IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

9/11/16.

Case Number: 57124/2013

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~

(3) REVISED

9.11.2016

DATE SIGNATURE

In the matter between:

NTUNTU DAVID KEKANA Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] The plaintiff, a 57 year old male detective in the South African Police Service, instituted a claim for damages against the defendant based on an alleged breach of a duty to care. The defendant raised a special plea of prescription which special plea forms the subject matter of this judgment.

PLEADINGS

[2] According to the pleadings, the plaintiff suffered injuries in a motor vehicle collision that occurred on 8 August 1996. The plaintiff lodged a claim directly with the defendant, which claim was settled during 1999 in the amount of R 63 088, 45. The plaintiff alleges that the defendant under settled the claim and in so doing *"The road accident fund failed to act in the best interest of the plaintiff who was then a direct claimant."*.

[3] The relevant allegations pertaining to knowledge of the under settlement of the claim, reads as follows:

"

12.3

On or about 23/07/1999 an offer of settlement was issued to the claimant in the amount of R48,835-31, the claimant protested that the offer was little and requested the road accident fund (handler Lizanne Coetzee increased the offer).

12.4

On the 2nd of August 1999 a second offer in the amount of R63088-45, the offer was issued as full and final. The claimant was still not happy and inquired as to why are his medical expenses half of the amount/expenses incurred, the claims handler informed him that the claimant had injured himself and therefore the 'RAF' will not pay any further amount.

12.5

The claims handler informed the claimant that the offer made was reasonable and fair and should he appoint an attorney he would pay from his pocket.

12.6

Even though the claimant was dissatisfied with the offer he reluctantly accepted the offer in order to avoid further costs.

12.7

The plaintiff became aware in 2013 after reading a newspaper clipping in the Pretoria news where a direct claimant who was under compensated was re-compensated by the north Gauteng high court, he further noticed that the facts of that case where (sic) *similar to his facts that his claim was under compensated.*

12.8

The plaintiff decided to appoint an attorney to hear if his claim was under settled and if his claim can be revived.

12.9

Upon assessment of the claim and compensation, it was clear that the amount tendered to the claimant as full and final settlement was neither a reasonable, nor fair and that his claim was indeed under settled."

[4] The defendant's special plea of prescription is premised on the following averments:

1.1 During or about February 1999, and in consequence of an alleged accident on 8 August 1996, the Plaintiff submitted to the Defendant a statutory Form 1, in which the Plaintiff claimed from the Defendant:

1.1.1 Medical expenses in the amount of R 49 781, 54;

1.1.2 General damages in the amount of R 80 000, 00; and

1.1.3 Future medical expenses, of which proof were to be furnished later.

1.2 ....

1.3 In consequence of the claims submitted, and during September 1999, the Defendant made a written offer of settlement to the Plaintiff, of which a copy is attached hereto marked annexure "P1".

1.4 The Plaintiff accepted the offer and signed a waiver, of which a copy is attached hereto marked Annexure "P2". As such, and or about 6 September 1999, when the debt became due, the Defendant made payment to the Plaintiff in the amount of R 63 088, 45, which agreed amount was calculated as follows:

1.4.1 Past hospital expenses in the amount of R 17 391. 91;

1.4.2 Past medical expenses in the amount of R 10 502. 17;

1.4.3 Future medical expenses in the amount of R 10 000. 00;

1.4.4 General damages in the amount of R 25 000. 00; and

1.4.5 Expanses in the amount of R 194.37.

1.5 Having regard to the value of the claim submitted, which Plaintiff completed and submitted in person, when Plaintiff accepted the offer of settlement and received the payment, the Plaintiff knew alternatively ought to have known, that the settlement was far less than the amount he was, on the Plaintiff's version entitled to.

1.6 Summons commencing action was only instituted during or about October 2013.

1.7 In the premises, plaintiff's claim has prescribed in terms of section 11 of Act 68 of 1969."

LEGAL PRINCIPLES

[5] It is common cause between the parties that the plaintiff's claim is a 'debt' as envisaged in the Prescription Act, 68 of 1969 (the Act) and that the prescription period in respect of the debt, in terms of section 11(d), is three years.

[6] The question that needs to be answered is exactly when the prescription period commenced. Section 12 (1) provides that prescription commence as soon as the debt is due. In its special plea the defendant relies on the provisions of section 12(3), which reads 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 acquire it by exercising reasonable care."

