

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NO.: 80976/2019

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

In the matter between:

CORNISE VAN SCHALKWYK

Plaintiff

And

FJ JORDAAN INCORPORATED

First Defendant

FJ JORDAAN

Second Defendant

ROSEMARY DREW

Third Defendant

JONATHAN WHITE

Fourth Defendant

JUDGMENT

van der Westhuizen, J

- [1] The plaintiff instituted an action against the present defendants for the recoupment of alleged damages suffered due to the alleged misconduct of the defendants. Allegedly the defendants allowed the plaintiff's claim against a third party to become prescribed. That claim related to alleged damages suffered as a result of injuries sustained by the plaintiff during an incident that occurred earlier.
- [2] The defendants defended the action and filed a special plea and a plea over. The special plea raised related to the defendants seeking a stay of the proceedings instituted against them by the plaintiff for recovery of the alleged damages suffered. The plaintiff filed a replication to the defendants' special plea, to which the defendants filed a rejoinder.
- [3] The action came before me for adjudication of the claim against the defendants for damages due to the alleged negligence on the part of the defendants who, as claimed, allowed the plaintiff's claim against the said third party to become prescribed.
- [4] The defendants sought at the commencement of the trial a separation of the special plea from the merits of the action in terms of the provisions of Rule 33(4). The plaintiff opposed the application for separation. After hearing argument, I ruled a separation of the two issues and delivered an *ex tempore* judgment in that regard.
- [5] Further, the defendants applied in terms of the Special Plea for the stay of the plaintiff's present action pending the finalisation of the plaintiff's claim instituted against the respective third parties under case numbers 57229/2016 and 59346/2017 respectively.
- [6] From the pleadings it is gleaned that the plaintiff suffered injuries as a result of an incident that occurred when the plaintiff slipped and injured herself on premises where the floor was wet and slippery.

- [7] The plaintiff initially appointed the defendants to institute an action against the appropriate party that would be liable for the compensation of the plaintiff's damages. The defendants instituted an action for the recovery of the damages under case number 57229/2016. On receipt of a plea in that matter, the defendants apparently opted to institute a second action against another third party under case number 59346/2017. In the latter action, no plea was filed. Neither of those two actions progressed to trial and are still pending.
- [8] Whilst the aforesaid two actions remained pending, the plaintiff approached her current attorneys of record for assistance. She was apparently advised to institute an action against the present defendants for recovery of her damages. In the present action it is alleged on behalf of the plaintiff that her claim for the recovery of her damages has become prescribed due to the alleged misconduct of the present defendants. The claim against the present defendant was premised upon two bases: firstly, that the present defendants negligently breached the terms of their mandate provided to them by allegedly causing the plaintiff's claim for damages suffered as a result of the aforementioned incident to become prescribed; secondly, the said claim is based upon delict, in that the defendants have breached a legal duty owed by them to the plaintiff, by allowing the plaintiff's aforementioned claim for damages to have become prescribed. Either way, the *causae* are prescription driven.
- [9] The amount for damages is the same amount in all the actions.
- [10] In the first action, under case number 57229/2016, no plea of prescription was filed. As recorded earlier, no plea was filed in the second action under case number 59346/2017. Accordingly, no plea of prescription was filed to date.
- [11] In an application by the plaintiff for condonation in the second action, a possibility was raised in an opposing affidavit by the defendant in that

action, that the claim may have become prescribed. That issue was vehemently denied and facts were provided in a replying affidavit, on behalf of the plaintiff, why the issue of possible prescription was a non-issue. Condonation was granted to the plaintiff by the court hearing the condonation application.

[12] It is to be recorded that at the time that a condonation application was presented to the court in the second action, the plaintiff was already represented by the plaintiff's present attorneys of record. The present defendants no longer represented the plaintiff in any of the two aforementioned actions, or in that condonation application.

[13] Apparently the present attorneys of record of the plaintiff, together with her counsel representing her, advised the plaintiff to hold over on prosecuting the two aforementioned actions and not to proceed therewith in the meantime. This is common cause. Consequently, a deliberate decision was taken not to proceed to have either, or both, of the two pending actions finally determined.

[14] It is trite law that the issue of prescription is to be pled specifically.¹ Furthermore, a court may not *mero moto* raise the issue of prescription.² The purpose for claiming prescription is to bring certainty to the period wherein a claim could be instituted. It brings finality to proceedings.

[15] Furthermore, there has been no determination by a competent court that the issue of prescription of the plaintiff's claim was alive and pronounced thereupon. In the present instance, the issue of prescription was raised by the plaintiff against her own claim against the third parties who have to date not raised, nor pled, the issue of prescription. No authority was cited for the proposition that a plaintiff may raise prescription against its own instituted claim. The present

¹ Prescription Act, 68 of 1969, section 17

² *Ibid*

matter is not akin to a situation where no claim was instituted on behalf of a plaintiff, thereby rendering the appointed legal representatives possibly guilty of negligence in that regard. Claims were instituted on behalf of the plaintiff. That is common cause.

- [16] Further in this regard, it is submitted by counsel on behalf of the plaintiff that this court was in as good a position as to determine the issue of prescription. There is no merit in that submission. The issue of prescription has not yet been raised in any proceedings for the claim for damages suffered by the plaintiff. As recorded earlier, claims were instituted on plaintiff's behalf. Those claims must first be determined, one way or the other. The plaintiff deliberately elected not to proceed with those claims. In the absence of a decision in either of those matters, the present action may have been prematurely instituted. G1
- [17] It is not appropriate, and it would be irresponsible, for this court to pronounce upon an issue that has not yet been raised in pending actions where it would be appropriately dealt with, should the issue be raised in either of those two pending actions. This is not a matter of possible *lis alibi pendens*. There is no pending possible decision on the issue where this court may have jurisdiction to entertain that issue in a likewise manner.
- [18] It was submitted on behalf of the defendants that prior to 2017, the High Court could regulate its own process, which included the power to stay or pend proceedings in exceptional cases.³ Post 2017, the position was relaxed and it was no longer to only be exercised in exceptional cases. The Constitutional Court held that the High Court has the inherent constitutional power to protect and regulate its own proceedings, which included the power to stay proceedings on grounds dictated by the interest of justice.⁴

³ See in this regard, *Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa*, 5th ed. Volume 1, at 306

⁴ *Mokona v Tasso Properties CC et al* 2017(5) SA 458 (CC)

[19] In my view, having regard to all the foregoing, the interest of justice dictates that the present proceedings be stayed, pending determination of the two pending actions under case numbers 57229/2016 and 59346/2017 respectively.

[20] Consequently the Special Plea stands to be upheld.

I grant the following order:

1. The special plea is upheld with costs
2. The plaintiff's action under case number 80976/2019 is stayed pending the final determination of the actions instituted under case numbers 57229/2016 and 59347/2017 respectively;
3. The action under case number 80976/2019 is postponed *sine die*.

C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

On behalf of the Defendants:	G F Heyns SC
Instructed by:	Ditsela Inc.
On behalf of Respondent:	S W Davies
Instructed by:	Wiese & Wiese Attorneys
Date of Hearing:	1 February 2023
Judgment handed down:	1 March 2023