THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 529/2020

In the matter between:

SUNNIDHEW SOOKAI JUGWANTH **APPELLANT**

and

MOBILE TELEPHONE NETWORKS (PTY) LTD **RESPONDENT**

Neutral citation: *Jugwanth v MTN* (Case no 529/2020) [2021] ZASCA 114 (9 September 2021)

Coram: NAVSA ADP, GORVEN and HUGHES JJA, and KGOELE and PHATSHOANE AJJA

Heard: 24 August 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 9 September 2021.

Summary: Practice – exception – extinctive prescription – exception to particulars of claim for not disclosing a cause of action on the basis that ex facie claim prescribed - party relying on prescription must invoke and prove it – no requirement for particulars of claim pre-emptively to plead a basis to defeat a possible plea of prescription — special plea of prescription susceptible to replication – particulars of claim not excipiable.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Ngalwana AJ, sitting as court of first instance):

1 The appeal is upheld with costs, such costs to include the costs of two counsel wherever so employed.

2 The order of the Gauteng Division of the High Court, Johannesburg, is set aside and substituted with an order dismissing the exception with costs.

JUDGMENT

Gorven JA (Navsa ADP, Hughes JA and Kgoele and Phatshoane AJJA concurring)

[1] The appellant, an attorney, claims that he was contracted to represent the respondent in matters before the Commission for Conciliation, Mediation and Arbitration.[1] For convenience, I shall refer to the parties as the plaintiff and defendant respectively. The plaintiff's claim relates to fees for having performed that work. He sued the defendant, one of the country's largest

[1] This refers to matters dealt with by the Commission for Conciliation, Mediation and Arbitration, created for the resolution of labour disputes under the Labour Relations Act 66 of 1995.

mobile telephone networks, for payment in the Gauteng Division of the High Court, Johannesburg (the high court). The defendant excepted to the particulars of claim on the basis that they did not disclose a cause of action because the debts on which the claim was based had prescribed. In the high court, Ngalwana AJ granted the following order:

'(a) The exception is upheld.

(b) The [plaintiff] is to pay the [defendant's] costs on exception.'

The appeal before us is with his leave.

[2] The particulars of claim alleged that the contract on which the appellant sued was concluded in April 2006. The services were said to have been rendered between 2006 and 2008. In support of the claim, the plaintiff annexed 148 invoices. The total claim was for payment of R3 875 501.60. The summons was served during June 2015, more than six years after the last of the services was rendered and invoices issued. The salient averments in the defendant's exception are:

'3. Therefore, the alleged Plaintiff's claims are not enforceable or claimable against the Defendant based on the following reasons:

3.1 Section 11*(d)* of the Prescription Act no. 68 of 1969 as amended provides that the period of prescription of debts shall be three (3) years in respect of any debt.

3.2 The Plaintiff alleges that the amounts due and payable as per Annexure(s) **"C1" – "C148"** are for the periods between 2006 and 2008.

3.3 The Plaintiff failed to claim his alleged debts within a period of three years from the date on which the debts were due and payable as required by the Act in terms of section 11.

3.4 The Plaintiff's debts as per Annexure(s) **"C1" – "C148"** reveal that majority of the alleged debts prescribed in the year of 2009 and the remainder thereof prescribed in the year of 2011 since the Plaintiff issued summons on 28 May 2015.

4. The Plaintiff's claim has prescribed and thus there is no cause of action against the Defendant.'

[3] The approach to an exception that a pleading does not disclose a cause of action was reiterated by Marais JA in *Vermeulen v Goose Valley Investments (Pty) Ltd*:

'It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that *ex facie* the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim *is* (not may be) bad in law.'[2]

An exception sets out why the excipient says that the facts pleaded by a plaintiff are insufficient. Only if the facts pleaded by a plaintiff could not, on any basis, as a matter of law, result in a judgment being granted against the cited defendant, can an exception succeed. Only those facts alleged in the particulars of claim and any other facts agreed to by the parties can be taken into account.[3]

[4] And in *Cook v Gill*,[4] referred to with approval by this Court in *McKenzie v Farmers' Co-Operative Meat Industries Ltd*, it was held that a cause of action is disclosed when the pleading contains:

'[E]very fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'[5]

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[2] *Vermeulen v Goose Valley Investments (Pty) Ltd* [2001] 3 All SA 350 (A) para 7.
[3] *First National Bank of Southern Africa Ltd v Perry NO and others* [2001] 3 All SA 331 (A) para 6. In that matter certain additional facts were agreed and could therefore be taken into account.
[4] *Cook v Gill* L.R.8 C.P. 107.
[5] See *McKenzie v Farmers' Co-Operative Meat Industries Ltd* 1922 AD 16 at 23.

