IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case no: 7236/2009

In the matter between:

BABALWA KWEYIYA	**Plaintiff**
and	
CHARLES ROBERT ROGER MacLEOD	**Defendant**

JUDGE	:	**P.A.L. GAMBLE**
FOR THE PLAINTIFF	:	**Adv. Geoff Budlender SC**
INSTRUCTED BY	:	**Messrs Malcolm Lyons & Brivik Inc**
FOR THE DEFENDANT	:	**Adv. P.B.J. Farlam**
INSTRUCTED BY	:	**Deneys Reitz Inc**
DATES OF HEARINGS	:	**15 March 2012**
DATE OF JUDGMENT	:	**10 April 2012**

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

REPORTABLE

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BABALWA KWEYIYA Plaintiff

And

CHARLES ROBERT ROGER MacLEOD Defendant

JUDGMENT : 10 APRIL 2012

GAMBLE, J:

INTRODUCTION

[1] On 30 January 1988 the Plaintiff was a passenger in a Valiant motor vehicle which collided with a Toyota motor vehicle in Khayelitsha. Plaintiff's date of birth is 29 April 1984 and so she was not yet three years old at the time. The Plaintiff was seriously injured in the collision and was rendered paraplegic as a consequence thereof.

[2] The Plaintiff's mother, Cynthia Kweyiya, consulted the Defendant, an attorney of Sea Point, regarding a damages claim on behalf of her daughter. As a consequence thereof a summons was issued out of this Court on 26 March 1993 under case no. 3972/93 in which an amount of R870 220.00 was claimed from the erstwhile statutory insurer of the Toyota and R25 000.00 from the statutory insurer of the Valiant. For purposes of convenience these claims are jointly referred to as *"the MVA claim"*.

[3] The MVA claim, which was governed by the provisions of the Motor Vehicle Accidents Act of 1986, was initiated by the Defendant on behalf of the Plaintiff's mother.

[4] On 18 March 1996 Fagan DJP granted an order by agreement between the Plaintiff's mother and the insurers of the Toyota (Santam Limited) in terms whereof Santam agreed to pay 35% of such damages as Plaintiff's mother could prove, both in her personal capacity and in her capacity as guardian of the Plaintiff. It was recorded that an amount of R25 000.00 had already been received from the statutory insurers of the Valiant (SA Eagle Insurance Company Limited) and that this amount would be taken into account when the claim against Santam was quantified.

[5] In February 1997, after an amendment to the particulars of claim, the quantum of the MVA claim against Santam was said to be of the order of R2,3 million.

[6] During May 1997, and allegedly acting on the advice of the Defendant, the claim against Santam was settled in the amount of R99 500.00. The

consequence of this was that the total damages recovered by the Plaintiff's mother in respect of the collision was the sum of R124 500.00.

[7] On 5 March 1998 the Defendant handed to the Plaintiff's mother a letter of account in respect of the MVA claim and provided her with a breakdown of the various amounts disbursed. From this letter it appears that the Plaintiff's mother was paid a total of R14 000.00 in cash, that various disbursements were made to medico-legal experts and counsel, and that a house was bought in Khayelitsha which was registered in Plaintiff's mother's name. The letter records that settlement of the claim was a difficult exercise but that on the advice of Counsel it was to be regarded as *"a good settlement"* in the circumstances.

[8] On 8 April 2009 the Plaintiff, then aged almost 25, served the summons in this matter on the Defendant alleging that he had acted negligently in settling the MVA claim in May 1997. An amount of R4,7 million was claimed – effectively the current value of the MVA claim which the Plaintiff alleged should have been settled in May 1997 in the sum of R2,198 million. The Defendant's liability is alleged to be founded both in professional negligence and breach of contract.

[9] Not unsurprisingly, the Defendant filed a special plea of prescription to the Plaintiff's claims herein and that matter was, by agreement, heard separately before the commencement of the main action, under Rule 33(4).

THE SPECIAL PLEA OF PRESCRIPTION

[10] In the special plea the Defendant alleges that the Plaintiff's cause of action against him arose by no later than 31 May 1997 being the date the Defendant advised the Plaintiff's mother to settle the MVA claim.

