

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG DIVISION, JOHANNESBURG

CASE NO: A5025/2022

- (1) REPORTABLE: YES  
(2) OF INTEREST TO OTHER JUDGES: YES  
(3) REVISED

**7 June 2023**

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In the matter between:

**MDLALOSE MDUDUZI ISHMAEL**

Appellant

and

**DOCTOR BRENDAN LUNE MEDICAL PRACTICE**

1<sup>st</sup> Respondent

**DOCTOR NATASHA FAKIR**

2<sup>nd</sup> Respondent

**DOCTOR BRENDAN SEAN BLAIR**

3<sup>rd</sup> Respondent

**Neutral Citation:** *Mdlalose Mduduzi Ishmael v Doctor Brendan Lune Medical Practise & Others* (Case No: A5025/2022 [2023] ZAGPJHC 657 (07 June 2023))

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**JUDGMENT**

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MDALANA-MAYISELA J (Wepener J and Dlamini J)

*Introduction*

[1] This appeal came before us as a result of leave being granted by the court below to this court. The appellant who was cited as plaintiff in the court below, is appealing against the whole judgment and order made by Crutchfield J, delivered on 1 February 2022, sitting as the court of first instance in Gauteng Division, Johannesburg (“court order”). Crutchfield J upheld the special plea of prescription raised by the respondents who were cited as defendants in the court below, and dismissed the action with costs.

*Background facts*

[2] On 24 July 2015 the appellant, a police officer sustained an injury on his right hand small finger when he was bitten by the suspect while assisting the prison warden. He was first treated at Meredale Medical Centre, and subsequently transferred to Netcare Garden City Hospital (“Netcare”) for further treatment. He was informed at Netcare that the previous treating doctors misdiagnosed him, and that there was no further treatment that could be performed except to amputate his small finger. As the result, on the 3<sup>rd</sup> of December 2015, his small finger was amputated at Netcare.

[3] The appellant issued the combined summons on 28 June 2018 against the Meredale Medical Centre (Pty) (Ltd) claiming R1 700 000.00 for general damages, R150 000.00 for past and future medical and related expenses, and R200 000.00 for past and future loss of earnings resulting from the alleged negligence and breach of legal duty by the Meredale Medical Centre treating doctors. On 4 September 2018, Meredale Medical Centre served the appellant with a special plea alleging that the treating doctors were not employed by it. They were employed by Dr. B Lyne Medical Practice with registration number 2001/024330/21 and were so employed at the relevant time.

[4] The appellant brought an application to join the respondents and Padayatchi Sujen as additional defendants in the main action. No further relief was sought in the joinder application. The original combined summons was attached to the joinder application as annexure "B" and the Meredale Medical Centre special plea and plea were attached as annexure "C". On 21 September 2018 all the respondents, including Padayatchi Sujen, served a notice of intention to oppose the joinder application, and appointed the address of their attorneys Norton Rose Fulbright South Africa Inc. as the address at which the respondents will accept notice and service of all documents. The basis for opposing the joinder application as stated in the letter dated 21 September 2018 addressed to the appellant was that the appellant did not follow a correct procedure by bringing a joinder application, and that he ought to have issued summons against the second to fifth respondents in order to claim damages. The respondents' attorneys sought indulgence to be granted extensions from the appellants' attorneys on more than one occasion to file their answering affidavit.

[5] In the email correspondence addressed to the respondents' attorneys dated 21 September 2018, the appellant's attorneys attached a copy of the notice of intention to amend his original particulars of claim in terms of rule 28(7) of the Uniform Rules of Court. On 2 October 2018 the respondents' attorneys sent an email to the appellant's attorneys advising them that they did not intend opposing the notice of intention to amend and that the appellant could proceed to file the amended pages.

[6] On 5 November 2018 Mokose AJ granted the order joining Dr. Brendan Lyne Medical Practice as second defendant, Dr. Natasha Fakier as third defendant, and Dr. Brendan Sean Blair as fourth defendant. The appellant served the joinder order on the respondents' attorneys on 13 November 2018. Again on 21 November 2018, the appellant's attorneys served the notice of intention to amend his particulars of claim in terms of Rule 28(1) and (2) of the Uniform Rules of Court on the respondents' attorneys of record. The cause of action and quantum in the notice of intention to

amend was identical to the cause of action in the original particulars of claim. The respondents did not object to the aforesaid notice of intention to amend which in terms of Rule 28(2) the amendment was duly effected. On 7 December 2018, the appellant served his amended particulars of claim on the respondents' attorneys. The sheriff effected a personal service of all the pleadings previously served on the respondents' attorneys to the respondents on 25 January 2019.

