




IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

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|--|-------------------------------------|
| (1)  | REPORTABLE: YES / NO                |
| (2)  | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3)  | REVISED.                            |
| <u>23 / 04 / 2015</u><br>DATE  |                                     |
| <br>SIGNATURE |                                     |

CASE NUMBER: 15315/2013

23/4/2015

In the matter between:

HAZEL NHLABATHI

APPLICANT

And

MPUMALANGA ECONOMIC GROWTH AGENCY

RESPONDENT

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JUDGMENT

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MAVUNDLA, J.

- [1] The Plaintiff claimed against the defendant the sum of R703 898, 35 with ancillary reliefs, which amount the plaintiff alleged was due and payable and arising out of the death benefits of her late husband Mr Qhinga Hastings Nhlabathi ("the deceased").

[2] It is common cause that the deceased was a member of Multikor Pension Fund. The death benefits prior to retirement were as follows:

2.1 Group life cover was R1 178 130. 00

2.2 Member's share was R1 015 087. 72

2.3 Spouses cover was R196 355. 00

[3] The Defendant raised a special plea that:

3.1 The plaintiff's claim arises from a pension fund benefit wherein the plaintiff was nominated as a beneficiary by her late husband who died in 2009. The plaintiff became aware of the benefits on or about 3rd August 2009;

3.2 The plaintiff's claim (which is a debt) became due and payable from February 2010 as per the plaintiff's summons after the other portion of the claim (the Group Life Cover) was dully paid by the defendant;

3.3 The plaintiff's summons was served during or about 21 March 2013, which is more than three years after the date on which the claim arose.

3.4 In the premises plaintiff's claim constitute a debt for purposes of s11 (d) and 12 of the Prescription Act 68 of 1969 and has therefore prescribed.

The plaintiff denied that the matter has prescribed.

[4] The defendant has also on the merits, pleaded that the plaintiff has waived her right to the benefit from the member's share and the spousal cover in favour of the children of the deceased, and her child born of the marriage between the plaintiff and the deceased. However, the plaintiff in her reply to the defendant's plea denied that these amounts were paid.

[5] In buttressing the special plea, counsel for the defendant submitted that the plaintiff's action was in respect of the members' share in the sum of R507 543. 86 and the spouse cover in the sum of R196 355. 00, which total amount is a debt that became due on the death of the deceased 9 July 2009) alternatively on the date the plaintiff became aware of the contract (2 February 2010). It was further submitted that the plaintiff instituted her claim in this Court three years later and therefore

her claim has prescribed ; *Umgeni Water and Others v Mshengu*<sup>1</sup>; *The Master v IL Back and Co Ltd*.<sup>2</sup>

- [6] It was further submitted on behalf of the defendant that the plaintiff's allegation that the withdrawal of the claim in the Magistrate court and subsequent issuing of same in this Court interrupted prescription has no basis in law. At the time of the withdrawal of the claim in the magistrate court, the plaintiff's claim had already prescribed and s51(1) of the Act is not applicable, contrary to the plaintiff's contention. In this regard, the defendant relied on the matter of *Van Der Merwe v Protea Insurance Co Ltd*<sup>3</sup> where it was held that: "The whole purpose of s 15 (2) of Act 68 of 1969 is that, if a creditor fails to prosecute successfully his claim under the process which interrupts prescription, either in the court in which such process commences legal proceedings, or on appeal to a higher tribunal, or, having been successful in the initial prosecution of his claim, abandons the judgment in his favour, or it is set aside on appeal at the instance of the debtor, the running of prescription is deemed not to have been interrupted. Accordingly, if the creditor commences action in a magistrate's court, withdraws it on finding that his claim exceeds the jurisdiction of that court, and commences a fresh action in the Supreme Court but only issues summons therein after the period of prescription, as from the date on which the cause of action arose, has expired, then the issue of summons in the magistrate's court, in which court the creditor had not successfully prosecuted his action to final judgment, did not serve to interrupt prescription and the creditor's right of action in the Supreme Court is prescribed."

