THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 826/2010

In the matter between:

HAROLD GUNASE **Appellant**

and

RAMESH ANIRUDH **Respondent**

Neutral citation: *Harold Gunase v Ramesh Anirudh* (826/10) [2011] ZASCA 231 (30 November 2011)

Coram: BRAND, MAYA and SERITI JJA

Heard: 21 November 2011

Delivered: 30 November 2011

Summary: **Prescription - ss 11, 12(1) and (3) of Prescription Act 68 of 1969 – claim prescribes after a period of three years from date upon which claim arose - prescription starts to run as soon as creditor knows or ought to know identity of debtor and facts from which debt arose – duty on creditor to exercise reasonable care in this regard – respondent failed to exercise reasonable care.**

ORDER

On appeal from: KwaZulu-Natal High Court, Durban (Hughes-Madondo AJ sitting as court of first instance):

(1) The appeal is upheld with costs.

(2) The order of the court a quo is set aside and replaced by the following:

'The special plea of prescription is upheld and the claim is dismissed with costs.'

JUDGMENT

SERITI JA (JJA concurring):

Introduction

[1] The respondent instituted a claim for damages against the appellant in the KwaZulu-Natal High Court. The appellant pleaded to the particulars of claim and filed a special plea, raising the defence of prescription.

[2] In terms of rule 33(4) of the Uniform Rules the issues relating to the special plea were separated from the other issues in the action. The matter was set down

for the determination of the special plea. On the date of the hearing evidence was led and the court a quo (Hughes-Madondo AJ) dismissed the special plea and reserved the costs of the preliminary hearing. The matter is before this Court with leave of the court a quo.

Background Facts

[3] On 9 July 1992 at about 18h20 the respondent, a pedestrian, was knocked down by a motor-vehicle with registration numbers ND 219134, which was driven by Mr Goundon. The respondent sustained serious physical injuries in the said accident and he was hospitalised for a period of about one year.

[4] During October 1993 the respondent allegedly instructed the appellant who then practiced as an attorney to lodge a third party claim for him in terms of the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 (the MVA Act). The respondent alleges that a month after the first consultation with the appellant, he provided the appellant with hospital records and police documents and his personal documents. The respondent alleges that he was informed by the appellant that they were going to work on his case and he must visit regularly to enquire about progress.

[5] Every month he visited appellant's office for a progress report. On one such visit he was informed that his claim was lodged and that they were waiting for the MVA Fund to advise them about the Fund's attitude towards his claim.

[6] At some stage, he visited the respondent's office again and he found that the offices had been closed; and that he was informed that they had moved to another office. He went to the new premises and he also found that office to be closed. In 2000 the appellant's practice as an attorney was closed down and the respondent became aware of that fact in 2001. During the period 2000 to 2004 he did not go to the defendant's offices or contact any other person for assistance.

[7] Later, he was informed that some of the files of the appellant, who had ceased practising as an attorney, were taken over by an attorney Ms Aggie Govender (Govender). His sister contacted Govender's office to find out if his file was with them, and she was informed that they would check. His sister phoned Govender's offices on five occasions during March 2005. On the last of these

occasions she was informed that his file was lost. He never went to the offices of Govender.

[8] On 28 April 2005 he consulted with Ms Anushka Parbhoo (Parbhoo) his attorney of record, after being advised by a friend to do so. He requested her to take over his third party claim. He explained to her the history of his claim and that the defendant who he had initially instructed had ceased practising as an attorney. He also informed her that Govender, who had taken over the files of the defendant, might have taken his file. Parbhoo informed him to get all the necessary documents relating to his claim and come back to see her so that she could find out what had happened to his claim. No file was opened for him.

[9] On 18 January 2006 the respondent went to see Parbhoo. He took all the relevant documents to her, a file was opened for him and a proper consultation ensued. The respondent told his attorney that he only came back at that time as it took a while long to gather the necessary documents. On 23 January 2006 Parbhoo telephoned the Road Accident Fund (RAF) in order to enquire if the respondent's claim had been lodged and establish that it was not. The respondent's identification number was used to make enquiries.

[10] On 2 February 2006 Parbhoo wrote a letter to KwaZulu-Natal Law Society enquiring about the date on which Govender took over the practice of the

appellant, who had since joined the bar. On 21 February 2006 the KwaZulu-Natal Law Society advised her that Govender took over the firm of the appellant on 1 July 2001. On 30 March 2006 Parbhoo addressed a letter to Govender enquiring if the respondent's file was with her. On 25 April 2006 Govender replied and said that she did not have the respondent's file and that she did not receive it from the appellant.

[11] On 23 June 2006 Parbhoo addressed a letter of demand to the appellant alleging that the respondent's claim prescribed because of his negligence and claiming substantial damages allegedly suffered by the respondent as a result. On receipt of the letter of demand the appellant forwarded it to the Attorney's Insurance Indemnity Fund. On 27 July 2006 Glenrand MIB Risk Services, Managers of the Attorneys Fidelity Fund Professional Indemnity Insurance Scheme addressed a letter to Govender and advised her that the letter she addressed to the appellant was handed to them. They requested that pleadings be held in abeyance so as to offer them an opportunity to investigate the matter.

[12] There was various correspondence exchanged between Parbhoo and Glenrand MIB, but the matter could not be settled. The last correspondence from Ms Parbhoo to Glenrand MIB is dated 26 October 2007. It is an email and in it she

said: 'I note with regret that despite our several requests to settle this matter amicably, we have to date not heard from yourselves or your client. In light of the above, we will have no alternative but to proceed with High Court litigation herein.'