Put another way, judgment could be granted if the averments in those particulars of claim were proved.

[5] There are certain features of the law of prescription which lend clarity to this matter. Prescription is governed by the Prescription Act 68 of 1969 (the Act). The period of prescription for this debt under s 11*(d)* of the Act is three years. Section 10 of the Act reads:

'[A] debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.'

This provision introduced what is termed 'strong prescription' into our law.[6] Despite this, s 10(3) of the Act provides that payment of an extinguished debt is payment of a debt.[7] The relevance of this to the present matter will become apparent later. Significantly, s 17 of the Act provides:

'(1) A court shall not of its own motion take notice of prescription.

(2) A party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings: Provided that a court may allow prescription to be raised at any stage of the proceedings.'

[6] It is settled law that a person invoking prescription bears a full onus to prove it. In *Gericke v Sack*, Diemont JA explained:

'[It] was the respondent, not the appellant, who raised the question of prescription. It was the respondent who challenged the appellant on the issue that the claim for damages was

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[6] Prior to this, our law utilised what is termed 'weak prescription'. There, a debt was not extinguished. It remained a debt but became unenforceable. Section 2(1) of the Prescription Act 18 of 1943 provided:
'Extinctive prescription is the rendering unenforceable of a right by the lapse of time'.

[7] Section 10(3) reads:
'Notwithstanding the provisions of subsections (1) and (2), payment by the debtor of a debt after it has been extinguished by prescription in terms of either of the said subsections, shall be regarded as payment of a debt.'

prescribed this he did by way of a special plea five months after the plea on the merits had been filed. The *onus* was clearly on the respondent to establish this defence.'[8]

In *Macleod v Kweyiya*, this Court endorsed that principle in ringing tones:

'This court has repeatedly stated that a defendant bears the full evidentiary burden to prove a plea of prescription, including the date on which a plaintiff obtained actual or constructive knowledge of the debt. The burden shifts to the plaintiff only if the defendant has established a prima facie case.'[9]

It bears mention that the burden which shifts to the plaintiff is an evidentiary one and not the burden of proof.

[7] Even if it appears clear when a debt became due, there are other provisions in the Act which could mean that the debt did not prescribe three years thereafter. Section 13 provides for circumstances in which the completion of prescription is delayed and ss 14 and 15 provide for circumstances in which the running of prescription is interrupted. In addition, prescription might not be invoked by the debtor. As mentioned, in terms of s 17(2) of the Act, prescription must be invoked by the party wishing to rely on it. The necessary corollary is that such a party might choose not to do so. If so, a debt which has been extinguished by prescription can found a judgment. This is also consistent with the provisions of s 10(3) mentioned above, where payment of a prescribed debt is regarded as payment of the very debt which has been extinguished. Further, a party invoking prescription might be barred from relying on it. In *De Jager and Others v ABSA Bank Beperk*,[10] this Court held that an agreement not to invoke prescription, even if

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[8] *Gericke v Sack* 1978 (1) SA 821 (A) at 825H.
[9] *Macleod v Kweyiya* [2013] ZASCA 28; 2013 (6) SA 1 (SCA) para 10.
[10] *De Jager and Others v ABSA Bank Beperk* 2001 (3) SA 537 (SCA); [2000] 4 All SA 481 (A).

made after a debt had been extinguished by prescription, was competent and could successfully resist a defence of prescription.[11]

[8] All of this means that prescription is fact driven. The fact that a debt appears to have become due on a certain date is not the only relevant fact required to determine whether it has prescribed. The particulars of claim do not necessarily show when the debt became due, whether the creditor was prevented from coming to know of the existence of the debt,[12] when the creditor became aware of the identity of the debtor,[13] whether the completion of prescription was delayed, whether the running of prescription was interrupted or whether there was an agreement not to invoke prescription.

[9] As mentioned, s 17(1) precludes a court from raising the matter of prescription of its own accord. The necessary corollary is that, if a defendant fails to enter an appearance to defend and a claim such as set out by the plaintiff in this matter came before a court for default judgment, the court could not refuse it on the basis that it had prescribed. This much was conceded by the defendant in argument before us. It was also conceded that, in those circumstances, default judgment would be granted on the particulars of claim in this matter. These are correct concessions.

