THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 922/2017

In the matter between:

JOHANNES PETRUS LOUIS GRIMBEEK **APPELLANT**

and

MZIWANDILE ALFRED JAKOBO **RESPONDENT**

Neutral citation: *Grimbeek v Jakobo* (922/2017) [2018] ZASCA 131 (27 September 2018)

Coram: Lewis, Tshiqi, Saldulker and Swain JJA and Mothle AJA

Heard: 29 August 2018

Delivered: 27 September 2018

Summary: Prescription Act 68 of 1969 – s 12(3) – professional negligence – attorney failing to lodge claim timeously – necessity for plaintiff to make reasonable enquiries – particular circumstances of plaintiff – inaction not unreasonable – special plea of prescription dismissed.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Rampai J with Van Zyl and Mhlambi JJ concurring, sitting as court of appeal):

1 The appeal succeeds to the extent set out in paragraph 2 below and the appellant is ordered to pay the respondent's costs of appeal.

2 The order of the full court is set aside and replaced with the following order:

'(a) The appeal succeeds with costs.

(b) The order of the trial court upholding the special plea of prescription and dismissing the appellant's claim is set aside and replaced with the following order:

The special plea of prescription is dismissed with costs.'

JUDGMENT

Swain JA (Lewis, Tshiqi and Saldulker JJA and Mothle AJA concurring):

[1] This appeal concerns a claim for damages instituted by the respondent, Mr Mziwandile Jakobo, against the appellant, Mr Johannes Grimbeek, an attorney, in the Free State Division of the High Court, Bloemfontein for professional negligence. The claim was based upon the allegation that the appellant negligently permitted the respondent's claim against the Road Accident Fund (the RAF) to prescribe. By agreement between the parties the trial court granted an order in terms of rule 33(4) of the Uniform Rules of Court, initially limiting the issues to a determination of the validity of the appellant's special plea of prescription.

[2] The evidence was accordingly restricted to a determination of the special plea of prescription, no evidence being led on the merits of the respondent's claim. After hearing the evidence, the trial court upheld the special plea and dismissed the respondent's claim with costs. A subsequent appeal to the full court with the leave of the trial court, resulted in the dismissal of the special plea. The full court then however impermissibly entered into the merits of the respondent's claim, finding that the appellant was liable for 100 per cent of the respondent's agreed or proven damages. In doing so, it committed a grave misdirection. It disregarded the order made by the trial court in terms of rule 33(4), which meant that it had no jurisdiction at that stage of the proceedings to determine the merits. It also ignored the absence of any evidence on this issue. Consequently, the finding by the full court on the merits cannot stand. Not surprisingly, the present appeal is with the leave of this court.

[3] Some of the facts which are relevant to the special plea of prescription, are unusual. The appellant had no recollection of consulting with the respondent or his father and was unable to identify them in court. However, from the limited records still in his possession he was able to say that he had received an amount of R250 on 13 February 2001 in connection with a third party claim. A cheque was then drawn in favour of the superintendent of the Boitumelo Hospital on 6 April 2001 for R200 and on 22 March 2005, he debited a nominal fee for R50 which reduced the account to a nil balance. On 1 June 2005 he closed the respondent's file, destroying it five years later. The appellant stated that without the file he was unable to say why he had closed it and whether the merits of the respondent's claim had been determined. He was unable to cast any light on what had happened to the claim.

[4] In order to place the appellant's evidence in context, it is necessary to briefly outline the history of the interaction between the appellant and the respondent. The accident in which the respondent was injured happened on 25 January 2001. The respondent was 17 years old and at school in grade 9, when he was struck by an ambulance, whilst riding a bicycle. He was admitted to the Boitumelo Hospital and was in a wheelchair when he consulted with the appellant during February 2001, in the company of his father Mr Friedman Jakobo. His father's employer, a client of the

appellant, had recommended they consult the appellant. The employer had apparently told the respondent's father that he would speak to the appellant and ask him to help them.

