IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

REPORTABLE

CASE NO: 12975/2017

In the matter between:

ISMAIL ABDUL HABIB	First Plaintiff
ISMAIL ABDUL SATAR TAYOB N.O	Second Plaintiff

and

ETHEKWINI MUNICIPALITY	Defendant

ORDER

(a) The application by the plaintiffs in terms of uniform rule 30 is dismissed with costs.

(b) The exception by the defendant is dismissed with costs.

JUDGMENT

Delivered on: 20 March 2019

Ploos van Amstel J

[1] The plaintiffs in this matter are the trustees of the Ismail Habib Family Trust. They have instituted an action against the eThekwini Municipality ('the municipality') in which they claim payment of the sum of R3 781 107, which they say they paid to it in respect of rates and penalties owed by a previous owner of an immovable property which they had purchased. The basis of the claim is that they were not liable to the municipality for the amount paid, but made the payment after threats by it regarding the discontinuation of services and legal action.

[2] The plaintiffs pleaded that they only became aware that they had not been liable to make the payment to the municipality after a judgment of the Constitutional Court on 29 August 2017, which was to the effect that it is not permissible for a local authority to compel the new owner of immovable property to pay the rates owed by a previous owner.

[3] The municipality's response was an exception to the particulars of claim on the basis that the facts pleaded do not disclose a cause of action. In essence the objection is that the averments do not establish that the plaintiffs' claim has not become prescribed. The point is made that it is not stated in the particulars of claim when the payment was made, and that the date of the Constitutional Court judgment is not relevant to the determination of when prescription commenced to run.

[4] The plaintiffs delivered a notice in terms of uniform rule 30(2)*(b)*, claiming that the notice of exception was an irregular proceeding and affording the municipality an opportunity to withdraw it. The basis of the contention was that prescription cannot be raised by way of an exception and has to be raised in a special plea. The municipality did not respond to the notice and the plaintiffs delivered an application in terms of uniform rule 30(1) for an order setting aside the exception as an irregular step.

[5] Counsel for the plaintiffs submitted that if I conclude that the exception should be dismissed on the merits then there is no need for me to decide the application in terms of rule 30. Counsel for the municipality submitted that the application was inappropriate and unnecessary, that it resulted in costs being incurred and that, regardless of my finding on the merits of the exception, I should order the plaintiffs to pay the costs of the application. In those circumstances it seems to me that I have to deal with the application.

Is the exception an irregular step?

[6] Counsel for the plaintiffs referred me to L T C Harms *Amler's Precedents of Pleadings* 9 ed (2018) at 305*,* where the learned author says the proper way of raising prescription in action proceedings is by way of a plea or special plea, and not by way of exception. He says the reason is that the plaintiff may have a valid answer to the plea of prescription (such as delay or interruption), which may be raised in replication.[1] He does not deal with the question whether such an exception will be an irregular step, and it appears to be no more than a caution that an exception based on prescription is bound to fail.

[7] In D Harms *Civil Procedure in the Superior Courts* SI-64 (2019) at B30.3 the learned author says the term 'irregular' is not defined in uniform rule 30, but 'it can be accepted that the rule applies only to irregularities of form and not to matters of substance'. He says there is, however, conflicting authority in this regard.

[8] In *Sanan v Eskom Holdings Ltd*[2] the plaintiff sued his former employer for damages on the basis that during his employment he was exposed to asbestos, as a result of which he contracted cancer. The defendant delivered an exception on the basis that the particulars of claim disclosed no cause of action, in view of the statutory embargo to such claims contained in s 35 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993. The defendant contended that s 35 was a complete bar and that the particulars of claim thus disclosed no cause of action. The learned judge upheld the exception and referred to *Mankayi v Anglogold Ashanti Ltd*[3], in which the Supreme Court of Appeal dismissed an appeal against a judgment which upheld a similar exception. He rejected a contention that the exception should be dismissed on the ground that the defendant should have raised the statutory bar by way of a special plea, and not by exception. After a discussion of Voet *Ad Pandectas* 46.1 and Herbstein & Van Winsen *The Civil Practice of the Supreme Court of South Africa* 5 ed at 599 and 600 the learned judge concluded that the nature of a defence raised by special plea or exception is more important than the procedure adopted. In other words, it should be considered on its merits.

