Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 795/2014

Before: The Hon. Mr Justice Binns-Ward

Hearing: 24 November 2015

Judgment delivered: 1 December 2015

In the matter between:

NASSIERA JAMES Plaintiff

And

MINISTER OF CORRECTIONAL SERVICES Defendant

JUDGMENT

BINNS-WARD J:

[1] The plaintiff claims compensation from the Minister of Correctional Services for the damages she has allegedly sustained as a consequence of contracting tuberculosis while incarcerated in Pollsmoor Prison during 2009. Summons in the action was served on the defendant on 21 January 2014. The institution of proceedings had been preceded by notice of the claim by the plaintiff's attorneys, purportedly given in terms of s 3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 ('the Institution of Proceedings Act'). The notice was given to the defendant on 16 September 2013.

[2] The defendant pleaded three special defences in the action; viz. (i) extinctive prescription; (ii) alleged non-compliance by the plaintiff with the notice requirements in terms of the Institution of Proceedings Act and (iii) 'misjoinder and/or non-joinder'. An order was made in terms of rule 33(4) of the Uniform Rules at the commencement of the trial directing that the special defences be tried and determined separately from, and before, the remaining issues in the action. This judgment is concerned only with the determination of the special defences.

[3] The date upon which the plaintiff's claim became due is a point of essential coincidence for the purpose of determining the first two of the aforementioned special defences. If, as maintained by the plaintiff's counsel, the claim became due only on 1 August 2013, when the plaintiff was first advised by an attorney that the facts upon which the claim is founded established a basis for a suit in damages against the Minister of Correctional Services, then the claim has not been extinguished by prescription. In those circumstances the notice given in September 2013 would also have been compliant with the requirements of s 3(2)(a) read with s 3(3)(a) of the Institution of Proceedings Act, having been given within six months of 1 August 2013.

[4] The period of extinctive prescription that pertains is one of three years; see s 11(d) of the Prescription Act 68 of 1969. In terms of s 12(1) of the Prescription Act –

> Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.

Subsections 12(2) and (4) are not relevant on the facts of the current case. Subsection 12(3) provides:

> 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.

The provisions of s 12(3) of the Prescription Act have the same effect as those of s 3(3)(a) of the Institution of Proceedings Act, which, insofar as currently relevant, provide –

> For purposes of subsection (2)*(a)*-
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> *(a)* a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless ...

[5] As noted in *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA), at para 17, it has been held in a series of decisions of the appeal court that the requisite knowledge goes to the minimum facts that are necessary to institute the action.[1] It is clear from the allegations in her

[1] The *dictum* of Mlonzi AJ in *Deysel v Truter and Another* 2005 (5) SA 598 (C) at 609 C, which was relied on by the plaintiff's counsel, that '*Knowledge <u>of the entire set of facts</u> giving rise to an enforceable claim is the knowledge which is an intrinsic requirement in terms of s 12(3).*' (underlining in counsel's heads of argument)

particulars of claim, which she confirmed in her oral evidence, and from the statement of agreed facts put in at the commencement of the trial, as well as her concession that she was aware that she had been wronged, that the plaintiff was aware of the facts from which the debt arose by the time she was discharged from prison on parole in December 2009.

[6] It is equally clear on the evidence that the plaintiff did not appreciate the legal implications arising from the facts of which she had knowledge. She did not appreciate that they gave rise to a claim in delict for damages – in other words, an exigible debt. She only became aware of the remedies available to her on the facts alleged in the particulars of claim when, in reaction to an advertisement that she had read in the *Voice* newspaper on 24 July 2013, she consulted with an attorney on 1 August 2013. The advertisement had been placed by her current attorneys of record. It stated '*Did you contract TB whilst in prison? If so, you may have a damages claim*'. There is also a series of appeal court judgments that holds that ignorance of 'the relevant legal conclusions' to be drawn from the facts or unawareness by a creditor 'of the full extent of its legal rights' does not affect the running of prescription; see the jurisprudence referred to in *Claasen v Bester* 2012 (2) SA 404 (SCA), at para 13-15 and in *MEC for Education, KwaZulu-Natal v Shange* 2012 (5) SA 313 (SCA), at para 10, note 4. I shall return to the effect of that aspect of those judgments on the current case later in this judgment.[2]

[7] It is evident from the allegations in the particulars of claim, loosely drafted as they are, that the defendant has been sued as a joint wrongdoer by virtue of the doctrine of vicarious liability. There is no reason to think that the plaintiff had actual knowledge prior to 1 August 2013 that the defendant was a debtor by virtue of his position as the responsible member of the Cabinet. It seems to me then that the only question in the circumstances is whether the defendant ought reasonably to have acquired knowledge of the identity of the defendant as the debtor earlier than she did.

