IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE HIGH COURT: MTHATHA

CASE NO: 872/06

Heard on: 04/02/13

Delivered on: 07/03/13

REPORTABLE

In the matter between:

VICTOR MEYER Plaintiff

and

LEGAL EXPENSES INSURANCE S.A. LTD Defendant

JUDGMENT ON SPECIAL PLEA

NHLANGULELA J:

[1] The plaintiff, an adult male, was an employee of the University of Transkei. In May 2001 the plaintiff together with other workers were

retrenched by the University. On 02 August 2006 he instituted an action against the defendant claiming payment of R949 324,08 as contractual damages arising out of an alleged failure by the defendant to challenge the retrenchment in the Labour Court. Amongst other defences raised in the defendant's plea to the plaintiff's particulars of claim is a special plea that the plaintiff's claim has become prescribed. This is a statutory defence in terms of s 12 of the Prescription Act 68 of 1969 (the Act) which reads:

> "**When prescription begins to run**-
>
> **(1)** Subject to the provisions of subsections (2), (3) and (4) prescription shall commence to run as soon as the debt is due.
>
> **(2)** If the debtor willfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
>
> **(3)** 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.
>
> **(4) …**"

[2] The facts of this matter can be gleaned from the allegations made in the pleadings, the documents discovered in terms of Rule 35 and the oral evidence of Miss Helena Archer, the Branch Manager of the defendant, based in East London. As a policy holder with the defendant, and as such being entitled to legal assistance, the plaintiff reported the dispute which he had with the University to the defendant in East London office. The protracted negotiations pertaining to the retrenchments that were going on in the University yielded no positive results for the plaintiff. A referral of the dispute to the Commission For Conciliation Mediation and Arbitration (the CCMA) in terms s 191(1)(b) of the Labour Relations Act 66 of 1995 was delayed for a period of approximately 17 months. An application for condonation of the late referral of the dispute to the CCMA in terms of s 191(2) of Act 6 of 1995 made on 22 October 2002 was dismissed on 13 February 2003. This came to the knowledge of the plaintiff on 10 April 2003. The plaintiff blamed the defendant for the prescription of his claim for re-instatement. As a result he sought redress against the defendant in a form of damages for loss of past and future income calculated from the date of retrenchment up to the date of retirement. When this claim was resisted by the defendant the plaintiff resorted to this court. He issued summons on 02 August 2006, which were received by the defendant on 03 August 2006.

[3] In resisting the special plea *Mr Mgxaji,* the attorney who appeared on behalf of the plaintiff, sought to challenge the evidence of Ms Archer on the basis of certain discovered correspondence. The first is a letter dated 23 July 2003 addressed by the defendant to the plaintiff. The letter reads as follows:

> "Further to the above we are advised by our Ms Maholwana, Manager of our Umtata Branch, that you attended at her offices today where she explained the options we suggested to proceed further with your matter.
>
> Ms Maholwana now advises that you request the explanation in writing as follows:
> Our Labour Attorney Mr Pierre Naude has consulted with counsel and suggests that your matter be referred back to Mr Tshiki who would be instructed to make an application to the High Court in Umtata by way of a constitutional challenge to the decision to retrench you on the basis of unfair administrative action in terms of the Promotion of Administrative Justice Act.
>
> Should you be successful in the above application, Unitra would then be obliged to follow the correct procedures in effecting a retrenchment i.e. negotiation with yourself.

> Alternatively should the court find that the previous procedures were correct the matter will end there.
>
> Please bear in mind that should you succeed in being reinstated, the university may re-open the disciplinary matter against you for the "mysterious disappearance" of the vehicle which you were driving, as well as bring charges of insubordination for the "numerous verbal warnings and reprimands" issued by the Dean of the University.
>
> You stated to the writer hereof that our legal advisor Mrs Sindi Sidinile delayed in referring the matter to the CCMA and that you felt that LegalWise had been negligent as a result of Mrs Sidinile's delay. In this instance if you feel that LegalWise has been negligent you have recourse to the law. We of course reserve our rights in this matter and deny that Mrs Sidinile was negligent."

[4] The second letter is dated 08 October 2003, written in the following terms:

> "For your information, we enclose herewith a copy of a letter we have written on your behalf. The letter has already been

> faxed/posted. As soon as there are further developments, we will again communicate with you.
>
> Should you have any queries or need to discuss the progress in this case, please do not hesitate to contact the hereof."

[5] The nub of the cross-examination on both letters as aforementioned was that the defendant, based on the contents thereof, admitted the blame, undertook to remedy the financial loss incurred and cannot be heard to say that the plaintiff's claim has become prescribed in terms of the Act. Ms Archer denied these suggestions. Another letter dated 10 September 2003, which Ms Archer was questioned about during cross examination, and interpreted to mean that the defendant offered to settle the plaintiff's claim in the sum of R6 500,00, re-inforces the belief I have that the reason behind these letters was to defeat the special defence of extinctive prescription.

[6] The approach to the evidence that was placed before the court must be on the basis that it was acceptable to both parties. I say this because there was no contradictory evidence adduced by the plaintiff.