[11] It is further alleged that Plaintiff could reasonably acquired knowledge of the identity of the alleged debtor, and the facts giving rise to the claim, on 31 May 1997, alternatively by "*at least April 2002*".

[12] Further, it is said that the Plaintiff attained majority (then still 21 years of age) on 29 April 2005 and that in terms of Section 13(1)(a) of the Prescription Act 68 of 1969 ("*the Act*"), the period of prescription was completed on 29 April 2006.

[13] A further allegation is made in the alternative that the Plaintiff either knew, or could reasonably have acquired knowledge of, the identity of the debtor and the facts giving rise to the Defendant by 7 April 2006. Accordingly, so the allegation goes, when the summons was served on 8 April 2009 the claim had become prescribed in terms of Sections 11, 12 and 13 of the Act.

[14] I pause to point out that in her particulars of claim the Plaintiff foreshadows a potential plea of prescription by alleging that she first became aware of the terms of the settlement of the MVA claim on 19 April 2006 when an erstwhile employee of the Defendant, Ms. Evelyn Stroud, made certain documents available to her. It is further contended that the Plaintiff first consulted her current attorneys of record on 4 February 2009. The Plaintiff goes on to allege that the date upon which

she first had knowledge of the facts from which the debt arose was therefore 4 February 2009, alternatively 19 April 2006.

THE RELEVANT STATUTORY FRAMEWORK

[15] In terms of Section 11(d) of the Act the period of prescription for a debt such as that which the Plaintiff alleges is due to her by the Defendant is three years. In terms of Section 12(1) of the Act "*prescription shall commence to run as soon as the debt is due,*" subject to the proviso's contained in Sections 12(2), (3) and (4). It is common cause that the proviso contained in Section 12(3) of the Act is relevant to the instant case. That section reads as follows:

> "*S12(3) 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.*"

And, in terms of Sections 13(1)(a) and (i) of the Act, the completion of the running of prescription is delayed (if the creditor is a minor) for a period of one year after the attainment of majority.

[16] It is common cause also that the relevant provisions of the Age of Majority Act, 57 of 1972, read with Section 17 of the Children's Act, 38 of 2005 (which reduced the age of majority from 21 to 18 years with effect from 1 July 2007) were not applicable *in casu* since the Plaintiff had already attained majority on 29 April 2005.

The effect of Section 13 of the Act then is to delay the completion of prescription in this case until 28 April 2006.

[17] Accordingly, on any approach, the Plaintiff could have validly served the summons herein on the Defendant by 28 April 2006. Once the summons is served beyond that date (as in fact happened) the provisions of Section 12(3) come into play.

THE APPLICABLE CASE LAW

[18] Mr. Farlam, for the Defendant, accepted that his client bore the overall onus of proof in regard to the issue of prescription raised in the special plea [1] and, in particular, the date upon which prescription began to run under Section 12 of the Act.

[19] As to the onus in regard to showing that prescription was delayed in terms of Section 13 of the Act, Mr. Farlam contended that the Plaintiff bore the burden of proof in this regard and relied on the *dictum* of Howie JA in ABSA Bank Limited v De Villiers [2]. A reading of that case, as well as Gericke v Sack and Van Zijl v Hoogenhout, demonstrate that the burden to a adduce evidence and the overall onus may, depending on the way in which the case has been pleaded, reside with both the Plaintiff and the Defendant respectively.

[20] In the instant case the summons was clearly served beyond any permissible prescriptive period – the latest date as set out above being 28 April 2006.

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[1] Gericke v Sack 1978 (1) SA 821 (A) at 826A-827C; Van Zijl v Hoogenhout 2005 (2) SA 93 (SCA) at 107G para 41.

[2] 2001 (1) SA 481 (SCA) at 486G-487C.

Prima facie therefore service of the summons on 8 April 2009 is out of time and the matter has become prescribed.