[8] The plaintiff is an adult woman, currently 34 years of age. She left school without completing grade 10 when she fell pregnant during her second year in that grade, having failed to secure a pass into the next grade at the end of her first year at that level. Since leaving school she has been employed in a series of low-level positions such as a worker in a despatch department sealing goods to make them ready for delivery, a shelf packer-cum-shop till cashier and a cleaner. She is currently a cleaning supervisor at the Khayelitsha district hospital. Having regard to her level of education and socio-economic circumstances, it is inherently improbable that the plaintiff knew anything about the doctrine of vicarious liability and the provisions of the State Liability Act 20 of 1957, or indeed enough about the operation of the law to be put on enquiry in that connection.

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has to be narrowly construed for consistency with appeal court authority. Reliance on the *dictum* is in any event questionable, as the judgment was reversed on appeal precisely because the learned acting judge had misapprehended the ambit of the knowledge required by a creditor before the debt is deemed to be due. See *Truter and Another v Deysel* 2006 (4) SA 168 (SCA), especially at para 11-24.

[2] At para [18], below.

[9] It is trite that the *onus* of establishing the defence that a debt has been extinguished by prescription is on the defendant. It was therefore incumbent on the defendant to prove on a balance of probability that the plaintiff could reasonably have acquired knowledge of the defendant's identity earlier than she did and, assuming that he was able to do so, also to show that the date upon which such knowledge could have been acquired was more than three years before the institution of the action. It has been recognised that discharging the *onus* can sometimes be difficult (see *Gericke v Sack* 1978 (1) SA 821 (A), at 827D-G), but that has not been found to afford any reason to ameliorate the effect of its incidence.

[10] The defendant led the evidence of Mr Siviwe Mancotywa, an official stationed at Pollsmoor Prison in the legal services section of the Department of Correctional Services, in an endeavour to establish that it was common knowledge amongst prisoners that inmates infected with tuberculosis as a consequence of the conditions in which they were incarcerated could bring a claim for compensation against the Department. The witness explained that this was so because of the wide publicity that had been given on television and in the newspapers to the high profile matter of *Lee v Minister of Correctional Services*. The judgments on the separated issue of liability in that matter at first instance and thereafter on appeal to the Supreme Court of Appeal and the Constitutional Court are reported at 2011 (2) SACR 603 (WCC); 2012 (3) SA 617 (SCA) and 2013 (2) SA 144 (CC). The case concerned a claim for compensation by a former inmate of Pollsmoor Prison arising out of his allegedly having contracted tuberculosis in prison as a consequence of the conditions in which he had been incarcerated there between 1999 and 2004.

[11] During his cross-examination of Mr Mancotywa, the plaintiff's counsel suggested to the witness by implication that the *Lee* trial had taken place after the plaintiff had been released from prison. He put it to him that the judgment at first instance in *Lee* had been given in 2012. The witness seemed surprised by this, but said that he was willing to accept the correctness of the proposition that counsel had put to him. In the course of preparing judgment I had reference to the report of the High Court judgment. According to the information given in the report of the judgment, the trial in the *Lee* case ran during the periods 2-10 December 2009, 1-25 February 2010 and 16-17 March, with judgment having been delivered on 11 March 2011. The first stage of the trial would thus have taken place while the plaintiff was still in prison. There was no evidence, however, as to at what particular stage of the proceedings the matter had attracted publicity.

[12] I directed that an email be sent by the court registrar to counsel on both sides drawing their attention to the incorrect premise on which the witness had been led to make the concession and inviting their submissions on what they might wish to do in the circumstances. Counsel elected, by agreement between themselves, to submit supplementary written argument. Neither side sought leave to reopen the trial. The plaintiff's counsel argued that even if there had been some publicity given to the first stage of the trial of the *Lee* case, it did not detract from effect of the plaintiff's evidence that it

had not come to her notice. The defendant's counsel included a reference to an internet link to a newspaper article on the case published during the first stage of the trial. I do not think that I can properly have regard to such material, which is evidential in nature and was not canvassed with the plaintiff or Mr Mancotywa. For the reasons set out below, however, I consider that even were I to have had regard to the publication of the article, it would not have affected the decision in respect of the first two of the special pleas.

[13] The plaintiff testified that the first time that she had heard of the *Lee* case was when she consulted her attorney in response to the advertisement mentioned earlier. Her evidence in this respect was not controverted. The defendant did not adduce any evidence to establish the nature and extent of the publicity given to the *Lee* case and thus laid no basis to impugn the credibility of the plaintiff's evidence that she had not known about the case. On the contrary, it seems inherently unlikely that the plaintiff would have delayed investigating the existence of a claim for compensation until seeing the advertisement if she had become aware of the *Lee* case earlier. The expedition with which the plaintiff reacted to the advertisement by arranging an appointment to consult the attorney within a week of having seen the advertisement is inconsistent with any inclination on her part to have been supine in that connection.