[7] The central issue for determination by this court is whether the defendant proved that the plaintiff's claim has become prescribed. That the *onus* to prove prescription rests upon a party who raises it is trite law – *Absa Bank Bpk v De Villiers* 2001 (1) SA 481 (SCA).

[8] *Mr Seape,* counsel who appeared on behalf of the plaintiff submitted that a debt which prescribes after the lapsing of three years as provided in s 11(d) read with s 12 (1) of the Act must be a debt which is described as:

> "that which is owed or due, anything (as money, goods or services) which one person is under an obligation to pay or render to another"

as stated in the case of *Electricity Supply Commission v Stewarts and Lloyds of SA (PTY) Ltd* 1981 (3) SA 340 (A) at 34F-G. The plaintiff's claim of R949 324,08 is such a debt. And it is common cause that the facts and circumstances in which the sum of R949 324,08 is calculated crystalised at the moment that the plaintiff acquired knowledge of the CCMA ruling on 10 April 2003. According to the evidence the defendant was to blame for the prescription of the plaintiff's right to pursue litigation against the University. As from 10 April 2003 the debt in question became due and the three years prescription in terms of the Act started to run. When the summons were served upon the defendant on 03 August 2006 a three year period had

already lapsed. In my view the statements of law made by Van Heerden JA in the case of *Truter And Another v Deysel* 2006 (4) SA 168 (SCA) at 174 sum up the case for the defendant. It was there stated as follows:

> "[16] I am of the view that the High Court erred in this finding. For the purposes of the Act, the term "debt due" means a debt, including a delictual debt, which is owing and payable. A 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.
>
> [17] In a delictual claim the requirements of fault and unalwfulness do not constitute *factual* ingredients of the cause of action, but are *legal* conclusions to be drawn from the facts:
>
> > 'A cause of action means the combination of *facts* that are material for the plaintiff to prove in order to succeed with his action. Such facts must enable a court to arrive at certain

> *legal conclusions regarding unlawfulness and fault, the constituent elements of a delictual cause of action being a combination of factual and legal conclusions*, namely a causative act, harm, unlawfulness and culpability or fault.'

[18] In the words of this Court in *Van Staden v Fourie:*

> 'Artikel 12(3) van die Verjaringswet set egter nie die aanvang van verjaring uit totdat die skuldeiser die volle omvang van sy regte uitgevind het nie. Die toegewing wat the Verjaringswet in hierdie verband maaak, is beperk tot kennis van "die feite waaruit die skuld ontstaan."'

[19] 'Cause of action' for the purposes of prescription thus means '…every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'"

(The underlining are mine for emphasis).

[9] The argument advanced by *Mr Mgxaji* that the correspondence exchanged between the parties on 23 July 2003 and 08 October 2003 established the cause of action which is determinative of the time prescription begins to run goes against the grain of the law which was stated in the case of *Truter, supra*, and more particularly the term: "the facts from which the debt arises" in s 12 (3) of the Act. The plaintiff did not need every piece of evidence inorder to institute his action. He needed the minimum facts such as those which were already present when the CCMA ruling was issued. He did not need any confirming legal opinion from the defendant or his own lawyers. This was aptly stated by Cameron JA (as he was then) and Brand JA in *Minister of Finance And Others v Gore NO* 2007 (1) SA 111 (SCA) at 119-120, para. [17] as follows:

> "This Court has, in a series of decisions, emphasized that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case 'comfortably'**…**"

[10] The matters raised in the correspondence referred to by *Mr Mgxaji* could not have prevented the plaintiff from instituting the action because all the ingredients of the cause of action were present as early as on 10 April 2003. The letter dated 23 July 2003 raised two things, namely, a legal opinion that the plaintiff may pursue his labour dispute against the University in the High Court and that he is free to institute action for damages against the defendant. The letter of 08 October 2003 refers to an unknown correspondence. These letters neither established the cause of action that is encapsulated in the plaintiff's particulars of claim nor did they prevent the plaintiff from coming to know of the existence of the debt as envisaged in s 12 (2) of the Act. Further, the alleged acknowledgement of liability to the plaintiff's claim was denied by Ms Archer. There is no documentary evidence, in a form of a written agreement, of admission of liability. Consequently, interruption of prescription could not have taken place as envisaged in s 14 of the Act, which reads:

> '**Interruption of prescription by acknowledgement of liability-**
>
> (1) The running of prescription shall be interrupted by an express or tacit acknowledgment of liability by the debtor.
>
> (2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall

> commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt, from the date upon which the debt again becomes due."

[12] In the circumstances the application for the dismissal of the action based on the special plea of prescription succeeds. The costs will follow this outcome.

[13] In the result the following order shall issue:

1. **The defendants's special plea of prescription be and is hereby upheld.**

2. **The plaintiff's action be and is hereby dismissed.**

3. **The plaintiff to pay the costs of the action.**

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Z.M. NHLANGULELA

JUDGE OF THE HIGH COURT

Attorney for the plaintiff	:	Mr S.L. M. Mgxaji of Mgxaji Mdunge Inc. MTHATHA.
Counsel for the defendant	:	Adv M. Seape
Instructed by	:	N.Z. Mtshabe Inc. MTHATHA c/o Norton Rose Attorneys JOHANNESBURG.