



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 18/24079

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| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES /NO |
| (3) | REVISED. |
| | 01.02.2022 |
| |  |
| | DATE SIGNATURE |

In the matter between:

MDLALOSE MDUDUZI ISHMAEL

Plaintiff

and

DOCTOR BRENDAN LYNE MEDICAL PRACTICE

First Defendant

DOCTOR NATASHA FAKIER

Second Defendant

DR BRENDAN SEAN BLAIR

Third Defendant

JUDGMENT

CRUTCHFIELD J:

[1] This is a medical negligence action brought by the plaintiff, Mduduzi Ismael Mdlalosi, a male member of the South African Police Service. The plaintiff's claim is for damages pursuant to the alleged unlawful and negligent conduct of the defendants, Dr Brendan Lyne Medical Practice, Dr Natasha Fakier and Dr Brendan Sean Blair, the defendants before me.

[2] The plaintiff issued the action initially against the Meredale Medical Centre (Pty) Ltd only. Thereafter, the plaintiff issued an application for joinder of the three defendants referred to afore. This Court, on 5 November 2018, granted an order joining the three defendants to the proceedings. On 2 December 2019, the plaintiff withdrew the action against the Meredale Medical Centre (Pty) Ltd.

[3] On 25 January 2019, the plaintiff served the amended combined summons and particulars of claim, the order for joinder, the defendant's special plea and the amended pages on the defendants.

[4] The defendants raised a special plea of prescription that I heard separately by agreement between the parties, prior to the parties commencing with the evidence on the issue of the defendants' alleged liability in the medical negligence claim.

[5] The special plea comprised of two legs:

5.1 Firstly, that in terms of s 12(3) of the Prescription Act, 68 of 1969 ('the Act'), the plaintiff had knowledge of the identity of the defendants and the facts giving rise to the debt on 4 December 2015. Accordingly, the claim expired on 3 December 2018.

5.2 Secondly, that service of the amended summons and relevant documents aforementioned, including the order of joinder, on the defendants on 29 January 2019 did not serve to interrupt prescription as the claim prescribed on 3 December 2018.

[6] The defendants carried the onus to prove the special plea of prescription and the plaintiff to prove the interruption of prescription.

[7] The defendants led the evidence of the second defendant, Dr Natasha Fakier, who testified that the treating doctors introduced themselves to the plaintiff at the respective consultations. Furthermore, that the forms necessary for a claim in terms of the workman's compensation regime, reflecting the names and practice numbers of the defendants, were handed to the plaintiff after the plaintiff attended upon the relevant defendants.

[8] The defendants then closed their case on the special plea of prescription and the plaintiff led the evidence of the plaintiff himself. The latter confirmed essentially that the names and practice numbers of the defendants were available to him, and that he had knowledge of the facts underpinning the debt on 4 December 2015 at the latest.

[9] The plaintiff, having heard the evidence, conceded that the plaintiff had knowledge of the underlying facts as at 4 December 2015. Thus, the claim prescribed on 3 December 2018, a point on which the parties were *ad idem*.

[10] The sole remaining issue was whether the granting of the order of joinder on 5 November 2018 served to interrupt prescription in terms of s 15 of the Act.

[11] Section 15 provides for judicial interruption of prescription. Section 15(1) provides for the interruption of prescription by service on the debtor of any process whereby the creditor claims payment of the debt.

[12] Four decisions of our courts are relevant to the issue before me; the decision of Howie J in *Cape Town Municipality & Another v Allianz Insurance Co Ltd*,¹ that of the Supreme Court of Appeal in *Peter Taylor & Associates v Bell Estates (Pty) Ltd & Another*,² followed by *Huyser v Quicksure (Pty) Ltd & Another*³ in the Gauteng Division and *Nativa Manufacturing (Pty) Ltd v Keymax Investments 125 (Pty) Ltd & Others*.⁴

[13] The plaintiff relied on *Huyser* and the defendants on *Nativa*.

[14] The plaintiff argued that the granting of the joinder order was a judicial pronouncement of joinder that served to interrupt prescription in terms of s 15(1) of the Act. Secondly, that the application for joinder was a process as envisaged in *Allianz*⁵ and referred to in *Nativa*,⁶ being a process whereby:

14.1 'The proceedings begun thereunder are instituted as a step in the enforcement of a claim for payment of a debt'; and

14.2 'A creditor prosecutes his claim under that process to final, executable judgment, not only when the process and the judgment constitute the beginning and end of the same action, but also where the process

¹ *Cape Town Municipality & Another v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C) ('Allianz').

² *Peter Taylor & Associates v Bell Estates (Pty) Ltd & Another (Pty) Ltd* 2014 (2) SA 312 (SCA) ('Peter Taylor').

³ *Huyser v Quicksure (Pty) Ltd & Another* [2017] 2 All SA 209 (GP) ('Huyser').

⁴ *Nativa Manufacturing (Pty) Ltd v Keymax Investments 125 (Pty) Ltd & Others* 2020 (1) SA 235 (GP) ('Nativa').

⁵ *Allianz* above n 1 at 334H-I.