[14] The facts of the current case are directly comparable for relevant purposes with those that obtained in *Shange* supra.

[15] In that matter the plaintiff had been injured during June 2003 by the deputy principal of the rural school he attended. His eye was injured when it was struck by the teacher's belt while the latter was administering corporal punishment to another pupil. The plaintiff was a 15 year old grade nine pupil at that time. The plaintiff accepted the teacher's explanation that what had happened had been 'a mistake', and no action was taken to seek compensation for the injury. In January 2006, while the plaintiff was still a minor, [3] a relative, who had enquired why he wore an eye-patch, advised him to complain to the Public Protector. An advocate employed at the office of the Public Protector informed the plaintiff that he could institute a claim against the MEC for Education and advised him to consult an attorney. The plaintiff acted on that advice. The attorney misdirected a notice in terms of the Institution of Proceedings Act to the national Minister of Education, instead of to the MEC. Proceedings were, however, subsequently instituted against the MEC in December 2008.

[16] The MEC delivered a special plea in which it was alleged that notice in terms of the Institution of Proceedings Act had not been given within six months of the date on which the debt became due. The plaintiff responded to the special plea by applying for condonation of his non-compliance with the Act. The Supreme Court of Appeal, in the context of determining whether the

[3] The age of majority was reduced from 21 years to 18 years only with effect from 1 July 2007 by virtue of s 17 of the Children's Act 38 of 2005.

plaintiff's application for condonation had met the requirements of s 3(4)(b)(i) of the Institution of Proceedings Act (viz. by satisfying the court that 'the debt had not been extinguished by prescription'), considered, with reference to s 12 of the Prescription Act, when the debt had become due.

[17] At para 7 of the judgment in *Shange*, Snyders JA stated:

> Immediately after the incident occurred, the [plaintiff] knew almost all the facts from which the debt arose: he experienced the event; he knew how it happened; he knew that it was a teacher who inflicted the injury; that it happened during school hours and at school. Insofar as his claim against the teacher was concerned, that debt became due immediately. However, whether he, as a 15-year-old rural learner, *knew the identity of the* [defendant] *as joint debtor*, is not apparent from those facts.

The learned judge of appeal continued as follows at para 11:

> [The plaintiff] states that an advocate in the office of the Public Protector advised him, in January 2006, to institute a civil claim against the [defendant]. Unfortunately the [plaintiff's] legal representatives did not appreciate the significance of this fact. *Its disclosure, evidently for the first time, informed the* [plaintiff] *of the identity of the* [defendant] *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 the teacher was his debtor, *but more importantly, that the* [defendant] *was a joint debtor. Only when he was informed of this fact did he know the identity of the* [defendant] *as his debtor for the purposes of the provisions of s 12(3) of the Prescription Act*.

and concluded thus at para 12:

> I am satisfied that a careful scrutiny of the unchallenged facts put up by the [plaintiff], taken together with the circumstances in which he found himself, gives rise to the overall factual conclusion, fairly arrived at, that the condition in s 3(4)(b)(i) of the Act does not operate against the [plaintiff]. *On the facts, the* [plaintiff], *in consulting an advocate in the office of the Public Protector and his attorney during January 2006, should reasonably have become aware, for the first time, that he had a claim against the* [defendant]. If prescription commenced running at that time it would, by 1 July 2007, when the [plaintiff], ex lege, achieved majority, have already run for some 18 months. By reason of s 13(1) of the Prescription Act, the [plaintiff] was entitled to the benefit of the full relevant period of prescription, ie three years, before his claim would be extinguished. That was until at least January 2009. Summons was in fact served on the appellant on 3 December 2008.
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> (Italicisation supplied for highlighting purposes.)

[18] The Supreme Court of Appeal thus considered that the court of first instance should have been satisfied on the facts described that the debt against the MEC became due only when the plaintiff was advised that he had a claim not only against the teacher, but also against the teacher's employer; in other words, when he first learned of the identity of the defendant in the context of being given legal advice to that effect. The Court plainly did not consider it to be relevant that the plaintiff's

ignorance of the operation of the doctrine of vicarious liability - and thus of the full extent of his legal rights arising out of the facts which had given rise to the debt and were within his knowledge - had been at the bottom of his failure to appreciate the very existence of a co-debtor. It approached the matter simply on the factual basis that the plaintiff did not know of the identity of the MEC as his debtor until he was informed of the existence of a claim based on vicarious liability. The Court therefore cannot have considered the *dicta* in the series of judgments mentioned in para [6], above, about the irrelevance to the running of prescription of a lack of knowledge by the creditor about the legal consequences of the facts to have been applicable in the circumstances. That cannot have been an oversight, for some of those judgments are actually referred to in *Shange*.[4]