- [7] It is common cause that the deceased had nominated the following people as his beneficiaries, namely the plaintiff 50% and his mother 50%. As the nominated beneficiary, the plaintiff was entitled to be paid 50% of the Group life cover of R1 178 130. 00 (R589065.00) and 50% of the members' share of R1 015 087.72 (R507543.86) as well as the spouses cover of R196 355. 00. The sum total the plaintiff was supposed to be paid was R589065.00 (Group life cover) + R507543.86 (members' share) + R196 355. 00 (the spouses cover) = R1, 292, 963. 86.

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<sup>1</sup> 2010 (2) ALL SA 505 (SCA).

<sup>2</sup> 1983 (1) SA 986 (A).

<sup>3</sup> 1982 (1) SA 770.

[8] The amount claimed by the plaintiff is R703 898. 86, which is the sum total of her 50% member's share and spouse's cover mentioned herein above. After hearing submissions on behalf of the defendant, this court reserved its judgment on the special plea, which was the only issue to be determined, and directed the defendant to file within 20 days all supporting documentation showing the names of the persons to whom the amount of R1 015 087. 72, in respect of the member's share, and R196 355. 00 and the spouses cover were paid and the form of payment, as well as relevant bank statements, accompanied with an affidavit filing such documentation.

[9] The defendant has since filed an affidavit deposed to by Ms Thandi Mokwena wherein she stated, *inter alia*, that:

"3.3 On the 02<sup>nd</sup> of February 2010 the Plaintiff and her mother in law as nominated beneficiaries were duly paid in each equal shares the benefits of the Group Life Cover and each signed and received an equal amount of R474 536.27 after tax and deductions, please see attached hereto copy of proof of payment as Annexure "TM1". It needs mentioning that, the defendant has not paid out the spouse's cover of R196 355. 00. In my view, the amount of R474 536.27 paid out to the plaintiff is by far less than what she was entitled to<sup>4</sup>. This is an issue that can be best explained through interrogated evidence during the trial. The defendant, in my view, is in a position of trust, in relationship with the plaintiff. The dictates of *uberrimae fidei* is akin to that is akin to However, in the event the special plea were to be upheld, that would be tantamount to slamming the door in the face of the plaintiff, depriving her of an opportunity to get to the truth of this matter.

[10] Section 12 of the Prescription Act provides:

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

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<sup>4</sup> *Vide* paragraph [7] *supra*.

- (2) If the debtor wilfully 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."

[11] In the matter of *Umgeni Water v Mshengu*<sup>5</sup> it was held that: '[5] Section 10 of the Prescription Act, No 68 of 1969 (the Act), provides for the extinction of a debt after the lapse of periods determined in s 11. The period of prescription applicable to the plaintiff's claim is that provided for in s 11(d) of the Act, namely 3 years. According to s 12(1) of the Act, prescription shall commence to run 'as soon as the debt is due'. The words 'debt is due' must be given their ordinary meaning. In its ordinary meaning a debt is due when it is immediately claimable by the creditor and, as its correlative, it is immediately payable by the debtor. Stated another way, the debt must be one in respect of which the debtor is under an obligation to pay immediately.

[6] A debt can only be said to be claimable immediately if a creditor has the right to institute an action for its recovery. In order to be able to institute an action for the recovery of a debt a creditor must have a complete cause of action in respect of it. The expression 'cause of action' has been held to mean: 'every fact which it would be necessary for the plaintiff to prove ... in order to support his right to 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'; or slightly differently stated 'the entire set of facts which give rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not "arise" or "accrue" until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action. A plaintiff must thus have a complete cause of action at the stage when summons is issued or at any rate when the summons is served."

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<sup>5</sup> *Supra* at 508e-f.

[12] The running of prescription shall be interrupted in terms of s14 (1) of the Act by an express or tacit acknowledgment of liability by the debtor, or in terms of subsection (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."

[13] Attached to the affidavit of Ms Mokwena is annexure 'TM3', *inter alia*, which is a letter from the defendant addressed to the plaintiff's erstwhile Duke Attorneys dated 6 July 2010. It is apposite to chronicle the contents thereof in full:

"Your letter dated 22 June 2010 and our response thereto of June 2010 has reference.

We hereby like to inform you that the Trustees took a resolution based on the Benefit Calculator received from Sanlam.