[21] But that is not the end of the matter. Cognisant of the provisions of Section 12(3) of the Act, and having regard to the Plaintiff's assertions in paragraph 37 of the particulars of claim that she first had knowledge of the facts from which the debt owing to her arose on 4 February 2009 or 19 April 2006, it is for the Defendant to show conclusively that the Plaintiff either had actual knowledge or so-called "*constructive knowledge*" before those dates. [3]

[22] In argument in reply Mr. Farlam conceded (very correctly, in my view) that the Defendant had not been able to establish that the Plaintiff had actual knowledge of the relevant facts before 8 April 2006, and accepted that the case fell to be determined on the basis of her "*constructive knowledge*".

[23] As to the facts which a plaintiff needs to have at her disposal to bring the case within the ambit of Section 12(3), our Courts have often pointed out that these are no more than the basic facts sufficient to institute proceedings. A plaintiff need not have been aware of the legal consequences to be drawn from those facts, nor of the evidence required to establish each material fact [4].

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[3] See Gericke's case supra at p828B.

[4] Van Staden v Fourie 1989 (3) SA 200 (A) at 216(C); Nedcor Bank Bpk v Regering van RSA 2001 (1) SA 987 (SCA) at 996-7 paras 8-13; Truter v Deysel 2006 (4) SA 168 (SCA) at 174D-175D paras 17-21; Minister of Finance and Others v Gore NO 2007 (1) SA 111 (SCA) at 119-120 para 17; Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng 2009 (3) SA 577 (SCA) at 590 para 37.

[24] In establishing those facts a Plaintiff cannot sit back and "*by supine inaction arbitrarily and at will postpone the commencement of prescription*" [5] A Plaintiff is expected to behave diligently and exercise reasonable care, not only in ascertaining the material facts underlying the debt, but also in evaluating the significance of such facts.

[25] In Drennan Maud and Partners v Pennington Town Board [6], Olivier JA summarized the approach as follows:

> "*This means that the creditor is deemed to have the requisite knowledge if a reasonable person in his position would have deduced the identity of the debtor and the facts from which the debt arises.*"

The test is, accordingly, an objective assessment as to whether the creditor has behaved reasonably.

THE MATERIAL FACTS

[26] The Defendant accepted that, in discharging the onus to establish the special plea, he had the duty to begin with the leading of evidence. The Defendant called Ms. Stroud and thereafter testified himself. The Plaintiff closed her case without leading any evidence.

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[5] Burley Appliances Limited v Grobbelaar NO and Others 2004 (1) SA 602 (C) at 607G.

[6] 1998 (3) SA 200 (SCA) at 209F-G

[27] From the evidence for the Defendant it emerged that prior to early 2006 he had never met or dealt with the Plaintiff personally. When the case was settled in 1997 the Defendant had only dealt with the Plaintiff's mother.

[28] The Defendant testified that some time early in 2006 (he could not pin-point the month) the Plaintiff came to see him. He said that she was "*in quite a state*" as there seemed to be a family dispute relating to her occupancy of the house which had been bought with the proceeds of the MVA claim. The Defendant said that before he could answer the Plaintiff's query he needed to draw the file from his archives. This he did and Ms. Stroud, his candidate attorney at the time, dealt with the matter further.

[29] Under cross-examination by Mr. Budlender SC for the Plaintiff, the Defendant said that there was no accusation or suggestion by the Plaintiff during this meeting that he had been negligent in the handling of the MVA claim. When asked by the Plaintiff whether there was any money still due to her the Defendant said that he told her that everything had been paid out. Importantly, said the Defendant, there was nothing that he said or did that day which would (or should) have alerted the Plaintiff to the fact that she may have a claim for professional malpractice against him.

[30] Ms. Stroud testified that she had sat in on part of this consultation with the Plaintiff, and was later tasked by the Defendant with location of the file. Ms. Stroud said that on 19 April 2006 she sent the Plaintiff an email to the following effect:

> "*We refer to the above matter and attach the following documentation:*

1. *The Order of Court.*
2. *A letter from the RAF- confirming payment amount.*
3. *A breakdown of payments to be made to Housing Africa.*
4. *A finalized account of the finances.*

Unfortunately we only have a faxed copy of the Deed of Sale (for the house your mother purchased) which has faded almost beyond illegibility (sic)."