[19] I have not overlooked the fact that the Court in *Shange* was not engaged in determining a special plea of extinctive prescription. The import of its reasoning in respect of the issue that it was dealing with is, however, indistinguishable in the circumstances of the current case. The only distinguishing feature of any legal significance between *Shange* and the current case is the incidence of the onus, or the burden of persuasion. In *Shange*, the *plaintiff* had merely to 'satisfy'[5] the court that his claim had not prescribed, whereas in the current matter the *defendant* had to prove that the debt has been extinguished by prescription.

[20] The defendant's counsel sought to distinguish *Shange* on the facts. In this regard she emphasised that the plaintiff in *Shange* had been a minor when he was injured, while the plaintiff in the current case was an adult at all material times. She submitted that it was also significant that in the current case the plaintiff had admitted that when she was diagnosed she had felt wronged for having been exposed to tuberculosis in prison, whereas the plaintiff in *Shange* had initially accepted that he did not have a claim in the face of his teacher's explanation that it had been 'a mistake'. She also submitted that the publicity that had attended the *Lee* case – a factor that was absent from the factual matrix in *Shange* - made it unreasonable for the plaintiff not to have appreciated earlier that she enjoyed a claim against the defendant.

[21] As to the first of those contentions, I am not persuaded that there was any material difference between the apparent situations of the plaintiffs in the two cases. The one was young and unsophisticated, the other is of limited education and means. Both had no knowledge of the law and no easy means of coming by appropriate advice. When it comes to deciding whether in their respective positions they ought to have identified a vicariously liable representative in the government as jointly and severally liable with the persons directly responsible for the harm suffered by them sooner than they did, I am unable to find a convincing basis for distinguishing between them. They were comparably disadvantaged.

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[4] See the judgments cited in note 4 at paragraph 10 of the judgment in *Shange*.
[5] As to the implication of *satisfying* a court in the relevant context; see *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) at para 8. It entails something less than providing proof on a balance of probabilities.

[22] As to the second contention, the fact that the plaintiff felt wronged did not mean that she understood that she had a claim.[6] More pertinently, even less so did it connote that she knew that the defendant was a co-debtor with the persons she would have appreciated had been directly responsible for housing her in the conditions in which she was allegedly exposed to infection.

[23] I have already addressed the third contention. The plaintiff did not read the newspapers in which the *Lee* case was given publicity. She did not see anything about it on television. It was not established that her failure to have done so was unreasonable. There was in any event no evidence concerning the content of the publicity allegedly given to the *Lee* case whereby a date by which the plaintiff should have identified the defendant as her debtor might be determined.

[24] In the circumstances, the defendant has failed to establish that the plaintiff's claim had been extinguished by prescription by the date on which the action was instituted, and the special plea of prescription must therefore be dismissed.

[25] The special defence based on the alleged non-compliance with the Institution of Proceedings Act must also fail. The uncontroverted evidence is that the plaintiff first became aware of the identity of the defendant as a debtor on 1 August 2013. On the approach adopted in *Shange*, the debt must be taken to have fallen due on that date. The notice given to the defendant was given well within the six-month period following on that date.

[26] The defendant's counsel conceded, advisedly so, that there was no merit in the special plea of 'misjoinder and/or non-joinder'. No more need be said about it.

[27] The following order will issue:

The defendant's special pleas are dismissed with costs.

A.G. BINNS-WARD

Judge of the High Court

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[6] In *Macleod v Kweyiya* 2013 (6) SA 1 (SCA), at para 12, it was held that for the debt to be due the claimant's appreciation 'entailed not only knowledge of the minimal facts of the claim, *but also an appreciation that those facts afforded her claim against the appellant*'. I confess to some difficulty in reconciling the italicised words quoted from *Macleod* with the frequently approved approach adopted in the Court's earlier judgment in *Van Staden v Fourie* 1989 (3) SA 200 (A), especially at 216B-E, in which the creditor's ignorance of the effect on the agreement he had concluded of certain provisions in the Share Blocks Control Act - knowledge he needed in order to appreciate that he enjoyed a claim - did not avail him in respect of the commencement of the running of prescription in circumstances in which the basic facts giving rise to the debt (but not their legal consequences) had been known to him. It has not been necessary for the decision of the current case, however, to determine whether there is indeed a conflict or, if so, how to deal with it; cf. *Makambi v MEC for Education, Eastern Cape* 2008 (5) SA 449 (SCA), at para 28.