

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: Yes / No
(2) OF INTEREST TO OTHER JUDGES: Yes / No
(3) REVISED: Yes / No

CASE NO: 74773/2014

Date: 13 March 2023 WJ du Plessis

In the matter between:

ZWANE FUNGILE APHILIA

Plaintiff

and

**MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

FIRST Defendant

FIRST NATIONAL BANK

SECOND Defendant

JUDGMENT

DU PLESSIS AJ

[1] Introduction

[1] This is a special plea for prescription raised by the First and Second Defendants. The parties agreed that the special case on prescription be decided first, before the merits of the case be considered.

[2] The Plaintiff institute action against the First Defendant in its capacity as the political head of the office of the Master of the High Court, and the Second Defendant, the bank where the deceased

Mr Mthombeni held a bank account. The Plaintiff's claim for damages rests on damages allegedly suffered by the Estate late Mthombeni, when R760 570 was withdrawn from the deceased banking account held by the Second Defendant, after being presented with a fraudulent letter of Executorship issued by the First Defendant. The allegation is that the employees of the First and Second Defendant colluded.

[2] Facts

[3] There is a stated case to which the parties agree. It rests on the Plaintiff's 15 January 2010 affidavit and the report from the Department of Justice and Constitutional Development.

[4] The Plaintiff deposed to an affidavit on 15 January 2010 at Evander Police Station with the following information:

- i. The deceased, Mr Mthombeni, passed on 30 June 2009. The Plaintiff, Ms Zwane, then approached the current attorneys to assist her with an application to be appointed as an executrix in her late husband's estate.
- ii. The Plaintiff's mother-in-law opened a fraud case on 29 December 2009 at the Embalenhle Police Station, accusing her of transferring the money from the FNB account to a Nedbank account.
- iii. On 4 January 2010, a person purportedly calling from the Master of the High Court told the Plaintiff that he was with a woman in his office who alleged that she was the deceased's wife. The person informed her that the Letter of Executorship was issued to her in October 2009. The Plaintiff enquired from her attorneys what she should do, and they informed her that they had not yet received a Letter of Executorship from the office of the Master.
- iv. On 14 January 2010 the Plaintiff was told to be at the Secunda Detective Branch to meet with the Investigating Officer handling the fraud case against her. The Investigating Officer produced letters of Executorship that he obtained from the Master's office, and the attorney for the other party likewise had a copy of the letters they also received from the Master. The Plaintiff asked to use the copy to verify information on the deceased's accounts at FNB. This enabled the Plaintiff to gather the information that the money had been transferred to a Nedbank account on instructions of the executor. She was given the Nedbank account number that then enabled her to approach Nedbank, where she was asked questions and had to produce her signature. When her signature did not match the signature in their records, they refused to give her further information regarding the account. All she knew was that an account was opened in Polokwane on 22 October 2009 in her name. She relayed this to the Investigating Officer.
- v. She likewise got information from FNB on 15 January 2010 that the money was transferred from the Goldreef Branch. She then showed them the copies of both letters of Executorship that she had received from the police.

[5] The parties agree that the Plaintiff is the lawful executor of the estate.¹ There is also no dispute that a sum of R760 570,89 was withdrawn from the deceased's account held with the Second Defendant during or about 2 November 2009.

[6] The crux of this matter turns on an internal report of the First Defendant received in September 2012. This report recorded that a letter of Executorship was issued in favour of the Plaintiff on 20 October 2009. This same letter was purportedly issued to other people, but neither the signature nor the date stamp on the other copies could be identified as belonging to someone in the office. However, after an investigation, the First Defendant found that the Letter of Executorship issued to the person purporting to be the Plaintiff is fraudulent. All this is set out in the internal report referred to above. It is unclear how the Plaintiff got sight of this internal report as it was not sent to her.

[7] The Plaintiff caused summons to be served on 24 November 2014 in an action to claim damages against the first and second defendants. The only point in dispute is whether, based on these facts, the claim has prescribed or not.