[31] Although the Plaintiff did not testify it is fair to infer that she sought legal advice some time after receipt of this email and that the current proceedings flowed from that advice. [7]

[32] On the strength of Ms. Stroud's evidence the Defendant accepted that the Plaintiff's actual knowledge of the terms of the settlement and the financial consequences and implications thereof, stemmed from the email of 19 April 2006. But, argued Mr. Farlam, the Plaintiff could have discovered these facts earlier by the exercise of diligence and reasonable care. Very soon, however, this argument ran into trouble due to the fact that the Plaintiff had not testified and that the Defendant had not been able to cross-examine her. Clearly, it was the Defendant's intention to attempt to establish part of his case through cross-examination of the Plaintiff in the hope of securing some useful concessions.

[7] In reply to the allegation in para 35 of the particulars of claim that the Plaintiff first consulted her current attorneys on 4 February 2009, the Defendant has said that he has no knowledge of the allegation and accordingly denies it.

[33] In paragraph 3 of the special plea the Defendant asserted that the Plaintiff could, by the exercise of reasonable care, have acquired knowledge of the facts giving rise to the debt "*on 31 May 1997, alternatively by at least April 2002*". The relevance of neither of these dates was elucidated by the brief trial particulars furnished for the purposes of the hearing of this special plea. Indeed, the answers furnished were obtuse and the Defendant sought to hide behind the customary evasive reply that these were matters for evidence.

[34] And yet, no such evidence emerged during the hearing. At best for the Defendant there was the Plaintiff's admission in her trial particulars that –

> "*The Plaintiff knew that the claim had been settled, and that the compensation for the accident paid for the house which her mother purchased. She knew this in 1996 or 1997.*"

In argument Mr. Farlam suggested that by April 2002 the Plaintiff had reached the age of eighteen years and would have been old and mature enough to start making enquiries about the sufficiency and advisability of the settlement of the MVA claim.

[35] However, as Mr. Budlender SC pointed out, this argument is predicated on the fact that the Plaintiff would have had reason to question a settlement which had been concluded by her mother, presumably acting in her daughter's best interests. Further, it was argued that the fact that at the age of 12 or 13 the Plaintiff knew that there had been a settlement was not enough. Mr. Budlender SC said that the Plaintiff had to know the terms of the settlement, and importantly the quantum thereof, before she could draw any inference of alleged negligence on the part of the

Defendant. On any version this only occurred on 19 April 2006 upon receipt of Ms. Stroud's email, and there was no apparent reason for the Plaintiff to have begun making enquiries before that date. After all, said Mr. Budlender SC, when she went to see the Defendant at the beginning of 2006, the Plaintiff was in dispute with her mother about occupation of the house bought with the proceeds of the settlement. There was never any dispute or accusation by her that her mother had behaved improperly towards her daughter by accepting a poor settlement.

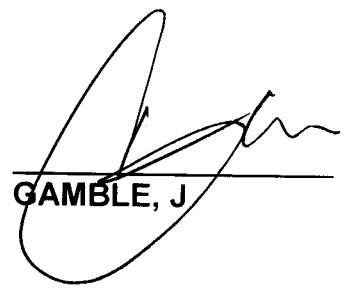
[36] While it is no doubt a source of great frustration to a professional person such as the Defendant to receive a summons so long after the event (in this case more than 21 years after the collision and 12 years after the settlement of the resultant litigation), this will always be a possible consequence of litigating on behalf of a minor who enjoys both the protection of Section 13 of the Act, and the opportunity under Section 12(3) of the Act to contend for an even longer period to issue summons than that permitted by Section 13.

[37] As the facts of this case demonstrate, on 19 April 2006 the Plaintiff quite fortuitously came upon the details of the settlement concluded on her behalf by the Defendant some nine years previously. She must then have received advice as to the perceived legal consequences of the manner in which the Defendant handled the claim, and thereafter instituted action against him and served the summons on him on 8 April 2009.

CONCLUSION

[38] I am of the view that it has not been shown by the Defendant that the Plaintiff could reasonably have acquired knowledge of the facts material to her claim before 19 April 2006. In the circumstances her claim against the Defendant has not prescribed.

[39] It follows that the special plea falls to be dismissed with costs.



GAMBLE, J