[7] The respondents' attorneys, Norton Rose Fulbright South Africa Inc. served a special plea of prescription and plea on the appellant's attorneys on 18 March 2019. In the special plea the respondents pleaded that the treatment the appellant received from them was rendered on 24 July and 11 August 2015. They relied on sections 12(1) and 11(d) of the Prescription Act, 68 of 1969 ("the Act") and pleaded that the appellant's claim for damages against them had prescribed on 10 August 2018. The appellant filed a replication to the defendant's special plea contending that the cause of action arose on 3 December 2015 when his small finger was amputated and that the debt prescribed on 2 December 2018. Further, he alleged that he instituted the action on 12 July 2018, and the respondents were joined as defendants to the main action by the court order granted on 5 November 2018 and served on their attorneys of record on 13 November 2018 before the claim prescribed. He contended that the prescription was interrupted by the service of the court order on the respondents' attorneys of record.

[8] On 30 September 2019 the respondents served a notice of substitution of attorneys Norton Rose Fulbright South Africa Inc, and appointed Webber Wentzel as their attorneys of record. On 29 November 2019 the appellant withdrew the action against the first defendant, Meredale Medical Centre. Further amendments of the pleadings by the parties occurred, and I find it unnecessary to give the details for the purposes of the issue before us.

*Ground of appeal*

[9] In the court below the special plea was separated from the merits by agreement between the parties. The court determined the special plea first. The parties agreed that the cause of action arose on 3 December 2015 when the appellant's small finger was amputated, and that the claim against the respondents prescribed on 2 December 2018. The court below upheld the special plea and dismissed the action with costs.

[10] The leave to appeal was granted on one specific ground. The issue before us is whether the joinder order ("not application") served on the respondents on 13 November 2018 constituted a 'process' whereby the appellant claimed payment of the debt in terms of section 15(1) read with 15(6) of the Act. From the reading of the leave to appeal judgment it seems that the court below mistakenly understood the issue to be the service of the joinder application and not the service of the joinder order.

### *Discussion*

[11] The respondents in raising a special plea relied on section 12(1) and 11(d) of the Act. Section 12(1) provides:

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

Section 11(d) provides:

*"...save where an Act of Parliament provides otherwise, three years in respect of any other debt."*

[12] The appellant in the action where the respondents were joined by the court as defendants, is claiming compensation sounding in money for delictual damages. In response to the special plea of prescription, he contends that the running of prescription was interrupted by the service of the joinder order in terms of section 15(1) read with 15(6) of the Act. Section 15(1) of the Act provides for the interruption of the running of prescription *"by the service on the debtor of any process whereby the creditor claims payment of the debt."* Subsection (6) defines process to include "a

*petition, a notice of motion, a rule nisi, a pleading in reconvention, a third party notice referred to in any rule of court and any document whereby legal proceedings are commenced."*

[13] In *Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited* (CCT236/16) [2018] ZACC 7; 2018 (5) BCLR 527 (CC); [2018] 6 BLLR 531 (CC); (2018) 39 ILJ 1213 (CC) (20 March 2018) paras [195] to [197], the Constitutional Court endorsing what was stated by Victor J in *Wessels v Coetzee* [2013] ZAGPPHC 82 at para 29 in respect of the interpretation of the words 'any document whereby legal proceedings are commenced' held:

"[195] .... While most of the documents to which reference is made ordinarily constitute documents associated with courts and the litigation advanced there, **[144]** the reference to "any document whereby legal proceedings are commenced" is clearly indicative of a broader and more generous approach to what may constitute such a document. The second judgment in *Mnyathaza*, referred to a Zimbabwean case which dealt with a similar provision to section 15(6) and defined the precise meaning of "process".**[145]** The Zimbabwe Supreme Court per Georges CJ held:

"The definition of 'process' in subsection (6) is not exclusive in its scope. The section merely enumerates some documents which fall within the ambit of the word. It clearly contemplates that other documents may fall within that ambit."**[146]**

All that section 15(6) requires is that the document in question is one by which legal proceedings are commenced.

