

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

REPORTABLE

Case No: AR299/16

In the matter between:

AFRISUN KZN PROPRIETARY LTD t/a SIBAYA

CASINO AND ENTERTAINMENT KINGDOM

MALANDELA SECURITY SERVICES (PTY) LTD

and

PRITHIRAJ SEWPERSAD

FIRST APPELLANT

SECOND APPELLANT

RESPONDENT

APPEAL JUDGMENT

MADONDO DJP

[1] The appellants appeal against the judgment of Verulam Magistrate's Court dismissing their special plea of extinctive prescription to the respondent's claim against them. The appellants were at the court *a quo* the defendants and the respondent was the plaintiff. For the sake of convenience, I propose to refer to them as the plaintiff and the defendants as they were so referred to in the court *a quo*.

[2] On 29 September 2014 the plaintiff instituted an action against the defendants for damages arising out of the personal injuries the plaintiff sustained when he slipped and fell on the wet floor surface at the first defendants' premises on 29 September 2011. The second defendant was operating a car washing business on the first defendant's parking area. The plaintiff averred that either the first or second defendant was or both were responsible for the then prevailing circumstances, they therefore directly contributed to the plaintiff's fall and injury.

[3] The defendants raised a special plea to the plaintiff's claim in terms of section 12 of the Prescription Act 68 of 1969 (the Act) because the action had not been commenced within three years after the cause of action had arisen, ie 29 September 2011. The questions to be decided by the court *a quo* were whether or not the plaintiff's claim against the defendants had prescribed in terms of s 12 of the Act and

how the three year prescription period applicable to the plaintiff's claim should be computed.

[4] The defendants contended that the plaintiff's claim was based on an incident which occurred on 29 September 2011 and that the plaintiff had to serve the summons by midnight on 28 September 2014. It was the contention of the defendants that a civil method of computation, inclusive of the first day and exclusive of the last day, applied. Accordingly, the defendants contended that the plaintiff's claim should be dismissed with costs. The learned magistrate was of the view that since s11(d) of the Prescription Act is silent on how the prescriptive period of three years referred therein must be computed, the method of computation provided for in s 4 of the Interpretation Act 33 of 1957 (the Interpretation Act) should be applied in determining the three-year prescriptive period. In support of his decision the learned magistrate relied on Rule 2 of the Magistrate's Court Rules which for calculation of periods of time or days refers to s 4 of Interpretation Act, dealing with the computation of days exclusively of the first day and inclusively of the last day. The learned magistrate also went on to hold that if legislation is silent with regard to certain issues, the correct procedure is to look to another Act of Parliament for clarity and guidance in approaching the Act which is under scrutiny. Secondly, the learned magistrate purportedly acting on a just and equitable principle extended the prescriptive period of the plaintiff's claim by including the last day so to prevent the loss of the plaintiff's right to claim due to miscalculation of days. The court *a quo* dismissed the defendant's special plea of extinctive prescription.

[5] Two questions this court is called upon to decide are: (a) how a three-year prescriptive period for a debt prescribed in s 11(d) of the Prescription Act must be computed; and whether, the court *a quo* was justified to extend the prescriptive period of the plaintiff's claim by one day, acting on the basis of a just and equitable principle, so to prevent the loss of plaintiff's right to claim. It is the contention of the defendants that in calculating the prescriptive period a civil method of computation, inclusive of the first day and exclusive of the last day, applies. To the contrary, the plaintiff contends that the statutory computation of days as prescribed in the Interpretation Act, exclusive of the first day and inclusive of the last day applies.

[6] In support of the defendants' contention, Mr Anderton, referred us to the case of *Arendsnies Sweefspoor CC v Botha* 2013 (5) SA 399 (SCA) as the recent leading decided authority on the issues. In this case the plaintiff had instituted an action against the defendant for damages arising out of the personal injuries the plaintiff sustained when he fell from the cable-car system operated by the defendant. The defendant raised a special plea to the effect that the plaintiff's claim had prescribed in terms of the provisions of s12 of the Act. However, in this case the appeal turned solely on whether the service as reflected in the return was to be construed as valid service upon the appellant, which had the effect of interrupting the running of prescription. The case had nothing to do with the computation of the period of prescription and is consequently irrelevant.

[7] In terms of s 11(d) of the Prescription Act the period of prescription for the debt is three years. Prescription commences to run as soon as the debt is due. (see s 12(1)). A debt is due when the creditors' cause of action is complete. The idea of a "debt" in relation to the Act refers to an obligation to do something, whether by payment or by the delivery of goods and services, or not to do something. See *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) 909A-B.

[8] The important words in calculating the period are those that fix the commencement of the period which are, "as from the date on which the claim arose". Those words are the typical words of commencement that bring the ordinary civil method of computation into operation. See *Kleynhans v Yorkshire Insurance Co. Ltd* 1957 (3) SA 544 (A) at 549 G-H. Departure from the civil rule is permissible only if it is clear from the language of the section and the context in which it appears are such as to show that the Legislature intended a different method to be used see *Joubert v Enslin* 1910 AD at 37; *Kleynhans* case at 549; *South African Mutual Fire & General Insurance Co. Ltd v Fouche en 'n ander* 1970 (1) SA 302 (A) at 315H-316 C.

