



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 3683/2018

In the matter between:

PHATSHOANE HENNEY ATTORNEYS

First Applicant

PIETER LABUSCHAGNE SKEIN

Second Applicant

and

JUANITA TROLLIP

Respondent

HEARD ON: 26 AUGUST 2022

JUDGMENT BY: LOUBSER, J

DELIVERED ON: 1 SEPTEMBER 2022

[1] This is an application for leave to appeal against the dismissal of a Special Plea of prescription with costs on an attorney and client scale. The Special Plea was filed by the two Applicants, who featured as the two Defendants in the trial proceedings. The Second Applicant was in the employment of the First Applicant as an attorney at the time of the events giving rise to the litigation.

[2] The Respondent claimed damages from the two Applicants based on the alleged negligence of the Second Applicant in his conduct of her case against the Road Accident Fund. The Second Applicant had instituted her claim in the

Regional Court, while it later transpired that the value of her claim was much higher than the maximum amount that could be claimed in the Regional Court. By the time the Second Applicant realized that this was the position, it was too late for the matter to be transferred to the High Court or summons to be re-issued. The Respondent had to be content with the maximum amount of only R400 000.00 awarded by the Regional Court for the bodily injuries she suffered. Hence the claim for the balance of her damages against the Applicants.

- [3] In their respective Pleas, the Applicants raised a Special Plea of prescription, alleging that the Respondent's claim became due on 10th June 2015, alternatively the 9th July 2015, being the date on which the Respondent acquired a complete cause of action for her claim. Summons in the action was only served on 24 July 2018, and therefore more than (3) years have lapsed between the debt falling due and the institution of the action, it was pleaded. In the Plea, the Applicants denied any negligence.
- [4] In a Replication filed by the Respondent, she alleged that she had only become aware of the identity of the debtor and the facts of the claim after she had consulted with her new attorneys on 19 July 2016. In the alternative, she pleaded that the Second Applicant had wilfully prevented her from coming to know of the existence of the debt, causing prescription to commence running only on 19 July 2016.
- [5] Shortly before the proceedings came before this Court, the Applicants filed an Amended Plea in which the negligence of the Second Applicant was conceded. It was now admitted that he -
- 5.1 Failed to properly assess the value of the Respondent's claim against the Road Accident Fund before instituting action in the prosecution of the Respondent's claim against the Road Accident Fund in the Regional Court.
 - 5.2 Failed to timeously either transfer the Respondent's action to the High Court, or reinstitute action in the prosecution of the Respondent's claim against the Road Accident Fund in the High Court.

5.3 Caused the Respondent's claim against the Road Accident Fund to be limited to the monetary value of R 400 000.00.

[6] Otherwise, the Applicants persisted in their Special Plea when they filed their Amended Plea.

[7] When the matter came before this Court, the Court was called upon to first adjudicate the issue of prescription as raised in the Special Plea. Only one witness testified in the process, namely the Second Applicant himself. He was called by the Applicants to testify. After his testimony, the Respondent was not called to the witness stand, and the Respondent's case was closed.

[8] In his testimony, and more particularly under cross-examination, the Second Applicant testified the following:

8.1 He conceded that the date of 10 June 2015 can be disregarded because

the Respondent was then still under the impression that the case was going to be transferred to the High Court.

8.2 He conceded that the Respondent is a lay person as far as the law is concerned.

8.3 When he received the calculations from the actuary in July 2015, he realised that the action instituted in the Regional Court was due to his own negligence.

8.4 He therefore knew in July 2015 that he would be liable should the Respondent claim from him.

8.5 On 9 July 2015 he did not inform the Respondent that the limited claim was the result of his negligence, because he did not regard it as his duty to inform her accordingly. He was not aware of such a duty.

8.6 He also did not regard it as his duty to refer the Respondent to another attorney in the circumstances.

8.7 On 9 July 2015 the Respondent was therefore unaware that she could claim from him, but she was aware that she had a bigger claim than the R 400 000.00.

8.8 The Respondent did not know on the 9 July 2015 that she could also claim form the First Applicant, because he did not inform her as such. He was not aware of a duty to inform her accordingly.

8.9 He created the impression with the Respondent that the limited claim was the result of circumstances beyond his control, and he failed to inform her of his omission relating to the obtaining of reports.

8.10 As a result of her dissatisfaction with the situation, the Respondent consulted with another attorney on 19 July 2016, whereafter she was advised that she potentially had a claim against the Applicants.