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[1] *Murray & Roberts (Cape) v Upington Municipality* 1984 (1) SA 571 (A), referred to in LTC Harms *Amler's Precedents of Pleadings*, is authority for the proposition that the plaintiff may have a valid answer to the plea of prescription – delay of completion of prescription in that case. The case does not deal with an exception in which prescription is invoked.

[2] *Sanan v Eskom Holdings Ltd* 2010 (6) SA 638 (GSJ)

[3] *Mankayi v Anglogold Ashanti Ltd* 2010 (5) SA 137 (SCA)

[9] In *Living Hands (Pty) Ltd & another v Ditz & others*[4] Makgoka J said it was quite understandable that the court in *Sanan* found it easy to dispose of the issue of prescription[5], for there could, in any event, not be anything in replication that the plaintiff could raise, as his action was barred by statute. He said, however, that he did not agree with the suggestion that, as a matter of principle, in all cases, a party has a choice to raise the defence of prescription either by plea or exception. He added that it is time-honoured that prescription should be raised by way of special plea, and this has been followed by our courts for many decades. He referred to a number of authorities[6], which he said were binding on the court in *Sanan*, but were not followed by it. I refer briefly to these authorities.

[10] In *Holmes v Schoch*[7] the plaintiff sued the defendant for the delivery of a number of donkeys which he owned, alternatively for damages. The defendant entered what he called an exception to the summons, on the basis that in terms of s 5 of Act 26 of 1908 the plaintiff should have brought his action within 14 days of the delivery of the donkeys to the defendant. On appeal from the magistrates' court De Villiers JP said this was clearly a plea of prescription, and should have been taken *in limine*. The defendant, before pleading, should have applied for leave to file his plea of prescription. He said if this were the only point in the case, and the court was satisfied that it was merely technical, it would have no difficulty in allowing the exception to stand as a plea of prescription. It was however held on the facts that the defendant was not entitled to the benefit of the section. In a separate judgment Bristowe J said:

'There is no doubt that the defence of prescription ought to be pleaded. But in this case, though it was not pleaded as a defence, it was pleaded as an exception, and inasmuch as the point is one of law I do not think we ought to hold that the objection is fatal to the appellant[8]'.

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[4] *Living Hands (Pty) Ltd & another v Ditz & others* 2013 (2) SA 368 (GSJ) paras 68-69

[5] This was an error. Prescription was not raised in *Sanan*. A complete statutory bar on claims against an employer was raised.

[6] *Holmes v Schoch* 1910 TS 700 at 703 and 705; *Reuben v Meyers* 1957 (4) SA 57 (SR) at 58; *Shield Insurance Co Ltd v Zervoudakis* 1967 (4) SA 735 (E); *Walsh NO v Scholtz* 1968 (2) SA 222 (GW); *Rand Staple-Machine Leasing (Pty) Ltd v ICI (SA) Ltd* 1977 (3) SA 199 (W); and *Union & SWA Insurance Co Ltd v Hoosein* 1982 (2) SA 481 (W) at 482G.

[7] *Holmes v Schoch* 1910 TS 700

[8] *Holmes v Schoch* 1910 TS 700 at 705

[11] In *Reuben v Meyers*[9] the issue was whether the defendant should have been allowed on the opening day of the trial to amend his plea by raising a defence of prescription. The statement by Murray CJ that according to the modern practice a defence of prescription is raised by a special plea was made in the context of that case. The question whether prescription can be raised by way of an exception did not arise.