[3] Arguments of the parties

[8] The Defendants argue that the debt, as of 15 January 2010, became due as envisaged in terms of section 12 of the Prescription Act 69 of 1969 (the Act), as the Plaintiff had knowledge, or alternatively, is deemed to have knowledge on that date of the identity of its debtors and of the facts from which the debt arose. A period of 4 years and 10 months thus passed before the Plaintiff served summons, and as such, the claim became extinguished by prescription in terms of section 10 read with section 11(d) of the Act.

[9] The Plaintiff argues that the claim is based on the Aquillian action (delictual liability); as such, negligence and causation are essential elements of its cause of action that must be proven. Both these requirements have factual and legal elements. Until they had knowledge of the facts that would lead them to think that there was negligence and that this negligence caused the harm, there are not enough facts to render the debt due. These facts only came to the knowledge of the Plaintiff when they viewed the report of the first Defendant, which means the debt only became due in September 2012. The claim thus has not prescribed.

[4] Interpretation and understanding of section 12(3)

[10] Since prescription is governed by legislation, finding a solution to this matter is a question of statutory interpretation. This brings it under the ambit of s 39(2) of the Constitution, which requires that a court, when interpreting legislation, promote the spirit, purport and objects of the Bill of Rights. Section 12(3) of the Prescription Act needs to be interpreted in line with the Constitution.² In *Makate v Vodacom (Pty) Ltd*³ the Constitutional Court also made it clear that the High Court is obliged to follow s 39(2) whether or not the parties had asked for it.

¹ CaseLines 14-31.

² *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13 par 90.

³ [2016] ZACC 13 par 90.

- [11] Section 34 of the Constitution entrenches the right of access to courts and to have a dispute resolved. The right of access to Courts is instrumental in ensuring the enjoyment and protection of other constitutional rights. Section 12 of the Prescription Act is a limitation of the s 34 right. In *Makate v Vodacom (Pty) Ltd*⁴ the Constitutional Court stated that the implication of this is that an interpretation of debt that must be preferred is the one that is least intrusive on the right of access to courts.
- [12] Section 12(3) of the Prescription Act 68 of 1969 provides:
- "A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that the creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."
- [13] The purpose of s 12(3), according to the Constitutional Court, is to strike a fair balance between the need for a definite date beyond which a person can no longer pursue their claim if they have not acted diligently (legal certainty and finality),⁵ and the need to ensure fairness in the cases where a rigid application would result in injustice.⁶ If enforced too strictly, it might force a debtor to institute proceedings too soon, either leading to unnecessary proceedings or not knowing whether they can establish a wrong on the facts. It would also be unjust to hold a creditor accountable for not bringing an action if he was either unable or could not reasonably be expected to do so.⁷ This is why, *inter alia*, there are periods of suspension where prescription cannot run.⁸
- [14] While most legal systems today recognise some form of temporal limitation on instituting a claim, this was not always so. In classical Roman Law there was not time limitation period.⁹ In terms of customary law, debts never rot.¹⁰
- [15] There are a few policy reasons for having a rule of prescription. For instance, after a long time passes, it will be difficult for a debtor to defend themselves against a creditor's claim. Or, after a lapse of time, there is a reasonable expectation that the incident giving rise to the claim is closed and that parties adjusted their behaviour accordingly and that it is in the interest of justice that these claims get settled swiftly so as not to create a situation of uncertainty and unfairness.¹¹
- [16] It is with these considerations in mind that different countries have different general prescription periods, ranging from three years, like in South Africa and Germany, to five in the Netherlands and

⁴ [2016] ZACC 13 para 91.

⁵ Loubser M, 'Towards a Theory of Extinctive Presecrption' 1988 (105) *S. African LJ* 52.

⁶ *Links v MEC for Health, Northern Cape* [2016] ZACC 10 para 26.

⁷ Zimmermann R, *Comparative foundations of a European law of set-off and prescription* Cambridge University Press 2002) 78.