[5] According to the respondent's father, at this meeting the appellant said he would proceed with the case and required payment of R250 to do so. The appellant also said they must not be impatient regarding progress of the claim. The respondent stated that the interpreter in the appellant's office told him to go to the police station and obtain a case number. The respondent then returned at a later stage to the appellant's office and furnished him with the case number. The respondent's father stated that he also returned to the appellant's offices not long after the meeting and paid the amount of R250 in cash at the reception. In the light of the appellant's evidence that he had received the sum of R250 on 13 February 2001 in connection with a third party claim and had paid an amount of R200 to the superintendent of the Boitumelo Hospital on 6 April 2001, it is clear that the respondent and his father consulted with the appellant at this time.

[6] At a later stage the respondent, together with his father and brother-in-law, Mr Michael Thabatha, visited the appellant. According to the respondent's father, the reason for the visit was that the appellant had not advised him about progress in the claim. Although there was some confusion between the witnesses as to the year in which this meeting took place, they all agreed that the appellant was asked what progress had been made. According to the respondent the appellant said he was handling the case and this type of case took a long time to finalise. The appellant said he would phone and keep them informed. The respondent and Mr Thabatha said the appellant was angry. According to Mr Thabatha the appellant spoke harshly to them, adding he knew how to do his work and they must not tell him how to do it. He then told them to leave, mentioning this type of claim took eight to ten years to finalise. According to the respondent his father said they must leave and give the appellant a chance to handle the case.

[7] Contrary to the evidence of the respondent and Mr Thabatha, the respondent's father said the appellant had not spoken harshly to them. When the

contradiction was put to Mr Thabatha, he replied this may be how his father-in-law viewed the appellant's behavior, but he maintained that the appellant was angry. He believed the reason for the appellant's anger was because they had questioned him about the claim.

[8] Mr Thabatha said his father-in-law told them after the meeting that he trusted the appellant who knew his work and they must leave him alone. He did not return to make any further enquiries from the appellant, as he had chased them away. The respondent likewise made no further enquiries and, as he put it, remained silent.

[9] In accordance with his instructions to the respondent and Mr Thabatha, the respondent's father did not approach the appellant again for information concerning the claim. He explained this was because he believed in the appellant and believed he would handle the claim properly and finalise it. When asked why he did not take the claim away from the appellant because he had taken so long, he restated his belief in the appellant adding that the appellant was helping them. He viewed the appellant as a 'dominee' and described him as a good man. He confirmed he got on well with the appellant and agreed it would not have been difficult to speak to the appellant if he wished. Because his place of employment was 200m from the appellant's offices he agreed he could have made enquiries at any time.

[10] According to the respondent, at none of these consultations did the appellant inform them they had not carried out their obligations and as a result he could not submit the claim. Mr Thabatha said they received no indication there were any problems with the claim, as the appellant said he was proceeding with it. The respondent's father never received any letter from the appellant, in which he was advised that the appellant was no longer proceeding with the claim. He had furnished his home address to the appellant at the first consultation. He was never told by the appellant he must obtain another attorney, as he was no longer prepared to act for his son and he must do this quickly, as his claim would prescribe.

[11] The first occasion on which the respondent became concerned about his claim was during 2012, when he heard on the radio that many cases against the

RAF had been neglected. He phoned the RAF, furnished his identity number and was told there was no record of a claim being lodged on his behalf. When he told his father what he had done, his father became very angry with him for doing so. The respondent's father explained his reaction on the basis of a deep belief he held in the appellant that he was helping them. He regarded the appellant as a person who would discuss his son's claim with him.

[12] It is against this factual background that the provisions of s 12(3) of the Prescription Act 68 of 1969 (the Act), must be applied:

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

[13] The meaning of the phrase ‘by exercising reasonable care’ has been considered in a number of cases. In *Drennan Maud & Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) at 209H-I, the following was stated:

'In my view, the requirement "exercising reasonable care" requires diligence not only in the ascertainment of the facts underlying the debt, but also in relation to the evaluation and significance of those facts. This means that the creditor is deemed to have the requisite knowledge if a reasonable person in his position would have deduced the identity of the debtor and the facts from which the debt arises.'

