



REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 45608/2012

In the matter between:

15/3/15

KOKETSO FRIEDA MOREOTLOTLO

PLAINTIFF

And

HIS LORDSHIP, MR JUSTICE

DEFENDANT

RAMARUMO MONAMA (J)

JUDGMENT

MOKGOHLOA DJP

1. The plaintiff, who is described in the amended particulars of claim as 'a housewife born on 08 March 1933', was injured in a motor vehicle accident around the area of Mafikeng in the North West on 5 August 1989. The accident occurred when the driver of a bus in which the plaintiff was a passenger lost control of the bus which then collided with an unknown object and overturned.
2. Shortly after the accident, the plaintiff instructed the defendant who at that time practised as an attorney in Mmabatho, Mafikeng, to recover compensation from the then Multilateral Motor Vehicle Accident Fund (now RAF) for damages she had sustained as a consequence of her injuries.

3. The plaintiff's action is to recover damages from the defendant for having allowed her claim to prescribe. The action is based on an alleged professional negligence.
4. In her amended particulars of claim, the plaintiff pleaded that:
 7. The Defendant had in fact informed the Plaintiff that he did so prosecute her claim timeously but advised her from time to time that he was unable to recover any damages from those responsible in that the Road Accident Fund was in serious financial difficulty and as a result whereof it was unable to make payment of the amount due to her at that stage but that he would report to her at a stage when the Road Accident Fund was in fact able to discharge her claim.
 8. The Plaintiff became disillusioned during the year 2009 and made enquiries from other attorneys with regard (to) what she was told by the Defendant and as a result she instructed her attorneys of record to contact the Defendant so as to ascertain the status of the Plaintiff's claim and whereafter they were informed by the Defendant that the claim had not in fact been prosecuted. This; notwithstanding the representations and undertakings aforesaid.
 12. The Defendant had breached his undertakings aforementioned or alternatively had failed to exercise the degree of care required of the Defendant under the aforementioned circumstances and for which the Defendant is liable to compensate the Plaintiff in that Plaintiff's claim had as a result become prescribed against all of those responsible to have compensated her for the aforementioned losses.'
5. The defendant raised a special plea of prescription.
6. It appears that during a previous trial date, an order was granted in terms of rule 33(4) of the Uniform Rules of Court directing that the special plea be tried and determined separately from the other issues in the action.
7. In terms of Section 23 (1) of the Road Accident Fund Act (RAF Act)¹, as it read prior to the amendment in terms of Act 19 of 2005, the plaintiff's claim had to be lodged in terms of Section 24 of the RAF Act, within three years of the date of the collision, i.e. by 4 August 1992. Thereafter, any action necessary to enforce the claim had to be instituted within five years of the date of the collision, i.e. by 4 August 1994.
8. The debt in issue is one within the meaning of Section 11 (d) of the Prescription Act² and was thus susceptible to extinction by prescription after three years. In terms of section 12(1) of the Prescription Act, prescription commences to run as soon as the debt is due. However section 12 (3) provides that a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and the facts from which the debt

¹ 56 of 1996

² 68 of 1969

arises: 'Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'

9. In *Truter v Deysel*³, the court held:

'A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.'

10. Maasdorp JA in *Mckenzie v Farmers' Co-operative Meat Industries Ltd*⁴ continued and explained that:

'Cause of action' for the purpose of prescription means

'... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'

11. The crisp question is thus when the plaintiff came to know 'of the facts from which the debt arises.'

12. There is no allegation in the particulars of claim as to when the plaintiff came to know of the existence of the debt. However, in an application which she brought seeking leave to institute the present action against the defendant in terms of s47 (1) of the Superior Courts Act⁵ the following appears in her affidavit:

'4. Shortly after the accident I consulted with His Lordship, Mr Justice RE Monama who at the time practised as an attorney of the High Court of South Africa and having had his offices at Mmabatho, Mafikeng, North West Province and having practised under the style and firm name Ramarumo Monama & Co.

5. I consulted with His Lordship, Mr Justice Monama (then an attorney) with the view of prosecuting a claim in terms of the then Multilateral Motor Vehicle Act, No 93 of 1989 (as amended), as I maintained that the Fund established thereunder was liable to compensate me in respect of the damages I suffered as well as such losses I incurred following the aforesaid accident.