⁸ Loubser M, 'Towards a Theory of Extinctive Presecrption' 1988 (105) *S. African LJ* 53. See *Meinties NO v Administrasieraad* 1980 (T), *Hartman v Minister van Polisie* 1983 (A), *Links v MEC for Health, Northern Cape* [2016] ZACC 10.

⁹ Zimmermann R, *Comparative foundations of a European law of set-off and prescription* Cambridge University Press 2002) 62.

¹⁰ Chanock M, 'A peculiar sharpness: an essay on property in the history of customary law in colonial Africa' 1991 (32) *The Journal of African History* 52.

¹¹ Zimmermann R, *Comparative foundations of a European law of set-off and prescription* Cambridge University Press 2002) 63.

Scotland, to ten years in Switzerland and Belgium.¹² Comparatively speaking, South Africa thus has a stricter rule than European counterparts, whose historical basis for laws also rests on the Roman *longi temporis preacriptio* (applying to all forms of prescription). In terms of this rule prescription only applied after 30 years or more,¹³ as the objective of the law was to give effect to an existing, long-standing, factual situation.¹⁴

[17] To counter some of the harshness of time limitations, the rule that prescription should not run unless the creditor knew, or could reasonably acquire the knowledge, that they have a claim. Of course, whether the test for deemed knowledge is purely objective or subjective will further limit a debtor's reliance on the special plea of prescription. With this general framework in mind, a discussion of the most pertinent case law on similar facts is analysed.

[5] Section 12(3) of the Prescription Act

[18] The onus rests on the defendants to show that prescription started to run no later than 24 November 2011. They must show that either the Plaintiff had the knowledge, or that the Plaintiff is deemed to have such knowledge, as they could have acquired such knowledge by exercising reasonable care.

(i) "Knowledge of the facts from which the debt arises"

[19] Wrongfulness and negligence have both factual and legal components. The distinction between the two are not always clear. In *Truter v Deyzel*¹⁵ the plaintiff claimed damages for a personal injury allegedly sustained by him due to the negligence of the defendants after repeated eye surgery. It is only seven years after the operation that the plaintiff obtained a medical opinion that stated that the harm was due to the negligence of the defendants. The Court¹⁶ stated that "debt due"

"[m]eans a debt, including a delictual 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."
[own emphasis]

[20] The Court continued to state that fault and unlawfulness are legal conclusions, not factual ingredients to a cause of action in a delictual claim.¹⁷ The Court reached this conclusion by interpreting the requirement of "knowledge of the facts", finding that the requirements of fault and

¹² Zimmermann R, *Comparative foundations of a European law of set-off and prescription* Cambridge University Press 2002) 87 – 89.

¹³ Loubser MM, *Extinctive prescription* Second edition. ed (Claremont, Cape Town, Juta & Co 2019) 5.

¹⁴ Loubser MM, *Extinctive prescription* Second edition. ed (Claremont, Cape Town, Juta & Co 2019) 21.

¹⁵ [2006] ZASCA 16 .

¹⁶ Para 16.

¹⁷ Para 17.

unlawfulness are not factual ingredients of the cause of action but rather the legal conclusion reached by drawing conclusions based on the facts. In other words, prescription does not only start running once a debtor becomes aware of the full extent of their rights. Thus, in *Truter*¹⁸ the Court held that an expert opinion indicating negligence is not a fact but evidence.

[21] In *Links v MEC for Health, Northern Cape*,¹⁹ the Constitutional Court on similar facts decided differently. In this case, the applicant's finger was amputated. He did not know what caused the loss or who was responsible until about two years later when his attorneys obtained the hospital records setting out what caused his finger to be amputated. The question was whether the reason why the applicant lost his thumb and what caused it is a factual question or a legal conclusion, and whether the facts of the cause and the person responsible for the loss had to be established before it can be said that the applicant had knowledge of the knowledge of all the material facts he needed to have before he could institute legal proceedings facts.²⁰

[22] The Court found that

“Until there are reasonable grounds for suspecting fault so as to cause the Plaintiff to seek further advice, the claimant cannot be said to have knowledge of the facts from which the debt arises.”²¹

[23] The Constitutional Court, other than the court in *Truter*, made it clear that negligence and causation have factual and legal elements and that until the applicant had knowledge of the facts²² that would lead him to think that there was negligence that caused his loss, he lacked the actual knowledge of the necessary facts contemplated in s 12(3).

