



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE

DATE: 9 October 2023

Case No. 2021/46570

In the matter between:

LM

Plaintiff

and

**SOUTH AFRICAN BROADCASTING CORPORATION
(SOC) LTD**

Defendant

JUDGMENT

WILSON J:

- 1 The Plaintiff, LM, worked for the defendant, the SABC, for a short period during 2007. LM resigned from her employment on 30 September that year, because she had been sexually harassed by her supervisor, a man I will call K. LM instituted a claim against the SABC for constructive dismissal in the Commission for Conciliation, Mediation and Arbitration (CCMA), but the claim was brought out of time. Condonation was refused.

2 Over a decade later, on 31 October 2018, the SABC resolved to institute an inquiry into a range of incidents of sexual harassment said to have taken place at the broadcaster in the recent past. LM participated in the inquiry. She named K as her harasser. The SABC subsequently disciplined and dismissed K, partly or wholly on the strength of his harassment of LM. The report of the commission of inquiry also substantially accepted LM's allegations and recommended that some form of reparation be made to her. There followed an engagement between LM and the SABC about an appropriate form of reparation. This engagement apparently came to nothing. In her evidence before me LM contended that the SABC's attitude to it was fundamentally unserious.

3 Aggrieved, LM instituted an action in this court for damages from the SABC. It is fair to say that the pleadings drawn on her behalf were not the most precise or well-thought-through documents. As originally drawn, the particulars of claim appear to ground LM's cause of action in the Employment Equity Act 55 of 1998. Once it became clear that the High Court has no jurisdiction to entertain a claim under that statute (claims under which lie to the Labour Court), LM's legal representatives sought to amend LM's particulars of claim to ground the action in the SABC's vicarious liability for K's conduct. That amendment was objected to, and an application for leave to amend is now necessary.

The special plea

4 The issue before me, however, is not the application for leave to amend, or the merits of LM's claim. It is whether LM brought her claim in time. Mr.

Tsatsawane, who appeared together with Ms. Naidoo for the SABC, contended that, whether or not the amendment now proposed is good, LM's claim has long since prescribed. The SABC raised a special plea of prescription, and Mr. Tsatsawane asked that I entertain it as a separate issue. There was no real objection to my doing so from LM's representatives. It is to the special plea I now turn.

5 On the best account of her case, LM sues in delict for damages arising from the SABC's vicarious liability for K's sexual harassment of her. Those damages, however much they turn out to be, are a "debt" under the Prescription Act 68 of 1969 ("the Act"). Sections 11 (d) and 12 (1) of the Act provide that an ordinary debt prescribes three years from the date it becomes due. Section 12 (3) of the Act provides that a debt does not become due unless and until the creditor, in this case LM, acquires knowledge of the identity of debtor, in this case the SABC, and of all the facts from which the debt arises.

6 Mr. Tsatsawane argued that SABC's debt to LM fell due, at the latest, on 30 September 2007. It was on or before that date that LM acquired knowledge of the facts upon which her claim arose, and the fact that the claim lay against SABC. We know this because LM's claim for constructive dismissal relies on substantially the same facts as are now pleaded in her particulars of claim. Accordingly, Mr. Tsatsawane submitted, LM's claim prescribed, at the latest, on 1 October 2010. LM instituted her claim on 4 October 2021, just over 11 years later. As a result, Mr. Tsatsawane argued, the claim was plainly brought out of time.