[10] It follows that it was not necessary for the plaintiff to anticipate the invocation of prescription and plead a basis on which the claim had not prescribed. This, too, was correctly conceded in argument. But the defendant

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[11] Ibid para 18-19.
[12] Section 12(2) of the Act.
[13] Section 12 (3) of the Act.

made two submissions in support of the judgment by the high court. First, that because an exception is a pleading, the delivery of the exception was an effective way of invoking prescription under s 17(2) of the Act. Second, that because prescription was invoked by the delivery of the exception, the plaintiff was, as a result, required to plead a basis on which the claim had not prescribed. Because he did not amend the particulars of claim to do so, they no longer disclosed a cause of action and the exception was correctly upheld.

[11] In support of the averment that prescription could rightly be invoked by the delivery the defendant set much store by two judgments. The first was the following *dictum* in *Habib and Another v Ethekwini Municipality*:

'These cases support the notion that prescription, in trial proceedings, should be raised by way of a plea or special plea. They do not in my view provide authority for the proposition that an exception which invokes prescription is an irregular step, or will not be considered on its merits.'[14]

In that matter, as in the present one, an exception had been delivered which relied on prescription. The plaintiff sought to set aside the delivery of the exception as an irregular step. Ploos van Amstel J went on to say:

'I think the point is rather that an exception based on prescription will usually fail because the contention that the particulars of claim lack averments necessary to sustain an action is incorrect. This is because the plaintiff is not required to aver that his claim has not become prescribed.'[15]

[12] That conclusion therefore does not support the defendant. No point was taken in this matter that the delivery of the exception was an irregular step. The plaintiff simply argued that it should not succeed. The fact that delivering

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[14] *Habib and Another v Ethekwini Municipality* 2020 (1) SA 580 (KZD) para 16.
[15] Ibid.

an exception may not be an irregular step does not make the exception good. The true test remains to determine whether the particulars of claim sustain a cause of action. It is important to bear in mind that Uniform Rule 23(4) does not, in the ordinary course, envisage further pleading, including a replication that might be a retort to a plea of prescription. In trial proceedings prescription is conventionally raised by way of a special plea to which there might be a replication.[16] Exceptions are decided on the pleadings as they stand at the time that the exception is taken.

[13] The second judgment, relied upon by both the defendant and the high court, was *Sanan v Eskom Holdings Ltd*.[17] There, Claassen J was confronted with an exception to particulars of claim to the effect that s 35 of the Compensation for Occupational Injuries and Diseases Act No 130 of 1993 (COIDA) did not allow for such a claim to be brought in court. The particulars of claim placed the plaintiff foursquare within the ambit of the embargo. The plaintiff argued that a special plea ought to have been taken and that an exception was inappropriate. However, this contention was rejected and the exception was upheld. This was correct because in that case the averments of the plaintiff himself barred him from instituting action. In any event that case was more about the ouster of the jurisdiction of the court to deal with certain claims and did not involve the application of the Act.[18] Claassen J referred to

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[16] Rule 23(4) states:
'Wherever any exception is taken to any pleading or an application to strike out is made, no plea, replication or other pleading over shall be necessary.'
[17] *Sanan v Eskom Holdings Ltd* 2010 (6) SA 638 (GSJ).
[18] Section 35 of COIDA is headed 'Substitution of compensation for other legal remedies' and s 35(1) provides:
'No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such

the matter of *Mankayi v AngloGold Ashanti Ltd*,[19] and also correctly pointed out that this Court had dismissed an appeal from a judgment upholding an exception on the same basis as *Sanan*. In dismissing the appeal, this Court did not criticise the procedure of excepting in those circumstances.

[14] However, having dealt with *Mankayi* and the particulars bearing on *Sanan*, Claassen J embarked on an unnecessary discussion of whether, in principle, 'a special plea or an exception is the appropriate procedure to raise a defence'. It is this aspect of the judgment on which the defendant relied.