[24] In the Constitutional Court case of *Mtokonya v Minister of Police*²³ the Court had to determine whether the applicant's lack of knowledge that the conduct of the police in not bringing him before a court of law within 48 hours following his arrest was wrongful and actionable, and that he had to sue the police to prevent prescription running against him. Mtokonya argued that he learned only three years later, after consulting an attorney, that the police conduct is wrongful and actionable.

[25] The Court summarised the question to be whether a creditor is required to know that the conduct of the debtor giving rise to the debt is wrongful and actionable before prescription can start running.²⁴ The Court found that the statement by the applicant that he did not know whether the action of the police against him was wrongful and actionable was not a fact but a conclusion of law.²⁵ In other words, knowledge of the legal conclusion, namely that the debtor's conduct is wrongful and actionable, is knowledge of law. It is not knowledge of a fact.²⁶

¹⁸ Para 25.

¹⁹ *Links v MEC for Health, Northern Cape* [2016] ZACC 10.

²⁰ Para 49

²¹ Para 42.

²² In the *Links* case the respondent did not rely on the proviso that the applicant would be “deemed to have such knowledge”, and thus only relied on the actual knowledge (or not) of the applicant.

²³ *Mtonkonya v Minister of Police* [2017] ZACC 33 para 39.

²⁴ Para 6.

²⁵ Para 44.

²⁶ Para 45.

[26] The Court cautioned against the situation where prescription only runs against plaintiffs with knowledge of the legal conclusion that their claim is actionable, as this might lead to a situation where prescription does not run against people with legal training, rendering the law of prescription ineffective.²⁷

[27] The Constitutional Court in *Kruger v Director of Public Prosecutions*,²⁸ dealt with a plaintiff that averred that he was malicious prosecution and the question whether prescription only ran once he had access to the police docket that indicated fault (malice). In dismissing the appeal as it does not engage the Constitutional Court's jurisdiction, Froneman J said that the

“only question to ask is whether the facts known to him on the day the charge was withdrawn were sufficient to ground the likely inference that there was no reasonable and probable cause for his prosecution and that his prosecution proceeded with intent to injure on the part of the public prosecutor”?

[28] This involves the rules of logic and asking whether the Plaintiff knew enough on that day to infer that, probably, he could sue for malicious prosecution. This is a question of fact. As for what facts, Froneman J then stated

“The 'facts from which this debt arose' in this case are the 'facts that must be proved' (facta probanda) for malicious prosecution, which the applicant had knowledge of before learning of the additional 'proving facts' (facta probantia) gleaned from the police docket. While this additional evidence of the 'proving facts' obviously strengthened his case for establishing the facts that must be proved, the applicant already had knowledge of the essential facts from which the debt arose.”

[29] The facts that are required to establish a cause of action, according to *Kruger*, are *facta probanda* and prescription runs as soon as that is established.

(ii) "Deemed to have knowledge"

[30] Section 12(3) has another leg: whether, in the absence of actual knowledge of the facts, the creditor could have reasonably acquired the knowledge of the facts by exercising reasonable care. In other words, not whether there was actual knowledge of the facts, but whether there is constructive knowledge.²⁹

[31] In *Macleod v Kweyiya*³⁰ the Supreme Court of Appeal had to interpret the constructive knowledge requirement. It reaffirmed the test that it is a question of what the reasonable person in the position of the creditor would do, concluding that there is an expectation to act reasonably and with the diligence of a reasonable person. The test thus seems objective taking into account a hypothetical reasonable person with the creditor's characteristics.

²⁷ Para 63.