[14] In *Leketi v Tladi NO & others* [2010] ZASCA 38; [2010] 3 All SA 519 (SCA) para 18, the subjective element in the objective enquiry to determine whether the requisite knowledge should be deemed to be held by the creditor, was described as follows:

'In order to determine whether the appellant exercised "reasonable care," his conduct must be tested by reference to the steps which a reasonable person in his or her position would have taken to acquire knowledge. . . .’

In *Macleod v Kweyiya* [2013] ZASCA 28; 2013 (6) SA 1 (SCA) para 13, the particular circumstances of the plaintiff were again emphasised in the following terms:

'It is the negligent and not an innocent inaction that s 12(3) of the Prescription Act seeks to prevent and courts must consider what is reasonable with reference to the particular circumstances in which the plaintiff found himself or herself.'

[15] An application of these principles in *Gunase v Anirudh* [2011] ZASCA 231; 2012 (2) SA 398 (SCA) paras 14 and 18, resulted in a finding that prescription of a client's claim for damages against an attorney who allowed a RAF claim to prescribe, commences to run when the client by making reasonable enquiries, should have learnt that his claim against the RAF was not timeously lodged.

[16] The justification for the principle of extinctive prescription is of particular importance in the present appeal where as a result of the long delay, the appellant is unable to recollect any of the details of the respondent's claim and most of the documentary evidence has been lost. The justification for the principle was formulated in *Road Accident Fund & another v Mdeyide* [2010] ZACC 18; 2011 (2) SA 26 (CC) para 8, in the following terms:

'This Court has repeatedly emphasised the vital role time limits play in bringing certainty and stability to social and legal affairs and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the potential to be drawn out for indefinite periods of time, bringing about prolonged uncertainty to the parties to the dispute. The quality of adjudication by courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be able to testify, or their recollection of events may have faded. The quality of adjudication is central to the rule of law.'

[17] Accordingly, the danger that a fair adjudication of the appeal may be compromised because of the delay must be guarded against. The danger is particularly acute as a result of the inability of the appellant to explain why he terminated his mandate from the respondent, by closing the respondent's file on 1 June 2005, long before the respondent's claim against the RAF prescribed on 17 December 2007. It is, however, clear that neither the respondent, nor his father, received notice from the appellant that he was no longer proceeding with the claim. If they had they would have approached another attorney, particularly as the appellant had not informed them of any problems with the claim.

[18] The crucial issue is when should the respondent have learnt, by making reasonable enquiries, that his claim against the RAF was not timeously lodged? It is common cause the respondent attained his majority by reaching the age of 21 years on 17 December 2004 and his claim against the RAF prescribed three years later, on

17 December 2007. The trial court held that on this date prescription commenced running against the respondent in respect of his claim against the appellant, with the result that three years later on 17 December 2010, his claim against the appellant prescribed. The first enquiry to the appellant through the respondent's new attorneys took place on 1 October 2012, followed by the issue of summons and service on the appellant on 6 February 2013, of the respondent's professional negligence claim against the appellant.

[19] The aspects of the evidence, which are relevant to this enquiry, are as follows. It was the decision of the respondent's father, after the meeting at which the appellant was asked about progress in the claim, that no further enquiries should be directed to the appellant. That this decision was respected by the respondent and Mr Thabatha is not surprising. He was a person in authority over them, whether as a father or father-in-law. It is clear that the reason for this decision was the deep-seated belief he held in the ability and good faith of the appellant, to properly prosecute the respondent's claim. He is not a sophisticated person and was in awe of the appellant. This may in part be attributed to the appellant being his employer's attorney and his employer having garnered the appellant's assistance. He believed implicitly that the appellant was helping them and would communicate with him regarding the respondent's claim. The evidence reveals he was extremely uncomfortable about questioning the appellant's progress at the meeting, regardless of whether the appellant's response to being questioned was one of anger, or not. The depth of his belief in the appellant is starkly illustrated by his reaction when told by the respondent that he had made enquiries concerning the claim, which revealed that the appellant had failed to lodge it with the RAF. Rather than directing his anger at the appellant for his failure to do so, it was directed at his son for questioning whether the appellant had properly handled the claim.