The Trustees agreed on the following:

That both the mother and spouse be excluded from the remaining payout since they received money from pension savings.

The children be maintained until the age of 18 years and that all the qualifying children up to the age of 18 years are allocated values according to the maintenance income and therefore remaining balance be distributed to all 8 children at an equal share each be maintained;

That all minor (under 18 years) children's benefits be paid into a Trust Account until they each reach their maturity. The guardians will request the withdrawals as per needs of children and their education;

Lastly, that the balance of R36 034.28 being the Advance granted to the family for burial costs by MEGA be deducted equally from the shares before any payout of the remaining money since it could not be deducted from Pension.

We further like to indicate that the resolution has since been sent to Multikotr (Sanlam) and you will be informed as soon as the payment is done."

[14] In the matter of *Roestorf v Johannesburg Municipal Pension Fund*<sup>6</sup> the Supreme Court of Appeal held that: “[19] Section 14 of the Prescription Act provides that:

'(1) The running of prescription shall be interrupted by an express or tacit acknowledgement 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.'

*In Agnew v Union and South West Africa Insurance Co Ltd* 1977 (1) SA 617 (A) at 623A this court approved the dictum of Broome JP in *Petzer v Radford (Pty) Ltd* 1953 (4) SA 314 (N) at 317H: J

'To interrupt prescription an acknowledgement by the debtor must amount to an admission that the debt is in existence and that he is liable therefor.'

[15] It is not in dispute that the plaintiff commenced an action in the Magistrate's Court in which she claimed for the remaining half of the pension held by the defendant. She subsequently withdrew that action and issued a new summons out of the High Court on 12 March 2013. In my view the defendant, *vis a vis* the plaintiff was in a position of trust. The dictates of trust demand of the defendant to have *uberrimae fides*, entailing, in the circumstances of this case to make full disclosure of what was due to the plaintiff right from on the onset. The contents of annexure "TM3" are lucid and clear admission that the defendant was still holding some moneys still to be paid out. This admission was only made on 22 June 2010. This admission, in my view, brings this matter squarely within the purview of the authorities cited herein *supra* et *infra*. As stated in *Erasmus v Grunow en Ander*<sup>7</sup> "Also the debtor who avers that he has already performed partly admits liability to the creditor in respect of a particular debt. It can certainly not be said in any of these cases that the debtor denies liability."<sup>8</sup> As Van Heerden J pointed out in *Erasmus v Grunow en 'n Ander (supra)* that: 'the wording of ss 14(1) and 15(1) of the Act leads to the conclusion that the legislature intended that a

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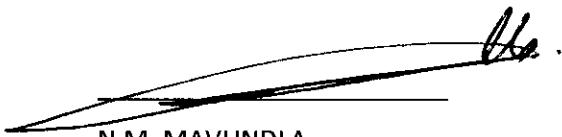
<sup>6</sup> 2012 (6) SA 184 (SCA) at 189.

<sup>7</sup> 1978 (4) SA 233 (O) at 244A-D at 244E-245H.

<sup>8</sup> Vide *Roestorf* case *supra* at footnote page 190

partial acknowledgement of a debt should have effect of interrupting prescription in respect of the whole debt.' In my view, by making partial payments and withholding other payments, and by the very fact that the defendant was still determining and processing final payment, which fact was privy not to the plaintiff but to the defendant itself until June 2010, has thereby protected the running of prescription. The running of prescription, in my view, could only resume on the date on which annexure TM3 was received by the plaintiff's attorney, which must have been in June 2010. The summons were issued in March 2013 and the plaintiff's right to claim could therefore not have prescribed.

[16] In the premises I conclude and find that the plaintiff's right to sue the defendant has not prescribed. The special plea stands therefore to be dismissed with costs, as I do.



N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

Date of Hearing : 16 / 09 / 2014

Date of Judgment : 23 / 04 / 2015

APPLICANTS' ATTORNEYS : NKOSI ATTORNEYS AND ASSOCIATED

APPLICANTS' ADVOCATE : NO APPEARANCE

DEFENDANT'S ATT : MATSANE ATTORNEYS INC

DEFENDANT'S ADV : MR. F.I. BALOYI.