v Shange*.¹²
46. In that case the tip of a teacher's belt had struck a learner in the eye while the teacher was administering corporal punishment to another learner. The teacher told the learner that the incident had been a mistake and the learner accepted that explanation. Some years later, a friend of the learner's mother asked about the eye patch he was wearing and upon hearing of the incident suggested he complain to the Public Protector. The learner did so and was advised to lay a claim against the MEC for Education in the Province. The

¹¹ At para 26. See also *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) at paras 90 and 91.

¹² 2012 (5) SA 313 (SCA)

SCA held that it was only at that stage that the learner learned that the MEC was his debtor. The SCA held as follows in this regard:

"The respondent's affidavit comes closer to addressing the real question. He states that an advocate in the office of the Public protector advised him, in January 2006, to institute a civil claim against the appellant. Unfortunately the respondent's legal representatives did not appreciate the significance of this fact. Its disclosure, evidently for the first time, informed the respondent of the identity of the appellant as the joint debtor with the teacher who injured him. He was a rural learner of whom it could not be expected to reasonably have had the knowledge that not only was the teacher his debtor, but more importantly, that the appellant was the joint debtor. Only when he was informed of this fact did he know the identity of the appellant as his debtor for the purposes of the provisions of s 12(3) of the Prescription Act."¹³ (emphasis added)

47. This judgment makes it clear, in my view, that "knowledge of the identity of the debtor" in terms of section 12(3) of the Act includes an awareness by the creditor that the party concerned is his or her debtor.
48. While it is not strictly necessary for purposes of this judgment to take this enquiry any further, it is clear that the interpretation contended for by the Defendant would mean that prescription would run against a plaintiff such as Mr Makhondo and effectively extinguish his claim regardless of the circumstances in which he failed to pursue his claim or of whether his conduct pursuant thereto was negligent or entirely innocent. Such an interpretation would undermine the purpose of section 12(3) of the Act. Moreover, given its adverse impact on the right of access to courts, it is an interpretation which, in accordance with the injunction in section 39(2) of the Constitution, is to be avoided. For these reasons too, the Defendant's construction cannot be

¹³ At para 11.

accepted.

49. Ms Mentz submitted that not accepting the Defendant's interpretation would *"open the floodgates and will allow every party who faces a special plea of prescription to a clearly defined debt to merely claim ignorance about his or her right to claim."* This submission loses sight of the important rider to section 12(3) of the Act. In terms thereof the creditor is deemed to have knowledge of the identity of the debtor if he or she could have acquired it by the exercise of reasonable care. It is thus always open to a party who raises a special plea of prescription to demonstrate that the creditor ought reasonably to have known that he or she had a claim against the debtor concerned. Moreover, if a *prima facie* case were established in this regard, the creditor would bear an evidentiary burden to rebut it.
50. Each case is accordingly assessed on its own facts with reference to what was reasonable in the circumstances. There is no spectre of the floodgates opening in this context.
51. It is to the assessment of the facts of this case that I now turn.
52. The issue to be determined is whether Praga has discharged its onus of proving that Mr Makhondo had actual or constructive knowledge of the identity of Praga as his debtor prior to October 2013.
53. Mr Makhondo's case was that it was only when he saw the newspaper article

on 19 May 2015 that he became aware that he may have a claim against Praga. Prior to that he believed that he only had a Workman's Compensation claim. Mr Makhondo's version in this regard was not denied by the Defendant in its pleadings, nor was it challenged by the Defendant in cross examination.

54. The Defendant has therefore failed to make out a *prima facie* case of actual knowledge on the part of Mr Makhondo of the identity of Praga as his debtor prior to October 2013.
55. It remains to consider the question of constructive knowledge. Can it be said that Praga has proved that Mr Makhondo ought reasonably to have known, prior to October 2013, that he had a claim against it.
56. As noted above, Ms Mentz submitted that this was a case in which a *prima facie* case of prescription could be inferred from the pleadings. However, it is also evident from what has been set out above that the Defendant did not plead constructive knowledge on the part of Mr Makhondo. Nor did the Defendant lay any basis in cross examination for its assertion that Mr Makhondo ought reasonably to have known that he had a claim against it.
57. Against this must be weighed the evidence of Mr Makhondo. The manner in which his evidence is to be assessed was described by the SCA in *Macleod v Kweyiya* in the following terms:

"It is the negligent and not innocent inaction that section 12(3) of the

Prescription Act seeks to prevent and courts must consider what is reasonable with reference to the particular circumstances in which the plaintiff found him or herself."¹⁴

58. Mr Makhondo's actions must be assessed with due regard to his level of education and employment. Given Mr Makhondo's circumstances, it can neither be assumed nor expected of him that he be acquainted with the legal remedies available to him in the event of a workplace injury. Moreover, as Mr Van den Bogert pointed out, Mr Makhondo only had a claim against Praga because he was employed by a labour broker – something that most people would not be aware of. Indeed, the intricacies of the triangular relationship between labour broker, worker and client is a subject that confounds many lawyers let alone lay persons.
59. Mr Makhondo's doctor advised him that he could claim Workman's Compensation as a result of his injury. Upon being so advised, Mr Makhondo submitted his claim promptly.
60. Mr Makhondo testified that he believed that he only had a Workman's Compensation claim arising out of injury. He testified further that this was confirmed by a superior at Praga. Mr Makhondo's evidence in this regard was unchallenged.
61. Given these facts, and particularly the confirmation that Mr Makhondo received from Praga, I am of the view that Mr Makhondo's belief was a


¹⁴ At para 13.

reasonable one in the circumstances.

62. Notably, in this regard Mr Makhondo was misinformed of his rights by the very company that now seeks to argue that he had constructive knowledge of his right to claim against it.
63. Mr Makhondo laboured under the belief that he only had a Workman's Compensation claim until he saw the newspaper article reporting that certain of his co-workers had sued Praga for damages. On learning of this, Mr Makhondo again acted promptly in seeking confirmation from his co-workers and in obtaining legal representation. Summons was issued just two weeks after Mr Makhondo had sight of the newspaper article. As Mr Van den Bogert correctly submitted, this is not a plaintiff who was laggard in enforcing his rights once he became aware of them.
64. For all of the above reasons, I am of the view that Mr Makhondo's actions were reasonable in the circumstances and that Praga failed to make out a *prima facie* case of constructive knowledge on his part. Even however, if I am wrong in this regard and there is a basis to say that Praga made out a *prima facie* case of constructive knowledge then I am of the view that this was effectively rebutted by Mr Makhondo in his evidence.
65. In the circumstances, Praga has failed to discharge its onus of proving constructive knowledge on the part of Mr Makhondo of the identity of Praga as his debtor.

66. I accordingly make the following order:

1. The special plea is dismissed with costs.

A handwritten signature in black ink, consisting of a large, stylized 'B' followed by a series of wavy lines, written over a horizontal line.

BARNES AJ

Appearances:

For the Plaintiff: Adv D Van den Bogert instructed by Gildenhuys Malatji Inc

For the Defendant: Adv S Mentz instructed by Dyason Incorporated