[12] In *Shield Insurance Co Ltd v Zervoudakis*[10] prescription was invoked in an exception to a third party notice. Munnik J said it was 'trite law that prescription must be pleaded as a defence and cannot be taken by way of exception'[11]. He referred to s 14 of the Prescription Act of 1943, which provided that a party who raises prescription shall do so in the pleadings. Section 14 is however not helpful in this context as an exception is a pleading.[12] He also relied on the decision in *Holmes.*[13] The way in which Munnik J put it, was that a plea of prescription can manifestly not be decided upon exception[14]. It is by no means clear that the court was of the view that such an exception would be an irregular step, as opposed to saying that such an exception was bound to fail.

[13] In *Walsh NO v Scholtz*[15] prescription was raised in an exception to particulars of claim. The learned judge said the procedure has always been to raise prescription by way of a special plea, which would give the other party an opportunity to reply to it. He reasoned that the particulars of claim could not be said to lack averments to sustain a cause of action and that if the defendant had not given notice of intention to defend, a judgment by default would have been granted. With reference to *Cassimjee v Cassimjee*[16] he said that in a case where all the facts were before the court and the question whether the claim had become prescribed is a question of law, there cannot really be an objection to the issue of prescription being decided by way of an exception.

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[9] *Reuben v Meyers* 1957 (4) SA 57 (SR) at 58
[10] *Shield Insurance Co Ltd v Zervoudakis* 1967 (4) SA 735 (E)
[11] *Shield Insurance* at 738A-B
[12] Herbstein and Van Winsen *The Civil Practice of the High Courts of South Africa* 5 ed at 642. See however *Walsh NO v Scholtz* 1968 (2) SA 222 (GW) at 224A.
[13] *Holmes v Schoch* 1910 TPD 700
[14] *Shield Insurance* at 738B
[15] *Walsh NO v Scholtz* 1968 (2) SA 222 (GW)
[16] *Cassimjee v Cassimjee* 1947 (3) SA 701 (N)

[14] In *Rand Staple-Machine Leasing (Pty) Ltd v ICI (SA) Ltd*[17] the defendant objected to a proposed amendment to the particulars of claim on the basis that the claim sought to be introduced had become prescribed. The court held that interlocutory motion proceedings were not proceedings as are envisaged by s 17(2) of the Prescription Act 68 of 1969 ('the Act'). Viljoen J said the document in which prescription is invoked is the plea or plea in reconvention in a trial or the opposing affidavit in motion proceedings. He said the proceedings envisaged are the main proceedings and not intermediate or interlocutory proceedings.

[15] In *Union & SWA Insurance Co Ltd v Hoosein*[18] the defendant in an action filed a notice of motion for an order striking out or dismissing the plaintiff's claim, on the basis that it had become prescribed. Goldstone J commented on the somewhat unusual procedure, and said prescription is normally raised by way of special plea and in no other way. He said it cannot, for example, be raised by way of exception. He added that this is presumably for the reason that a plaintiff may wish to replicate a defence to the claim of prescription, for example, an interruption. Because the plaintiff had not objected to the procedure adopted, and instead replied fully to the application, the learned judge allowed the matter to be argued on the issue of prescription, on the basis that all the relevant facts were before the court.

[16] These cases support the notion that prescription, in trial proceedings, should be raised by way of a plea or special plea. They do not in my view provide authority for the proposition that an exception which invokes prescription is an irregular step, or will not be considered on its merits. I think the point is rather that an exception based on prescription will usually fail because the contention that the particulars of claim lack averments necessary to sustain an action is incorrect. This is because the plaintiff is not required to aver that his claim has not become prescribed.

[17] Uniform rule 23 provides for the delivery of an exception where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be. The exception in the present matter was based on the contention that the facts pleaded in the particulars of claim do not disclose a cause of action. Such an exception is provided for in uniform rule 23. Whether or not the exception should succeed seems to me to depend on whether or not the particulars of claim disclose a cause of action. If they do, the exception fails.