[9] It is also the case where the parties have not indicated in their contract how such period should be reckoned, the computation should as a general rule, be made including the first day and excluding the last day. See: *Minister of Police v Subbulutchmi* 1980(4) SA 768 (AD) at 772 A. The clear wording of a statute or contract may of course lead to the rejection in any particular case of the ordinary civil

rule in favour of the natural *de memento* in momentum rule or in favour of the exceptional civil rule, which includes both the first and the last days.

[10] The statutory computation is used in the calculation of the number of days prescribed for the doing of an act or for any other purpose prescribed. Section 4 of Act 33 of 1957 provides:

'Reckoning of number of days – when any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday and public holiday.'

The provisions of Rule 2(2) of the Magistrates' Court Rules of Court, the court *a quo* relied upon when it sought guidance from s 4 of the Interpretation Act; do not apply to the provisions contained in other statutory provisions including the Magistrates' Courts Act 32 of 1944. But the provisions of the sub-rule apply only to the calculation of time in terms of those rules. *Champion v Myers* (1908) NLR; *Anglia v Naicker* 1951 (1) SA 99 (N); *S v Kashire* 1978 (4) SA 166 (SWA);

[11] The provisions of the Interpretation Act, apply to the interpretation of every law, as defined in this Act, and to the interpretation of all by-laws, rules, regulations or orders made under the authority of any such law, unless there is something in the language or context of the law, by-law, rule, regulation or order repugnant to such provisions or unless the contrary intention appears therein, see s1.

[12] Where a particular number of days is prescribed without there being any exclusion of the application of s 4, either in express terms or by necessary implication, the natural inference would be that the Legislature intended the section to apply. However, the scope of the Interpretation Act is limited to the computation of days. See also *Joubert v Enslin* 1910 AD 6, 37-38. It does not apply to the calculation of such time when such time in any other unit than days is expressed. See *Nair v Naicker* 1942 NPD 3 at 5; *Muller v New Zealand Insurance Co. Ltd* 1965 (2) SA 565(D) at 571E.

[13] If a claim is not lodged before the expiry of the prescriptive period of three years, the right to claim prescribes automatically; the period of prescription starts running from the day on which the plaintiff's cause of action arose or from the date on which the creditor might reasonably have been expected to have knowledge of such wrong, whichever is the earlier date. See: s 12 (1) and (3) of the Prescription Act. Mr Kahn for the plaintiff has for the first time on appeal argued that it took the plaintiff sometime, subsequent to 29 September 2011, to become aware of the wrong by the defendants. Such contention was never made in the pleadings nor in the court *a quo*. In the result such contention was not anytime relevant hereto nor before the court *a quo*. I therefore find no merit in it.

[14] In the present case the period of prescription started running as from the 29th September 2011, being the day on which the cause of action arose. The method of computation is in accordance with the ordinary civil method of calculation of time, which means that the first day must be included and the last day excluded. In order to interrupt the running of the prescription, summons had to be served on the defendants not later than midnight on the 28th September 2014. See *Kleynhans case*; *Somdaka v Northern Assurance Co Ltd* 1961(4) SA 764 (D); *Thomas v Liverpool and London & Globe Insurance Co. of SA Ltd*; *Platjies v Eagle Star Insurance Co.* 1968(4) SA 141(C).

[15] The period of three years prescribed in s 11(d) of the Prescription Act must be computed in accordance with the civil or common law rule *de die in diem*, ie the first day included and the last day excluded where the last day of the period of prescription thus computed is a Sunday, the period nevertheless expires on such Sunday. Prescription is only interrupted if summons is served before the period expires. See *Somdaka* case at 766D-E, 769 A-B.

[16] The court *a quo* erred in looking to the Interpretation Act, which is specifically designed for the calculation of the period of time relating to days, for clarity and guide in determining the three year period of prescription, prescribed in s 11(d) of the Prescription Act.

[17] If upon the construction of the legislation the intention of the Legislature is doubtful the whole last day ought to be included if the expiration of the period in question would cause the loss of the right. In the present case the language of the act is clear and there is a plethora of decided authorities on the issue. The court *a quo* therefore misdirected itself in calculating the three years of prescription mathematically so as to prevent the loss of plaintiff's right to claim due to miscalculation of days by his attorney and on that basis to include the last day. More so, the magistrate's court as a creature of statute does not possess or derive powers outside the four corners of the statute by which it is created, the Magistrate's Court Act 32 of 1944 (the Magistrates Act). Powers to decide matters on just and equitable of principles are not imposed upon magistrates by law. See s 12(1) (2) of the Magistrate's Court Act.

ORDER

[18] In the result, I make the following order:

- (a) The appeal is allowed, with costs.

Madondo DJP

Poyo Dlwati J

I agree.

Date reserved: 8 September 2017

Date delivered: 3 November 2017

Plaintiffs' counsel: Adv Kahn

Instructed by: Theasen Pillay and Associates

REF: Mr I Pillay/sk/ s397

Defendants counsel: Adv Anderton

Instructed by: Stowell & Co Incorporated

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