Reportable

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION – MTHATHA)

CASE NO: 1057/14

Heard on: 17/08/15

Delivered on: 23/09/15

In the matter between:

SINETHEMBA MTOKONYA **Plaintiff**

and

MINISTER OF POLICE **Defendant**

JUDGMENT ON THE SPECIAL PLEA

NHLANGULELA ADJP:

[1] On 23 April 2014 the plaintiff, an adult male of 36 years of age, instituted an action against the defendant claiming payment of R350 000,00 as damages arising out of an alleged unlawful arrest on 27 September 2010, and detention on the same date for a period of approximately four days.

[2] In defence to the claim as aforementioned the defendant raised a special plea of prescription, objecting to the claim on the basis that the plaintiff's claim had become prescribed when summons were served on 23 April 2014 within the meaning of the provisions of sections 11(d), 12 (1) and 12 (3) of the Prescription Act 68 of 1969 (the Act). Subsection 11(d) provides that a debt prescribes after 3 years; subsection 12 (1) provides that the prescription shall begin to run as soon as the debt is due. In so far as the dispute is predicated on the provisions of s 12 (3) I proceed to quote the subsection in full:

> "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."

[3] The plaintiff and defendant are referred to in the Act as the creditor and debtor respectively.

[4] It appears from the stated case filed on behalf of the parties that the plaintiff did not institute an action within three years, as he was enjoined to do so in terms of s 11(d) of the Act, until it emerged from the conversation he had

with Mr Nkululeko Babe, an attorney of record for the plaintiff in July 2013 that he:

> "3.2.1 was not supposed to be detained in excess of a period of 48 hours without him having been made to appear before a Court of law;
>
> 3.2.2 was wrongfully and unlawfully:
>
> 3.2.2.1 misled by the Police into believing that they will at some point call upon him to attend Court simply to conceal the wrongfulness of their conduct, but never called him; and;
>
> 3.2.2.2 arrested and detained by the Police in circumstances where they had no reason to believe that he had committed an offence;
>
> 3.2.3 has a cause of action against the Minister of Police for unlawful arrest and detention."

[5] Despite the advices that the plaintiff received from Mr Babe, summons were delivered only on 23 April 2014.

[6] Pursuant to discussions as aforementioned the plaintiff instructed the same Mr Babe to institute the action on his behalf, duly preceded by a statutory notice issued in terms of s 3 of Act 40 of 2002.

[7] The upshot of the plaintiff's case is that he was ignorant of the fact that he had a right to sue the defendant for damages as soon he was released from detention. For the remissness of the plaintiff to be excused it must be subjected to the test stated by Tshiqi JA in *MaCleod v Kweyiya* 2013 (6) SA 1 (SCA) at 7 as follows:

> "[13] It is the negligent and not an innocent inaction that s 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 himself or herself. In *MEC for Education, KwaZulu-Natal v Shange* 2012 (5) SA 313 (SCA) para 11 this court had to consider whether a 15-year-old learner who had been hit with a belt on the side of his eye by his teacher acted reasonably in waiting more than five years to institute action against the teacher's explanation that it was an accident. A family friend noticed that he was wearing an eye patch and suggested that he should approach the Public Prosecutor. An advocate in that office advised him of the possibility of a claim against the

teacher. Synders JA held that the delay was innocent, not negligent. She stated:

> '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 appellant was a 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.'"

[8] In the case of *Shange, supra,* it was found that although the learner had knowledge of the material facts from which the cause of action arose, he did not have knowledge of the identity of the debtor (the MEC), and he could not be expected to know the debtor, until sometime later. In the *MaCleod* case the plaintiff, a minor child, could not have obtained knowledge in 1988 that her claim against RAF was settled by her attorney on a significantly low amount of damages until in 2009 when she was 25 years of age. In both cases it was held that the prescriptive period of three years was delayed by the fact that the plaintiffs were ignorant of the identity of the debtor. In *MaCleod*, the plaintiff

was also ignorant of the fact that the attorney who settled her claim was liable towards her to the extent of the damages not recovered from the RAF.

[9] In the present case the upshot of the plaintiff's case is that he did have the knowledge of identity of the debtor and the material facts giving rise to the debt at the time when he was released from detention in September 2010; but he did not know that he had a legal remedy against the defendant. That much was submitted by *Mr Bodlani*, counsel for the plaintiff, when he said that the plaintiff was not aware of his rights until he was approached by Mr Babe with a legal advice that the plaintiff has a right to sue the defendant for damages. For present purposes the real question to be asked, and answered, is whether knowledge of a legal remedy is required for prescription to run.