[9] This Court then found in the light of this evidence by the Second Applicant that the Respondent did not have all the facts on 9 July 2015, nor did she know that it was the Second Applicant who was responsible for her predicament. The Court found that there was indeed a duty upon Second Applicant to inform the Respondent of these facts, and by his failure to do so, he had wilfully prevented the Respondent to know of the existence of the debt. The Court then found that the Applicants have failed to prove that the Respondent's claim had become prescribed. This finding was based on the provisions of Section 12 (1), (2) and (3) of the Prescription Act 68 of 1969.

[10] At the hearing of this application for leave a number of grounds for the intended appeal were raised on behalf of the Applicants, one of them being that the Court had erred in finding that there was a duty on the Second Applicant to inform the Respondent of his omissions and that she could claim from him. It soon became clear, however, that the main challenge was directed at the Court's finding that the Respondent did not have the required knowledge on 9 July 2015 to realize that possibly there had been negligence on the side of the Second Applicant, and that the Respondent therefore did not know what caused her predicament on that date.

[11] Mr. Grobler, appearing for the Applicants, submitted that on 9 July 2015, the Respondent knew that something had gone wrong. In addition, she knew that her claim was limited in the Regional Court, while the actuarial calculations obtained after the issue of summons in the Regional Court, suggested that her claim was much higher than the limit in that Court. She also knew that her

action could not be transferred to, or re-instituted, in the High Court. On the basis of this knowledge, she must have known, or could have established it by the exercise of reasonable care, that she had a claim against her attorney, the argument went. Mr. Grobler submitted that the specific grounds of negligence were therefore irrelevant in establishing whether the Respondent had the required knowledge.

[12] I respectfully do not agree. In **Links v Department of Health 2016 (4) SA 414 (CC)** the Constitutional Court held unanimously as follows in par 45 of its Judgement: “Until the applicant had knowledge of facts that would have led him to think that possibly there had been negligence and that this had caused his disability, he lacked knowledge of the necessary facts contemplated in section 12(3).” And in par 46 of the Judgement: “A firm finding that the applicant did not know what caused his condition as at 5 August 2006 can, therefore, be justifiably made. That was a material fact that a litigant wishing to sue in a case such as this would need to know.”

[13] In the premises, I am therefore of the view that there is not a reasonable prospect that a court of appeal would come to a different conclusion on this main point of contention. As for this Court’s finding on the duty of an attorney, the reality remains that the Second Applicant did not inform the Respondent of the facts, whether he had the duty to inform her as such, or not. Consequently, I do not think that this ground of appeal has the potential of altering the outcome of the proceedings on appeal. The remaining grounds of appeal, for instance that the Court has erred in respect of certain facts of the case fall in the same category, in my view. For instance, it was submitted that this Court should have taken into account that the Respondent was never called to testify about the knowledge she had on 9 July 2015, and that the Court should have held it against her. However, the onus of proof was on the Applicants, and not on the Respondent. The Respondent probably felt that it was not necessary to testify in view of what the Second Applicant had testified.

[14] There are two remaining grounds of appeal, however, that needs to be mentioned. The first is that the Court erred by ordering the Applicants to pay

costs on a punitive scale. This order of costs was made because the Applicants persisted in their Special Plea on prescription while the Second Applicant was well aware of the fact that he had withheld crucial information from the Respondent, which caused her to lack the necessary knowledge to the effect that there had been negligence on the part of her attorney. This Court found that in such circumstances, the Respondent should not be left out of pocket.

[15] The second is that this Court erred by ordering the Applicants to pay the fees of a witness by the name of Weideman. Now Weideman did not testify in the proceedings, but he was present at the Court as an expert attorney to testify that the Second Applicant was negligent in the conduct of the Respondent's case. After the testimony of the Second Applicant, the Respondent obviously did not regard it necessary to call him anymore. As far as these two grounds are concerned, I therefore do not think that there is a reasonable prospect that another court would come to different conclusion.

[16] In the premises, the following order is made:

1. The Application for leave to appeal is dismissed with costs.

P. J. LOUBSER, J

For the Applicants:

Adv. J. F. Grobler SC

Instructed by:

Ditsela Inc. Attorneys, Pretoria

c/o Phatshoane Henney Attorneys, Bloemfontein

For the Respondent:

Adv. J.J. Wessels SC

Instructed by:

Munro, Flowers & Vermaak, Johannesburg

c/o Lovius Block Attorneys, Bloemfontein

/roosthuizen