[196] The interpretation I have attached to the term "any document" is not offensive to the section, nor is it overly broad and inconsistent with the context within which it is used. In addition, and to the extent that it may be necessary, interpreting the term "any document" in a narrow sense, as being confined to documents used in formal court processes, would not accord with what is required if the interpretation exercise, as it must, is viewed through the prism of section 39(2).**[147]** The interpretation of prescription, in effect, releases the constraint that the running of prescription has on the right to access to courts, which is provided for in section 34 of the Constitution.**[148]** It accordingly justifies a broader meaning to be attached to the term "any document", for the

same reasons advanced above in support of a narrower meaning to be ascribed to the term “debt”.

[197] If ultimately the re-interpretation of the Prescription Act must demonstrate a fidelity to the values of the Constitution, then there can be no justification in seeking to assign a narrow meaning to the term “any document”, which in any event is qualified by the reference to it being “any document” commencing legal proceedings.[149] In *Wessels*, the High Court held that the meaning ascribed to “any”, as contemplated in section 15(6), did not even require a reading in of the term, because the subsection was already “wide” and clearly “inclusive of a wide range of documents”.**[150]**”

[14] In *Cape Town Municipality v Allianz Insurance Co Ltd 1990 (1) SA 311 © at 334H-J* the court held that a process that initiates proceedings for enforcement of payment of a debt interrupts prescription:

*“It is sufficient for the purposes of interrupting prescription if the process to be served is one whereby the proceedings begun there under are instituted as a step in the enforcement of a claim for payment of debt.*

*A creditor prosecutes his claim under the process to final, executable judgment, not only when the process and judgment constitute the beginning and end of the same action, but also where the process initiates an action, judgment in which finally disposes some elements of the claim, and where the remaining elements are disposed of in a supplementary action pursuant to and dependent upon that judgment.”*

[15] The Constitutional Court in *Food and Allied Workers Union supra* endorsed the principle set out in *Cape Town Municipality supra* and held:

*“[203] What is instructive from this decision is that it recognises that the judicial process- may consist of various steps that are intertwined and that it is not necessary that the process that commences proceedings must result in a judgment in the same proceedings. Thus it matters not that the process that constitutes a referral to conciliation does not result in a judgment. It may still, and does indeed, constitute the commencement of proceedings for the enforcement of a debt.”*

[16] Crutchfield J in her judgment on the special plea stated that four decisions were relevant to the issue before her, namely, *Cape Town*

*Municipality supra, Peter Taylor & Associates v Bell Estates (Pty) Ltd & Another 2014 (2) SA 312 SCA, Huyser v Quicksure (Pty) Ltd & Another [2017] 2 ALL SA 209 (GP), and Nativa Manufacturing (Pty) Ltd v Keymax Investments 125 (PTY) Ltd & Others 2020 (1) SA 235 (GP)*. She also stated that the appellant relied on *Huyser* and the respondents relied on *Nativa*. She aligned herself with the judgment of Keightley J in *Nativa* in upholding the special plea and dismissing the action with costs. Counsel for the parties also referred us to the jurisprudence mentioned in this paragraph and other cases mentioned in their heads of argument.

[17] I have considered all these cases, and in my view, they are distinguishable from the present matter. In *Allianza* the application was for a declarator, and not about a joinder order granted and served before the claim prescribed. In *Peter Taylor* the SCA did not make a finding that a court order granted and served before the claim prescribed, joining the parties as defendants in the main action whereby the creditor claims payment of the debt, was not a process in terms of section 15(1) read with 15(6) of the Act. In that matter, the SCA was determining the issue whether the 'joinder application' constituted a process whereby the creditor claims payment of the debt for purposes of section 15(1) of the Act and whether the service thereof had interrupted the running of the prescription.

[18] In my view, Crutchfield J erred in aligning herself with *Nativa* case. The present matter is distinguishable from *Nativa*. Keightley J in *Nativa* had to determine whether an 'application for joinder' served before the claim prescribed, constituted a process whereby the creditor claimed payment of a debt and whether the service thereof had interrupted the running of the prescription. In the present matter, the issue to be determined is whether the 'joinder order' granted and served on the respondents, joining them as defendants in the main action whereby the appellant is claiming payment of a debt before the claim prescribed, constituted a process for the purposes of section 15(1) read with 15(6) of the Act, and whether the service thereof had interrupted prescription.