[15] Claassen J went on to say:

'Would it matter if an exception in the true sense of the word is raised by way of a special plea? Surely not. Why then would the converse be fatal?'[20]

He went on to quote the following passage from Herbstein and Van Winsen:[21]

'The essential difference between a special plea and an exception is that in the case of the latter the excipient is confined to the four corners of the pleading. The defence raised on exception must appear from the pleading itself; the excipient must accept as correct the factual allegations contained in it and may not introduce any fresh matters. Special pleas, on the other hand, do not appear *ex facie* the pleadings. If they did, then the exception procedure would have to be followed. Special pleas have to be established by the introduction of fresh facts from outside the circumference of the pleading, and those facts have to be established by evidence in the usual way. Thus, as a general rule, the exception procedure is appropriate when the defect appears *ex facie* the pleading, whereas the special plea is appropriate when it is necessary to place facts before the court to show that there is

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employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.'

[19] *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2010 (5) SA 137 (SCA); 2011 (5) BCLR 453 (CC).

[20] *Sanan* fn 17 above para 18.

[21] Herbstein and Van Winsen *The Practice of the High Courts in South Africa* 5 Ed (2009) at 599-600.

a defect. The defence of prescription appears to be an exception to this rule for it has been held that that defence should be raised by way of special plea even when it appears *ex facie* the plaintiff's particulars of claim that the claim has prescribed, apparently because the plaintiff may wish to replicate a defence to the claim of prescription, for example an interruption.'[22]

Claassen J criticised this approach:

'With respect to the learned authors, it seems to me incongruous that a party is obliged to raise a defence in a particular way in order to accommodate or assist his opponent in raising a counter argument to such defence.'[23]

[16] Claassen J is incorrect to say that where prescription is concerned, raising 'a defence in a particular way' is done 'in order to accommodate or assist his opponent in raising a counter argument to such defence'. In the first place, prescription must be invoked. In the second place, as we have seen, when this is done the party invoking it attracts an onus. If it attracts an onus, it can hardly be said that this in any way accommodates or assists an opponent. If prescription is invoked in a plea, it may require the other party to replicate setting out a basis on which the claim has not prescribed but, if that party takes the view that the excipient will not succeed in proving prescription, a replication might not be delivered at all. The unqualified criticism of the approach of Herbstein and Van Winsen was unwarranted. It may not be possible to say that an exception relying on prescription could never succeed but that is certainly the position in this matter.

[17] What then, of the submission that the delivery of the exception brought about a situation where the plaintiff was required to amend the particulars to

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[22] See *Sanan* fn 17 above para 20.
[23] Ibid.

plead a basis on which the claim had not prescribed? This submission necessarily means that the delivery of the exception resulted in the particulars of claim, which previously sustained a cause of action, no longer did so. In the light of the onus borne by the party invoking prescription, and the architecture of the Act, sketched above, it simply cannot be the case that an exception to otherwise sufficient particulars of claim requires a plaintiff to amend on pain of the exception being upheld and the claim being dismissed. If a plaintiff need not anticipate prescription being raised in order for the particulars of claim to disclose a cause of action, the delivery of an exception cannot change the picture.

[18] A simple example shows up the fallacy in the submission. In the present matter, the defendant could enter a special plea invoking prescription which, if proved, would defeat the claim. If the defendant failed to appear at the trial of the matter, Rule 39(1) of the Uniform Rules of Court provides:

'If, when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies upon him and judgment shall be given accordingly, in so far as he has discharged such burden: Provided that where the claim is for a debt or liquidated demand no evidence shall be necessary unless the court otherwise orders.'

The present claim is for a debt, so the plaintiff would not have to lead evidence in that regard. And because the plaintiff bears no onus as regards the pleaded defence of prescription, no proof would be required of him. Default judgment would then be granted. Even the delivery of a special plea does not change the fact that, in these circumstances, the particulars of claim would be sufficient to found a judgment. How much less would an exception do so? In

circumstances where the particulars of claim begin by disclosing a cause of action, accordingly, the delivery of an exception does not change that position.