[10] *Mr Mdeyide*, counsel for the defendant, brought the case of *Claasen v Bester* 2012 (2) SA 404 (SCA) to the attention of the Court. The case of *Claasen* was referred to with approval by Tshiqi JA in the *MaCleod's* case. The case of *Claasen* deals with the interpretation of the provisions of s 12 (3) of the Act in a long line of cases decided by the Supreme Court of Appeal which state that the subsection requires the creditor to have obtained the minimum facts, not the legal conclusions of the facts so acquired. For an example, in *Yellow Star*

Properties v MEC, Department of Planning and Local Government [2009] 3 All SA 475 (SCA) at para. [37] the following was said:

> "It was then argued by the applicant that by reason of the provisions of s 12 (3) of the Prescription Act, prescription only began to run once Smit J had delivered his judgment as until then the applicant could not have known that the sale was invalid. Again, this argument cannot be accepted. The section provides that a creditor shall be deemed to have knowledge of the identity of the debtor and of the facts from which the debt arises if he could have acquired it by exercising reasonable care. In the present case, the applicant was told by the Department of Development Planning and Local Government in its letter of 12 December 2000 that the property "belongs to the National Department of Public Works and not the Gauteng Department of Education who instructed the disposal of the property." From then on, the applicant was aware that the property vest in the respondent. This was also clearly set out in the respondent's opposing affidavit in case 15278/2001 which was filed in August 2001 more than three years before the institution of the applicant's action for damages. <u>It may be that the applicant had not appreciated the legal consequences which flowed from the facts, but its failure to do so does not delay the date prescription commenced to run."</u> (The underlining is mine).

[11] M. M. Loubser in: "*Extinctive Prescription",* Juta, 1996 had the following to say at p104:

> "However, s 12 (3) refers specifically to the *facts* from which the debt arises and not to the legal implications of such facts, and it appears therefore that the subsection must be interpreted to mean that the prescription period will begin to run even if the creditor is unaware that the known facts afford him a legal remedy.
>
> This interpretation is supported by the decision in *Van Staden v Fourie,* **…**"

[12] In *Van Staden v Fourie* 1989 (3) SA 200 (A) Grosskopf JA said the following a 216 E:

> "Artikel 12 (3) van die Verjaringswet stel egter nie die aanvang van verjaring uit totdat die skuldeiser die volle omvang van sy regte uitgevind het nie. Die toegewing wat die Verjaringswet in hierdie verband maak, is beperk tot kennis van 'die feite waaruit die skuld ontstaan'. Myns insiens het die respondent reeds sodanige kennis gehad toe hy die eerste betaling gemaak het."

[13] The Supreme Court of Appeal in *Truter v Deysel* 2006 (4) SA 168 restated the principle mentioned in *Van Staden* in the following terms at para. [20]:

> "Section 12 (3) of the Act requires knowledge only of the material facts from which the debt debt arises for the prescriptive period to begin running – it does not require knowledge of the relevant legal conclusions (ie that the known facts constitute negligence) or of the existence of an expert opinion which supports the conclusion."

[14] In this case the plaintiff did acquire knowledge that the defendant was the arrestor as well as that the arrest and detention were not justified; but he did nothing about that. The legal advice that he later on obtained from Mr Babe that he had right to institute a claim for damages against the defendant, was a legal conclusion made in July 2014 based on material facts already in existence in September 2010. In the circumstances it was a negligent, rather than innocent, inaction on the part of the plaintiff to allow prescription of his claim to run. Therefore, the answer to the question raised is that knowledge of a legal remedy does not interrupt prescription. The findings on the issue of prescription dispose of the merits of the whole case.

[15] In the result the following order shall issue:

1. **The defendant's special plea is upheld.**

2. **The plaintiff's claim is dismissed.**

3. **The plaintiff to pay costs of the action.**

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Z. M. NHLANGULELA

ACTING DEPUTY JUDGE PRESIDENT

Counsel or the plaintiff	:	Adv. A. Bodlani
Instructed by	:	Babe and Talapile Inc.
		MTHATHA.
Counsel for the defendant	:	Adv. A. Mdeyide
Instructed by	:	State Attorney.
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