- 7 Ms. Kgoroadira, who appeared for LM, did not accept this. She argued that prescription actually started running on 31 October 2018, which is when the SABC published the report of its commission of inquiry. However, I do not think that is correct. LM plainly had knowledge of the facts underlying her cause of action and the identity of the debtor soon after she left SABC in 2007. The publication of the commission's report added neither to LM's knowledge of the facts underlying her cause of action nor to her conviction that her claim lay against the SABC.
- 8 It was further contended on LM's behalf that the commission of inquiry's findings about what K had done to LM constituted an acknowledgement of liability for the debt LM now claims. The theory behind this contention was that the acknowledgement of liability reset the running of prescription, and gave LM a further three years from 31 October 2018 in which to institute her claim.
- 9 The SABC disputes that it ever acknowledged liability for LM's damages, but I need not consider this issue. Even if the SABC did acknowledge liability for LM's damages, such an acknowledgement would only have interrupted prescription. It would not have reset the clock in the manner for which Ms. Kgoroadira contends (see section 14 (1) of the Act). Since, on the evidence before me, the claim had prescribed well before 31 October 2018, the publication of the commission of inquiry's findings did not interrupt it. In other words, by the time the commission reported its findings, there was no longer a debt for which the SABC could acknowledge liability (see *Volkskas Spaarbank Bpk v van Aswegen* 1990 (3) 978 (A)).

10 It follows that, on the evidence as it currently stands, the SABC's special plea of prescription must be sustained.

The appropriate order

11 Other things being equal, the conclusion I have reached would lead to a dismissal of LM's action. This would bring the case to an end, rendering the consideration of LM's application for leave to amend unnecessary, and extinguishing any prospect of LM being able to claim in delict for the harm she says the SABC caused her.

12 But I do not think other things are equal. LM's pleadings contain several allegations that tend to show that she had difficulty pursuing her claim because of the emotional anguish brought on by the sexual harassment she suffered. Section 12 (4) of the Act provides that prescription does not run on a debt arising from the commission of "any sexual offence in terms of the common law or a statute" for the period during which "the creditor is unable to institute proceedings because of his or her mental or intellectual disability, disorder or incapacity, or because of any other factor that the court deems appropriate".

13 LM's pleadings, on their face, attempt to bring the claim within the ambit of section 12 (4). But, for reasons that are not clear to me, LM's legal representatives declined to rely on section 12 (4) at trial. No evidence was led that would permit me to find that prescription ceased to run at any time between LM's departure from SABC and the institution of her claim, still less that the extent to which prescription may have been abated meant that the claim had not prescribed by the time LM brought it. I cannot say whether that

evidence is available, but nor can I discount the possibility that LM's claim might be good if it is.

14 Mr. Tsatsawane contended that 12 (4) does not apply, because none of the misconduct the SABC found K to have committed amounted to a statutory or common law offence. However, I have heard almost no evidence of exactly what K did to LM. K's harassment is described only in very general terms in the pleadings. So it seems to me that the question of whether section 12 (4) of the Act applies to LM's claim remains open.

15 For that reason, the proper order is one absolving SABC from the instance, rather than dismissing the claim outright. The effect of such an order is that LM will be permitted, if she can, to lead evidence showing that a "mental or intellectual disability, disorder or incapacity" or "any other factor that the court deems appropriate" suspended the running of prescription, and meant that her claim was brought in time.

Costs

16 Neither Mr. Tsatsawane nor Ms. Kgoroadira engaged squarely with the harassment to which K subjected LM. Nor was the issue of SABC's vicariously liability for the harm K caused explored. However, on a common sense approach to the material on which both parties relied, including the commission's report, I do not think that it can realistically be disputed K did sexually harass LM. Nor can it be disputed that, whether or not it is liable in law for the harm done to LM, the SABC has acknowledged some responsibility for the trauma to which LM was put. I will not risk retraumatising LM by ordering her to pay the SABC's costs on trial.

Order

17 For all these reasons, the defendant is absolved from the instance, with each party paying their own costs.

S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 9 October 2023.

EVIDENCE HEARD ON: 17 August 2023

WRITTEN ARGUMENT
RECEIVED ON: 29 August 2023

DECIDED ON: 9 October 2023

For the Plaintiff: K Kgoroadira
Instructed by Mamathuntsha Inc

For the Defendant: K Tsatsawane SC
R Naidoo
Instructed by Tasneem Moosa Inc