6. After having consulted with the aforementioned Monama (then an attorney) and after having given my version as to how the accident happened as well as the injuries sustained by me in the aforementioned accident, the said Monama agreed to accept my mandate and to

³ 2006 (4) SA 168 (SCA) at para 16

⁴ 1922 AD 16, cited with approval by Corbett JA in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838 D-H

⁵ 10 of 2013

investigate the circumstances surrounding such accident; to obtain all the necessary details he required as from the South African Police Services and the Hospital whereat I was admitted and treated as well as from myself (where so required) so as to prosecute such claim against the said Fund (hereinafter referred to as (the MMF). The said Fund subsequently and in the year 1996 became known as the Road Accident Fund in terms of Act 56 of 1996 (as amended).⁷

12. Acting upon such representations and undertakings, I mandated the said Monama and which he accepted.
13. My instructions were furnished and the aforementioned undertakings and representations were given and made in and during the latter part of the year 1998.
14. I had contact with the said Monama for a number of years following my instructions and I was always informed by the said Monama and/or his staff that everything necessary had been done and that I should be "patient" and await finality of my claim.
15. I then lost contact with the said Monama and as a result I became referred to Attorneys Röntgen & Röntgen Incorporated of Pretoria on or about the 9th day of August 2009 whom, I understood, also handled personal injury claims and I was then advised on or about the 7th day of August 2009 that they had ascertained from the Road Accident Fund that, according to the Fund, a claim had been lodged by the said Monama and which had been allocated a claim number 05/17096/23/0. The said Road Accident Fund also advised that apart from having lodged such claim, no further steps had been taken.⁸

13. It is therefore clear and the plaintiff confirmed these allegations in her evidence that she came to know of the debt on 9 August 2009. This means that her claim against the defendant arose on 9 August 2009 and would have prescribed on 8 August 2012.
14. During 2012 the plaintiff launched an application in terms of s47 (1) of the Superior Courts Act seeking leave to institute action against the defendant. It is not clear when this application was heard or when leave was granted. However, summons dated July 2012 were issued on 6 August 2012 and served on the defendant on 29 October 2012, more than three years after the plaintiff came to know of the existence of the debt. Mr Röntgen on behalf of the plaintiff conceded that the bringing of an application in terms of s47 (1) of the Superior Courts Act did not interrupt prescription. The claim has therefore become prescribed.
15. I now turn to deal with the question of costs.
16. The defendant's counsel sought, in the event of the special plea being upheld, an order that the plaintiff's legal representative pays the costs *de bonis propriis*.
17. The general principle at common law is that a party who litigates in a representative capacity (such as a trustee) cannot be ordered to pay costs *de bonis propriis* unless he or she has been guilty of improper conduct⁶. Orders of this nature have been made against attorneys who

⁶ Cooper NO v First National Bank of SA Ltd 2001 (3) 705 (SCA)

conducted themselves in an irresponsible and grossly negligent manner in relation to the litigation. Such costs orders mark the court's disapproval of the conduct.

18. As stated earlier, the plaintiff knew of the existence of a debt on 9 August 2009. In her replication to the defendant's special plea, she stated the following:

'The plaintiff denies the averment made by the defendant with regard to prescription and the defendant is put to the proof of its special plea.'

19. There is no explanation as to what made it impossible for the summons to be served before 8 August 2009. Mr Röntgen did not argue, correctly so in my view, that he did not know the whereabouts of the defendant because he knew by the 11 March 2011 (letter from the Law Society of Northern Provinces) that the defendant was a judge in the High Court of South Africa Johannesburg Division. Certainly, the plaintiff's attorney with all the experience and expertise should have ascertained that the summons was served timeously before the claim prescribed.
20. Furthermore, the plaintiff is cited in the particulars of claim as an unemployed adult female. It is clear that she will not be in a position to pay the defendant's costs which could have been avoided had her attorney exercised the professionalism and expertise expected from an attorney.
21. I have been informed by the defendant's counsel that their legal costs are covered by the underwriters of the Attorneys Fidelity Fund but that there may be excess payment due by the defendant. In that case, the plaintiff will have to pay only the excess if any.

In the result the following order shall issue:

1. The special plea is upheld, and the action is subsequently dismissed with costs.
2. Such costs to be *borne* by the plaintiff's attorney *de bonis propriis*.



MOLEGOHLOA DJP

REPRESENTATIONS

1. For the Plaintiff : K.M Röntgen
Instructed by : Röntgen & Röntgen Inc

2. Counsel for the defendant : P Uys
Instructed by : Maluleke Msimang & Associates

3. Date of hearing : 01 February 2018

4. Date handed down : 15 March 2018