[7] It is trite law that the defendant bears the *onus* in proving either actual or constructive knowledge. [See: *Macleod v Kweyiya* 2013 (6) SA 1 SCA at para [10].]

EVIDENCE

[8] Although the defendant bears the *onus*, it did not call any witnesses whereas the plaintiff elected to testify.

[9] In respect of the issue to be determined herein, the plaintiff testified that he was aware when he accepted the defendant's offer that the amount did not adequately compensate him for the damages consequent upon the injuries he sustained. He further testified that his medical bills were more than the offer made by the Fund. When he protested, an employee of the Fund told him that there is *"No way the offer could be made better because I had self-inflicted injuries and the claim was about to expire and once the claim expires I will get nothing. If I go to a lawyer I will have to foot the bill.* The plaintiff testified that he accepted the offer because he had medical bills to pay and that he did not know what to do from there onwards.

[10] The plaintiff confirmed that he only sought legal advice during 2013 after he had read an article in the Pretoria News about a person who had a problem similar to his problem.

[11] During cross-examination it emerged that the plaintiff was aware when he accepted the offer that he was being treated unfairly.

When asked what he did about his unhappiness, he answered he could not do anything because he did not have the knowledge where to go. It was only in 2013 and after reading the newspaper article that his eyes *"opened"*.

DISCUSSION

[12] Mr Myburg, counsel for the defendant, indicated that the defendant relies on actual knowledge and consequently the court does not need to consider the principles applicable to constructive knowledge.

[13] Both Mr Myburg and Mr Sekula, counsel for the plaintiff, agreed that the identity of the debtor (the Fund") was known to the plaintiff when he accepted the offer.

[14] The only issue that remains in dispute is the date on which the plaintiff became aware of *"the facts from which the debt arises"*. Mr Myburg submitted that the date would be either when the plaintiff accepted the offer from the fund or when he received the amount of damages. Both these events occurred in 1999 and consequently the plaintiff's claim has prescribed.

[15] Mr Sekula did not agree. He submitted that the plaintiff's claim is premised on the defendant's breach of a duty of care it owned the plaintiff and that such duty and the breach thereof only came to the plaintiff's knowledge in 2013. The proceedings were instituted in 2013 and as a result the special plea of prescription should be dismissed.

[16] In the premises, the crisp issue to be determined is whether knowledge of the duty of care the defendant owed the plaintiff is, in the present circumstances, a *"fact from which the debt arises"*.

[17] In support of his contention that all the facts underlying the plaintiff's claim were already known to the plaintiff in 1999, Mr Myburg referred me to various authorities.

[18] Lewis JA, with reference to earlier decisions, summarised the prevailing legal position in *Claasen v Bester* 2012 (2) SA 404 SCA at para [15], as follows:

"These cases clearly do not leave open the question posed and not answered in Van Staden. They make it abundantly clear that knowledge of legal conclusions is not required before prescription begins to run. There is no reason to distinguish delictual claims from others. The principles laid down have been applied in several cases in the court, including most recently Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government , Gauteng 2009 (3) SA 577 (SCA) [2009] 3 All SA 475) para 37 where Leach AJA said that if the applicant 'had not appreciated the legal consequences which flowed from the facts' its failure to do so did not delay the running of prescription. See also ATB Chartered Accountants (SA) v Bonfiglio [2011] 2 All SA 132 (SCA) paras 14 and 18. "

[19] Mr Myburg submitted that a duty of care and consequently the breach thereof is a legal conclusion and not a fact underlying the debt. Mr Sekula conceded during argument that, save for the duty of care fact, no new facts came to light from the date the plaintiff grudgingly accepted the defendant's offer until summons was issued.