²⁸ *Kruger v National Director of Public Prosecutions* [2018] ZACC 13 par 85.

²⁹ *Macleod v Kweyiya* 2013 (6) SA 1 (SCA) case para 7.

³⁰ 2013 (6) SA 1 (SCA).

- [32] In *Loni v Member of the Executive Council, Department of Health, Eastern Cape, Bhisho*,³¹ the Constitutional Court found that an objective approach must be followed in establishing what a reasonable person in the position of the applicant would have realised that "the treatment and care which he had received was sub-standard" and thereby actionable, which means that he should have suspected fault on the part of the respondent. This, however, seems to suggest that it is expected that the applicant should have been able to make a legal conclusion based on the facts.
- [33] In *Loni*, the Court further states that the applicant *had* all the necessary facts (and is not deemed to have had) which gave rise to the claim, and this knowledge was sufficient for him to act. The facts that he knew were that his wound was oozing pus after being discharged; he removed a bullet himself that the hospital was supposed to remove; he had continuous pain and was limping; and he had access to his medical file. He thus had knowledge of everything that would enable him to get an assessment done to gather the evidence to prove negligence.

[6] Discussion

- [34] On what date did the debt become due? In the Particulars of Claim, the Plaintiff sets out its claim, namely payment of damages that the Estate late Mthombeni suffered³² after money was withdrawn from the deceased's banking account based on fraudulent letters of Executorship issued by the First Defendant.
- i. Against the First Defendant, it is alleged that the employee who fraudulently issued letters of Executorship in the name of the Plaintiff.
 - ii. Against the Second Defendant, it is claimed that a bank employee collided (sic) with employees of the First Defendant by not verifying the authenticity of the letters of Executorship and the correctness of the person claiming to be the Plaintiff.
- [35] The First Defendant argues that the Plaintiff need not know or appreciate the legal consequence of the facts, only the minimum facts from which the Plaintiff can make out their case. This was then the date of 14 January 2010 when the Plaintiff was confronted with two letters received from the Master's office that she knew were not issued to her and that the Master self did not know off.
- [36] The Plaintiff states that negligence and causation have factual and legal elements, and that until the Plaintiff has knowledge of the facts that will lead him to believe there was negligence (i.e. the report), she did not have the necessary facts to render the debt due. The report, she argued, is essential in showing that the fraudulent letters originated from the offices of the First Defendant (i.e. knowledge of the debtor), and that these fraudulent letters caused (i.e. causality) the Second Defendant to transfer the funds.
- [37] The latter argument, however, conflates the causality element between the two parties. As far as the First Defendant is concerned, to succeed in a claim, the Plaintiff must prove that there was conduct (the issuing of the letters), that was wrongful (in that it was fraudulent), and that this enabled (caused) a withdrawal of monies from the bank (fault), and as a result damages were suffered.

³¹ [2018] ZACC 2.

³² Caselines 01-7.