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[17] *Rand Staple-Machine Leasing (Pty) Ltd v ICI (SA) Ltd* 1977 (3) SA 199 (W)

[18] *Union & SWA Insurance Co Ltd v Hoosein* 1982 (2) SA 481 (W)

But an exception which is without substance on its merits, even if it is hopeless, is not an irregular step. It is a bad exception.

[18] I am not aware of a case where an exception was set aside as an irregular step in terms of uniform rule 30. In *Cassimjee* a number of exceptions were upheld on the basis that the plaintiff's claims as set out in the declaration had become prescribed. It appears from the judgment that some of the issues were matters of law. Nevertheless, it is an example of a matter where prescription was dealt with on exception.

[19] Where therefore an exception is taken on the basis of prescription, the correct approach in my view is not to set it aside as an irregular proceeding, or to dismiss it on the basis that the incorrect procedure has been followed, but to consider whether the particulars of claim lack averments which are necessary to sustain an action. In most cases the answer will be that the particulars of claim are not excipiable, because the plaintiff is not required to aver that his claim has not prescribed.

[20] The application under uniform rule 30 can therefore not succeed.

The exception on its merits

[21] An excipient has to show that the pleading is excipiable on every interpretation that can reasonably be attached to it.[19] In Herbstein & Van Winsen *The Civil Practice of the Supreme Court of South Africa* at 631 the learned authors say that:

'for the purposes of an exception no facts [other than agreed facts] may be adduced by either party and an exception may thus only be taken when the defect objected against appears *ex facie* the pleading itself'.

[22] It is trite that an averment that the claim has not prescribed is not required to establish a cause of action. Section 17(1) of the Act provides that a court shall not of its own motion take notice of prescription. Subsection (2) provides that 'a party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings'.

[23] The defendant states in the notice of exception that according to the particulars of claim the plaintiffs had paid the relevant amount 'on an unpleaded (sic) date' and that it had done so 'as at 2006'. This is not what is stated in the particulars

[19] *First National Bank of Southern Africa Ltd v Perry* [2001] 3 All SA 331 (SCA) para 6.

of claim. The averments are that it was a condition of the transfer that the rates for a period of two years prior to the transfer had to be paid by the trust. This amount was duly paid and the transfer was registered on 29 March 2005. After transfer the municipality demanded that the plaintiffs pay the debt of a previous owner in respect of rates in an amount set out in a statement dated 8 August 2006. Then follows an averment that under compulsion and threat of discontinuation of services and legal action, the plaintiffs made payment to the municipality in respect of this debt in a total amount of R3 781 107. The date on which the payment was made is not pleaded. The statement of account annexed to the particulars of claim is accompanied by a letter of demand dated 25 January 2013, referring to arrears in the sum of R3 302 121, and an acknowledgement of debt signed by the first plaintiff, dated 2 May 2013, which refers to an amount outstanding of R1 668 756 and instalments of R278 126. The dates on which those payments were made are not pleaded.

[24] It seems to me that it does not appear from the particulars of claim whether or not the claim has become prescribed. It does not follow that they lack averments necessary to sustain an action. To use the analogy referred to in *Walsh*, if the action was undefended a court would have had no difficulty in granting a default judgment on the particulars of claim.

[25] The order that I make is as follows:

(a) The application by the plaintiffs in terms of uniform rule 30 is dismissed with costs.

(b) The exception by the defendant is dismissed with costs.

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Ploos van Amstel J

Appearances:

For the Plaintiffs	:	M *Pillemer* SC
Instructed by	:	Shaukat Karim & Co.
		Durban
For the Defendant	:	J P *Broster*
Instructed by	:	Linda Mazibuko and Associates
	:	Durban
Date Judgment Reserved	:	06 March 2019
Date of Judgment	:	20 March 2019