[19] The high court upheld the exception with costs and held as follows:

'There is no factual dispute about the respondent's claim having prescribed. The respondent disavowed his waiver averment when he removed it from his second amendment notice and did not include it in his amended particulars of claim. If the applicant had raised its prescription defence by way of special plea, it is unlikely to have met with any credible rejoinder from the respondent in a replication and subsequent evidence at trial. The insistence on the facts of this case that prescription should have been raised by way of special plea, in order to enable the respondent to replicate, is therefore in my view purely a technical nicety for its own sake. It would simply delay the inevitable, namely, the dismissal of the respondent's claim on grounds of prescription and, in that process, unwarrantedly increase costs and add to an already overburdened court roll. In this regard, it is well to remember that dismissal of an exception (except only one founded on jurisdiction) does not finally dispose of the issue raised by way of exception because the issue can still be argued at the trial.'[24]

[20] There are a number of difficulties with this set of findings. In the first place, the learned judge held that there are 'no factual disputes about the [plaintiff's] claim having become prescribed'. This ignores the approach to prescription outlined above. That was the very issue before the court. The facts as pleaded might have shown when the debt appears to have become due. They did not show anything further of relevance to the issue of prescription.

[24] Gender references have been corrected.

[21] In the second place, mention is made of an averment of waiver in the original particulars of claim, which was omitted from the amended particulars. The averment prior to removal by amendment took the following form:

'On 18 February 2010, Defendant, represented by Mr Nyathi, orally waived the defence of prescription to the above claims of the Plaintiff. This was recorded in an e-mail from the Plaintiff to the Defendant dated 18 February 2010, a copy of which is attached hereto marked as "D".'

Prior to the amendment which removed this paragraph and the annexure referred to, the plaintiff had unnecessarily attempted to plead a basis on which the claims had not prescribed. The high court incorrectly held that the amendment removing this averment resulted in the plaintiff disavowing that basis of resisting prescription. That is not so. It remains open to the plaintiff to plead in a replication the same, or another, basis on which he avers that the claim has not prescribed.

[22] Thirdly, there was absolutely no warrant for the following finding:

'If the applicant had raised its prescription defence by way of special plea, it is unlikely to have met with any credible rejoinder from the respondent in a replication and subsequent evidence at trial. The insistence on the facts of this case that prescription should have been raised by way of special plea, in order to enable the respondent to replicate, is therefore in my view purely a technical nicety for its own sake.'

With respect, the learned judge is not in a position to speculate as to whether a potential 'rejoinder' might be made or, if made, be credible. A court cannot, at the stage of an exception, anticipate the basis on which the defendant will invoke prescription or that none of the potential bases which overcome the defence of prescription will be pleaded and, if pleaded, decided against the plaintiff. A trenchant example is the matter of *De Jager* referred to above. A court dealing with an exception in that matter could not have known that the

plaintiff would allege that, even though the debt had prescribed and thereby been extinguished, the creditor had agreed not to invoke prescription.[25]

[23] Fourthly, it is important to correct the statement that the issue can still be argued at the trial. For this, Ngalwana AJ used as authority the matter of *Maize Board v Tiger Oats Ltd and Others*.[26] In that matter Streicher JA said:

'When it has to be decided whether a declaration or particulars of claim disclose a cause of action or whether a plea discloses a defence the issue often is whether in law that is the case. A decision on that point of law is not final . . . The point may be re-argued at the trial in the event of the exception being dismissed.'[27]

The dictum of this Court applied only to a situation where an exception is dismissed. In such a case, the action continues to trial and the point of law can be reargued. If, however, an exception is upheld, leave is not given to amend, and the claim is dismissed, there can be no trial of that action. That ends the action. That, of course applies to an exception such as the present one that the particulars of claim do not disclose a cause of action. If the exception was based on the pleading being vague and embarrassing, upholding it does not end the action because the party concerned is given the opportunity to remove the cause of the vagueness or embarrassment.

[24] For all of the above reasons, the exception was incorrectly upheld. This means that the appeal must succeed. Plaintiff asked for the costs of two counsel on appeal. This was not contested and seems to me appropriate. In the result:

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[25] *De Jager* paras 15 and 18.
[26] *Maize Board v Tiger Oats Ltd and Others* [2002] 3 All SA 593 (A).
[27] *Maize Board* para 12.

1 The appeal is upheld with costs, such costs to include the costs of two counsel wherever so employed.

2 The order of the Gauteng Division of the High Court, Johannesburg, is set aside and substituted with an order dismissing the exception with costs.

T R GORVEN
JUDGE OF APPEAL

Appearances

For appellant:	D A Turner (with him N C Cheethai)
Instructed by:	Jugwanth Attorneys Incorporated, Johannesburg Webbers Attorneys, Bloemfontein.
For respondent:	A M Mtembu
Instructed by:	Mashiane, Moodley & Monama Inc, Sandton Lovius Block Inc, Bloemfontein.