- [38] As far as the Second Defendant is concerned, the Plaintiff knew that the late Mr Mthobeni held an account with the Second Defendant, and that the Second Defendant allowed the funds to be transferred (i.e. conduct) to a Nedbank account, without a person authorised to do so authorising the transfer. For the Second Defendant the question is whether the conduct (i.e. the payment of the monies) was wrongful (either through collusion) that the Second Defendant has fault (failure to verify) and that *this* is what caused (causation) the loss of the monies.
- [39] These are two different inquiries. In fact, the acknowledgement of the bank to the Plaintiff that "the signature appearing in their records and my signature is not the same"³³ is enough to plead wrongfulness and fault (or possibly a breach of contract, but this was not pleaded), and if this is true, this, in all probability, caused the loss. That this transfer was done without either the Plaintiff or Mr Mthombeni's instruction means that the Plaintiff had the knowledge, or that a reasonable plaintiff in the shoes of the Plaintiff is deemed to have the knowledge that the monies transferred was based on fraudulent instructions of a purported executor. Thus, facts material to "unlawfulness" and "fault", as far as the Second Defendant is concerned, was in the knowledge of the Plaintiff, or at the very least can be deemed to be in the knowledge of the Plaintiff. This was so on 14 January 2010.
- [40] As for the First Defendant, it is not certain that the Plaintiff knew where the fraudulent letters originated from. In her affidavit she states that "the investigating officer produced the letters of executorship obtained by him at the Master's office and the Attorney for the other party also produced a copy of his which he also received from the office of the Master".³⁴ In a supplementary affidavit later filed for an application of condonation,³⁵ the Plaintiff states that she and her attorney was surprised to note the dates on the letters, as the people at the office of the Master in Pretoria told them that no such letters of Executorship exist. She further states that she and her attorney of record visited the Master's office on numerous occasions, they were not provided with (her) letter of Executorship, and on the last occasion they were told that the file was missing. Then, while the investigation was ongoing, she requested the Master for the original letters of Executorship in her name but was refused further information as the matter was being investigate internally. Are these facts sufficient to draw the likely inference that there was a wrong, and that the wrong emanated from the Master's office? I think not.
- [41] During argument in court, counsel gave the example that these could be photoshopped papers printed by someone other than someone working in the Master's office.
- [42] Counsel for the First Defendant disagreed, stating that the Plaintiff knew that only the First Defendant issues these letters – thus when she was confronted with two unfamiliar letters, they could only originate from the office of the Master. While that might be so that the First Defendant's offices issue the *true* Letters of Executorship, it is possible that other parties not connected to the office can forge the letters. This was only known for certain when the report was leaked. The question is whether this is a fact needed to establish a cause of action (*facta probanda*) and/or facts "material fact to the case"?

³³ Plaintiff's affidavit para 12 CaseLines 08-5.

³⁴ Plaintiff's affidavit para 9, CaseLines 08-5.

³⁵ Plaintiff's affidavit in support of application for condonation, CaseLines 08-7.

- [43] Following the reasoning in *Links*, the plaintiff did not have knowledge of all the material facts (it being the identity of the debtor) to institute legal proceedings before September 2012, when they received the reports. Can she be deemed to have such knowledge? I don't think so. It seems from the report at the centre of this inquiry that the Master's office *themselves* did not know if the Letters emanated from their office. It is easy to have an armchair view on these issues, but the fact of the matter is that, on the facts before this court, the Master's office was not forthcoming with information either.
- [44] In line with the *Makate* case³⁶ that the interpretation of a debt must be preferred that is least intrusive on the right of access to courts, so arguably must the rest of s 12(3) of the Act be interpreted. So too a balance must be struck between the need for legal certainty and finality, and the need to ensure that a too rigid application does not lead to an injustice.³⁷
- [45] From the facts it seems that the Plaintiff did what a reasonable person in her position would do: she appointed attorneys to help her, she co-operated with the Investigating Officer who investigated the fraud, she enquired from the Master's office where her Letter of Executorship was, and copies of the other letters. This shows that she did not give up on pursuing her claim. Once she got hold of the internal memo, she issued summons within the prescribed period. To force the Plaintiff to institute action before she had knowledge of where the letters emanated from would expect of her to institute the claim prematurely, without all the facts.
- [46] Thus, on the evidence presented before me and the authority referred to above, I conclude that the Plaintiff's claim against the Second Defendant has prescribed in terms of the provisions of Section 11(d) of the Prescription Act 68 of 1969. However, the claim against the First Defendant did not prescribe.

[7] Order

[47] The following order is made:

- i. The First Defendant's special plea is dismissed, with cost
- ii. The Second Defendant's special plea is upheld, with cost.

WJ du Plessis

Acting Judge of the High Court

³⁶ *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13 para 91

³⁷ *Links v MEC for Health, Northern Cape* [2016] ZACC 10 par 26.

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

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Instructed by:	TMN Kgomo & associates inc
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For the for second Defendant:	H van der Vyver
Instructed by:	Glover Kannieappen Inc
Date of the hearing:	2023/02/06
Date of judgment:	2023/03/13