[19] Crutchfield J stated that for the prescription to be interrupted in the present matter, the appellant ought to have served the joinder order, the amended summons and particulars of claim before the claim prescribed. With due respect to Crutchfield J, this interpretation of section 15(1) read with 15(6) is insensible. If all the aforesaid documents ought to be served before the claim prescribed, then section 15 of the Act which is concerned with judicial interruption of prescription, would be irrelevant as the claim would have been instituted within three years as required by sections 11 and 12 of the Act. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18 the SCA in setting out the approach to interpretation held “..... *The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document*”. Section 39(2) of the Constitution enjoins the court when interpreting legislation to promote the spirit, purport, and objects of the Bill of Rights. The interpretation of prescription, in effect, releases the constraint that the running of prescription has on the right to access to courts, which is provided for in section 34 of the Constitution (*Food and Allied Workers Union para [196] supra*).

[20] Section 15(6) in defining the meaning of ‘process’ includes ‘any document commencing legal proceedings’. In my view a ‘court order’ joining the respondents as defendants in the action for damages, is a document commencing legal proceedings against them for enforcement of a debt, and therefore a process for purposes of section 15(1). The Constitutional Court in *Food and Allied Workers Union para [203] supra* held that it is not necessary that the process that commences

proceedings must result in a judgment in the same proceedings. It must be a process that constitutes the commencement of proceedings for the enforcement of a debt. The service of the said joinder court order on the appellants before the claim prescribed, constituted 'a service of a process on the respondents whereby the appellant claims payment of the debt', and therefore interrupted the running of prescription.

[21] The claim prescribed after the joinder order and notice of intention to amend the particulars of claim were served on the respondents' attorneys in accordance with their election contained in the notice to oppose the joinder application. The service of a notice of intention to amend the particulars of claim in terms of section 28 of the Uniform Rules of Court is a judicial process. The respondents were given 10 days to raise an objection to the proposed amendment. The claim prescribed during the said 10 days. There was no objection to the notice of amendment. The amended combined summons was served on the respondents 5 days after the claim prescribed. It should also be noted that the respondents contributed to the delay in setting down the joinder application by asking for extensions to file their answering affidavit.

[22] The rationale behind section 15 is that where the creditor takes judicial steps to enforce the debt, which is indicative of the creditor's intention to enforce the debt, prescription should not continue running while the law takes its course (*Food and Allied Workers Union para [56] supra*). In my view, the service of the joinder order followed by the notice to amend, effected before the claim prescribed, created the certainty about the appellant's intention to enforce the debt and therefore, interrupted the running of prescription. The cause of action and quantum claimed in the original particulars of claim which were attached to the joinder application as annexure "B", were identical to the cause of action and quantum claimed in the notice of intention to amend and amended particulars of claim. In the circumstances, the appellant should not be denied his right to access to court.

[23] The respondents' counsel argued that service of the aforementioned court documents on the respondents' attorneys was not good service because the attorneys were only briefed to represent the respondents in the joinder application. I do not agree with this submission. The service that was effected on the respondents' attorneys was proper service on attorneys of record of the respondents as postulated by Rule 4. It was not contended on behalf of the respondents that the served documents were not received, let alone brought to their attention by their attorneys. In fact, the converse is true on objective facts. That is, upon service of these court documents by the appellant's attorneys, the respondents' attorneys sent an email to the appellant's attorneys on 2 October 2018 confirming that the respondents would not object to the amendment, and the same attorneys subsequently filed the respondents' special plea in March 2019. The correspondence and pleadings filed by the parties show that Norton Rose Fulbright South Africa Inc. was appointed on 21 September 2018 and remained the respondents' attorneys of record until their substitution on 30 September 2019.

[24] It follows that the appellant's claim against the respondents has not prescribed. The court a quo has erred in this regard and the appeal ought to succeed. There is no reason why costs should not follow the result.

Accordingly, the following order is proposed.

#### *ORDER*

1. The appeal is upheld with costs.
2. The order of the court below is set aside and replaced with the following:

'The special plea of prescription is dismissed with costs'

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M.M.P. Mdalana-Mayisela  
Judge of the High Court  
Gauteng Division, Johannesburg

I agree and it is so ordered

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W.L. Wepener  
Judge of the High Court  
Gauteng Division, Johannesburg

I agree

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J Dlamini  
Judge of the High Court  
Gauteng Division, Johannesburg

(This judgment is made an Order of Court by the Judges whose names are reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge's secretary. The date of this Order is deemed to be 7 June 2023.)

Appearances:

On behalf of the Appellant: Adv T Mathopo

Instructed by: N. T Mdlalose Attorneys

On behalf of the Respondents: Adv L Choate

Instructed by: Webber Wentzel Attorneys