[20] Mr Sekula referred me to various cases in support of his contention that prescription only commenced in 2013. He submitted that the unreported judgment of Modiba AJ in *Anthony Phumule Ndlala v Road Accident Fund* [Gauteng Division, Pretoria, case number 34859/2011] dealt with the very issue under consideration and supports his contention. He relied on paragraph 11, which reads as follows:

"Our courts have repeatedly held that where a person owes another a legal duty of care, prescription only commence to run when the latter person becomes aware of the breach of the duty.[4] Therefore in terms of section 12 (3) of the Prescription Act, prescription is reckoned from the day the plaintiff

becomes aware that the defendant was negligent in not fulfilling the representations it made to him. The plaintiff only became aware of the defendant's negligence when he consulted an attorney in January 2011. Until that date, the plaintiff did not know that his claim had prescribed in the hands of the employees. The defendant has not adduced facts to prove or even argued that the Plaintiff should have acquired that knowledge by exercise of reasonable care. Therefore prior to that date, the plaintiff cannot be deemed to have had constructive knowledge of the loss that he sustained as a result of negligence on the part of the defendant's employees. Prescription for the plaintiff's claim for breach of the legal duty of care started running in January 2011 when he received advice from his attorneys. He issued summons on 21 June 2011 and served them on the defendant on 30 June 2011, well within the 3 year prescription period applicable in terms of section 12 (3) of the Act."

[21] Modiba AJ relied on certain extracts (173 B-D and 174 C-D) from the judgment in *Truter and Another v Deysel* 2006 (4) SA 168 SCA in support of his conclusion that prescription commences once a plaintiff becomes aware of the breach of a duty to care. I had regard to the references *supra* and respectfully disagree with the conclusion he reached in this respect.

[22] Mr Sekula also referred to the Constitutional Court judgment in *Road Accident Fund v Mdeyide* 2011 (2) SA 26 CC. The matter is, however, distinguishable from the present matter, in that it dealt with the provisions of section 23 of the Road Accident Fund Act, 56 of 1996.

[23] Mr Sekula further referred to the unreported judgement of Murray AJ in *Anderson Angelina v Elmer Junius Bredenkamp N.O.* [Free State Division, Bloemfontein, case nr 5469/2007], in which it was held that prescription commenced on the date when the plaintiff became aware that the Deed of Gift she relied upon for he occupancy of an immovable property was invalid. The background facts underlying the aforesaid conclusion are set out in the judgment as follows:

"[2] In brief, the Plaintiff received, in terms of a Deed of Gift ("the Deed") two erven as a gift from her mother ("the mother") on 26 September 1994. The erven formed part of Sub-Division 7 of the consolidated farm Louterwater No 77 in the district of Parys which was registered in

*the mother's name. The Plaintiff built a house on the said erven in 1995 and effected further improvements to it in 1998 and 2002, but since the Deed contradicted the provisions of the Subdivision of Agricultural Land Act, 70 of 1970, ("the Act"), Louterwater was never sub-divided in order to transport the erven to the Plaintiff. (**See: Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others[1]**).*

[3] The plaintiff now offers restitution of her occupancy of the erven and claims from the deceased estate in an enrichment action payment of R548 527.00, being the value of the fixed improvements she had made to the land in the bona fide belief that the Deed was valid and that she was to be the sole heir of the undivided property. Her step-brother ("the brother"), the executor of her mother's estate, and in terms of the mother's last Will the sole heir, occupies the Plaintiff's house and avers in a Special Plea on behalf of the estate that her claim has prescribed."

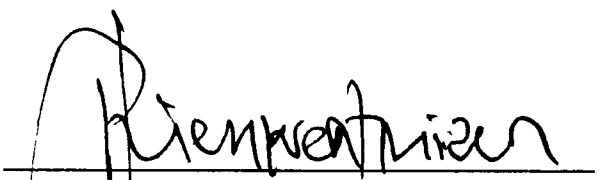
[24] Knowledge that the Deed was invalid was a fact for purposes of the plaintiff's enrichment claim in the matter *supra* and consequently, the judgment does not assist the plaintiff in the matter *in casu*.

[25] Although I have the utmost sympathy with the plaintiff's predicament, the law as it stands simply does not assist him. In the premises, I agree with Mr Myburg's submission that all the facts from which the debt arises was known to the plaintiff in 1999. The information that came to the plaintiff's knowledge in 2013 was the legal conclusion that flows from the facts. It follows that the plaintiff's claim has prescribed and that the action stands to be dismissed.

ORDER

In the premises, I make the following order:

The plaintiff's claim is dismissed with costs.



N JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

APPEARANCES

Counsel for the Applicant: Advocate Sekula

Instructed by: T L Kekana Attorneys

Counsel for the Respondent: Advocate Myburgh

Instructed by: Mothle Jooma Sabdia Incorporated