[20] A recurring theme in the evidence of the respondent, his father and Mr Thabatha was that the appellant told them they must be patient and this type of claim took a long time to finalise. In addition, the appellant at no stage warned them of the danger of prescription and the effect it could have on the enforceability of the claim.

[21] In *Macleod* (para 10), it was reiterated that a defendant bears the full evidentiary burden to prove a plea of prescription, including the date on which a plaintiff obtained actual or constructive knowledge of the debt. The burden shifts to the plaintiff only if the defendant has established a prima facie case. Accordingly, as stated in *Ditedu v Tayob* 2006 (2) SA 176 (W) para 12, a defendant bears the onus of proving that a plaintiff, in acting as he did, failed to meet the standard of care required by s 12(3) of the Act. In this manner, the date on which the plaintiff obtained constructive knowledge of the debt may be proved.

[22] It must be borne in mind that it is negligent conduct and not innocent inaction on the part of a plaintiff that s 12(3) of the Prescription Act seeks to prevent. What is reasonable conduct must be determined by reference to the particular circumstances in which the plaintiff found himself or herself. I am satisfied on a conspectus of all the evidence that the failure by the respondent to make further enquiries from the appellant concerning the progress of his claim, was not unreasonable in the particular circumstances of this case. The appellant therefore failed to discharge the onus of proving that the respondent in acting as he did, failed to meet the standard of care required by s 12(3) of the Act. The appellant accordingly failed to prove that the respondent obtained constructive knowledge, earlier than the date on which he obtained actual knowledge of the failure of the appellant to lodge his claim with the RAF.

[23] In reaching this conclusion I am acutely aware of the lengthy delay before the respondent obtained knowledge of the appellant's failure to submit his claim to the RAF and the resultant inability of the appellant to explain his conduct. A loss of evidence and the inability of witnesses to recollect events as justification for the principle of extinctive prescription are equitable considerations aimed at ensuring that the quality of adjudication is maintained. In the present case an equally important equitable consideration is the failure of the appellant to ensure that the respondent received proper notification that he was no longer proceeding with the respondent's claim. If he had done so, the respondent would have been able to obtain the services of another attorney well in advance of his claim prescribing.

Consequently, a consideration of the equities in the appeal does not favour the appellant.

[24] In the result, the appeal against the decision of the full court dismissing the special plea of prescription must be refused. However, for the reasons set out above, the appeal against the decision by the full court in which the merits of the respondent's claim were determined in favour of the respondent, must succeed.

[25] The appellant submitted that if the appeal only succeeded to the extent that the order of the court a quo determining the merits of the claim in favour of the respondent was set aside, the appellant should be entitled to the costs of the appeal, on the basis that the appellant was materially successful. I do not agree. The only substantive issue on appeal was whether the court a quo was correct in reversing the finding of the trial court on the issue of prescription. The appellant has failed on this issue and there is no reason why the appellant should not be ordered to pay the costs of the appeal.

[26] I grant the following order:

1 The appeal succeeds to the extent set out in paragraph 2 below and the appellant is ordered to pay the respondent's costs of appeal.

2 The order of the full court is set aside and replaced with the following order:

'(a) The appeal succeeds with costs.

(b) The order of the trial court upholding the special plea of prescription and dismissing the appellant's claim is set aside and replaced with the following order:

The special plea of prescription is dismissed with costs.'

K G B Swain
Judge of Appeal

Appearances:

For the Appellant:	J F Grobler
	Instructed by:
	Gildenhuys Malatji Inc, Pretoria
	Symington & De Kok, Bloemfontein
For the Respondent:	Z Schoeman
	Instructed by:
	R Röntgen & Röntgen Inc, Pretoria
	McIntyre Van Der Post, Bloemfontein