On 21 October 2008 summons was issued.

Prescription

[13] Article 55 of the MVA Act provides that a right to claim compensation from the MVA Fund or its appointed agents in respect of claims arising from the driving of a motor vehicle in the case where the identity of either the owner or driver thereof has been established, shall become prescribed upon the expiry of a period of three years from the date upon which the claim arose. Section 11(*d*) of the Prescription Act 68 of 1969 (the Prescription Act) states that a debt shall prescribe after three years unless an Act of Parliament provides otherwise. There is no suggestion from any of the parties that the three-year prescription period does not apply in the case of the debt involved in this case. Section 12(1) and (3) read as follows:

'(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due…

(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.'

[14] Section 12(3) imposes a duty on the creditor to exercise reasonable care to obtain knowledge of the identity of the debtor and the facts from which the debt arises. A creditor is not allowed to postpone the commencement of the running of prescription by his failure to take necessary steps. In *Burley Appliances Ltd v Grobbelaar NO & others* 2004 (1) SA 602 (C) at 607G Nel J said: '…the declarator is contrary to the established principle that a creditor cannot by supine inaction arbitrarily and at will postpone the commencement of prescription.'See also *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty)Ltd & another* [2005] 4 All SA 517 (C)para 26 and *Uitenhage Municipality v Molloy* 1998 (2) SA 735 (SCA) at 742A-C.

[15] In *Drennan Maud & Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) at p 209F-G, Oliver JA said:

'[s]ection 12(3) of the Act provides that a creditor shall be deemed to have the required knowledge "if he could have acquired it by exercising reasonable care." 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.'

In *Leketi v Tladi NO & others* [2010] 3 All SA 519 (SCA) para 18 Mthiyane JA said:

'[I]t seems to me that the adverse operation of section 12(3) is not dependent upon a creditor's subjective evaluation of the presence or absence of "knowledge" or minimum facts sufficient for the institution of a claim. In terms of section 12(3) of the Prescription Act, the "deemed knowledge" imputed to the "creditor" requires the application of an objective standard rather than a subjective one. 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 of the "fraud" on the part of Albert.'

The impact of s 12(1) read in conjunction with s 12(3) is that prescription starts to run as soon as the creditor has or ought to have knowledge of the identity of the debtor and the facts from which the debt arises.

[16] The accident in which the respondent was involved, as stated earlier, took place on 9 July 1992. His claim against the MVA Fund, in terms of article 55 of the MVA Act prescribed on 8 July 1995.

[17] The respondent alleges that after giving instructions to the appellant to lodge his claim with the MVA Fund, he regularly visited the appellant's offices to find out about progress made in his claim. On 1 July 2001 he went to the offices of the appellant and he found them closed. From July 2001 to April 2005 he did not take

any steps to ascertain what transpired with his claim. When asked why he waited for such a long period before consulting with his attorney of record he said: ‘I waited for such a long period because I did not know what to do until my friend advised me to check for another attorney’. He consulted with his attorney of record on 28 April 2005. His attorney requested him to bring her all relevant documents and he took all the relevant documents to her only on 18 January 2006. After the first consultation, he only saw her 8 months later.

[18] It is clear to me, applying an objective standard that the respondent failed to exercise reasonable care as required by s 12(3) of the Prescription Act. If he had, he would have known that the appellant did not lodge his claim at least shortly after the appellant ceased practising as an attorney. The appellant’s offices were closed from 1 July 2001, and if the respondent had made enquiries at RAF, or had consulted another attorney, the possibilities are that he could have known during 2001 that the appellant had not lodged his claim with the RAF. He would have gained knowledge of the facts from which his claims arose during 2001.

[19] The respondent consulted with his attorney of record on 18 January 2006 when he gave her the documents she requested. On 24 January 2006, his attorney, utilising his identification number, enquired from the RAF if the respondent’s

claim was lodged and she was informed that no such claim was lodged. The attorney received an answer from the RAF in six days.

The evidence reveals that the respondent's failure to institute action timeously was caused by his inaction and not his inability to obtain knowledge of the relevant facts timeously.

[21] The respondent issued summons against the appellant on 21 October 2008. In its judgment, the trial court said:

'[I] therefore conclude, that the earliest, the plaintiff could have been in a position where he had every fact necessary for him to prove and support him attaining a judgment of the court, was on the 21 January 2006. The plaintiff's claim against the defendant had not prescribed when summons was served on the defendant on the 11 November 2008.'

It is clear that the trial court did not consider s 12(3) of the Prescription Act. If the trial court was referred to and considered s 12(3), it would have been clear to the trial court that if the respondent had exercised reasonable care he could have acquired knowledge that his claim was never lodged with the RAF much earlier than January 2006, either in 2001 or the latest April or May 2005.

[22] In my view, the appeal should succeed with costs. I therefore make the following order:

(1) The appeal is upheld with costs.

(2) The order of the court a quo is set aside and replaced by the following: 'The special plea of prescription is upheld and the claim is dismissed with costs.'

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W L SERITI

JUDGE OF APPEAL

APPEARANCES:

For Appellant: R Pillemer

Instructed by:

Nichols Attorneys - Durban

For Respondents: CD Pienaar

Instructed by:

Du Toit Havemann and Lloyd Attorneys - Durban