⁶ *Nativa* above n 4 para 12.1 – 12.2 referring to *Allianz* above note 1 at 334H-I.

initiates an action, judgment in which finally disposes of some elements of the claim, and where the remaining elements are disposed of in a supplementary action instituted pursuant to and dependent upon that judgment.⁷

[15] Keightley J⁷ contextualised the findings in *Allianz*⁸ that were referred to and relied upon by the Supreme Court of Appeal in *Peter Taylor*.⁹

[16] The court in *Nativa*¹⁰ found that *Allianz* did not deal with an application for joinder but with a declarator to the effect that the defendant was liable to indemnify the plaintiff under an insurance policy. Howie J found that the declarator was a process that served to interrupt prescription in terms of s 15 of the Act.¹¹

[17] The reasons were twofold. Firstly, that the proceedings for the declarator constituted a 'step in the enforcement of a claim for payment of a debt,'¹² in that the judgment in the declaratory proceedings finally disposed of some of the elements of the claim, being liability under the insurance policy, with the balance of the required elements being determined in a supplementary action linked to and dependent upon that judgment.¹³ The supplementary and dependent action in *Allianz* was a claim for payment of the amount for which the defendant was liable under the insurance policy.

[18] Thus, the action for payment in *Allianz* arose pursuant to declaratory proceedings that determined the issue of liability under the insurance policy. Accordingly, there was

⁷ *Nativa* above n 4 para 12.3.

⁸ *Allianz* above note 1 at 316E-F.

⁹ *Peter Taylor* above n 2 para 8.

¹⁰ *Nativa* above n 4 para 12.3.

¹¹ *Id.*

¹² *Id* para 12.1.

¹³ *Id* para 12.6.

a 'substantive link', a 'shared cause of action,'¹⁴ between the declaratory proceedings and those for payment of the amount due, sufficient to interrupt the payment of prescription.

[19] The process before me is an application for joinder together with an order of court ordering joinder of the three defendants.

[20] Finalisation of the joinder application by way of the granting of the order of joinder served, in my view, only to add the defendants as parties to the action but did not finalise any of the necessary elements of the medical negligence claim.¹⁵

[21] The application for joinder did not move the substantive process of the medical negligence claim a step closer towards 'the enforcement of a claim for payment of a debt'.¹⁶ It served only to include the defendants as parties who were potentially liable under the claim. Nor did the judgment in the application for joinder dispose of an element of the medical negligence action as occurred in *Allianz*.¹⁷

[22] Furthermore, the cause of action in the joinder application comprised the required elements of a claim and order for joinder in terms of rule 10 of the uniform rules of court. Joinder is a procedure governing the addition of parties and/or causes of action whatever the characterisation of the main claim and the necessary elements of the main claim may be. The medical negligence claim in this matter served as context to the joinder application but did not share a cause of action with the joinder application.

¹⁴ Id para 12.4.

¹⁵ Id para 12.6 referring to *Allianz* at 317G-I.

¹⁶ Id para 12.1 referring to *Allianz* at 316F-H.

¹⁷ Id para 12.3.

[23] The required elements of the joinder application are markedly different from those of the medical negligence claim.

[24] The next issue is the effect of the granting of the order of joinder pursuant to the joinder application. In *Nativa* the joinder application was heard at a stage when the claim against the proposed defendant had already prescribed.¹⁸ This is distinguishable from the matter before me in which the claim against the defendants had not prescribed as and when the order for the defendants' joinder to the action was granted.

[25] In my view, in order for the granting of the joinder order to have the effect of interrupting prescription in terms of s 15 of the Act, the order had to be served upon the defendants together with the amended summons and particulars of claim and such additional process as had been delivered in the matter as at that stage. Furthermore, service of the joinder order together with the various relevant documents had to be effected during the prescriptive period, the last day for such service being 3 December 2018.

[26] The necessity for service of the order and relevant documents during the prescriptive period was dealt with by Keightley J in *Nativa*,¹⁹ relying on *Allianz*,²⁰ to the effect that under the Act service of a process claiming payment of a debt is required in order to complete the requirements of s 15(1). The requirement for service of the process claiming payment of the debt arises from the necessity for certainty as between the debtor and the creditor. It is only upon service on the debtor that the latter is required to comply with the demand for payment or to take steps to defend the process.

¹⁸ *Nativa* above n 4 para 3.

¹⁹ *Id* para 16.

²⁰ *Allianz* above n 1 at 329H-I.

[27] Keightley J relied on Howie J's finding that it is service of the process claiming payment of the debt that comprises the 'taking of judicial steps to recover the debt, thereby removing all uncertainty as to its existence'.²¹

[28] Furthermore, Keightley J noted²² that it is the service of the process, not the issue of the process, that institutes the proceedings. Service on the defendant requires the defendant to answer to the claim.

[29] Hence, in my view, not only did the plaintiff have to procure the order for the joinder of the defendants within the three-year period terminating on 3 December 2018 but also had to effect service of the order together with the relevant documents, on or before 3 December 2018, being within the prescriptive period.

[30] Regard being had to the judgment in *Huyser*,²³ I am in respectful agreement with the findings of Keightley J in *Nativa*²⁴ that there is no substantive difference in an order that seeks the joinder of a prospective defendant or an order that seeks the leave of the court to join a prospective defendant to the proceedings.

[31] In the circumstances, I respectfully align myself with the judgment of Keightley J in *Nativa* and find that the special plea of prescription is upheld.

[32] Accordingly, I grant the following order:

1. The special plea of prescription is upheld and the action is dismissed with costs.

²¹ *Nativa* above n 4 para 18 referring to *Allianz* at 317D.

²² *Nativa* id at footnote 23.

²³ *Huyser* above note 3

²⁴ *Nativa* above n 4 para 23.

I hand down the judgment.



CRUTCHFIELD J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 1 February 2022.

COUNSEL FOR THE PLAINTIFF: Mr T Mathopo.

INSTRUCTED BY: N. T Mdlalose Incorporated.

COUNSEL FOR THE DEFENDANTS: Mr L Choate.

INSTRUCTED BY: Webber Wentzel Attorneys.

DATE OF THE HEARING: 31 January 2022.

DATE OF JUDGMENT: 1 February 2022.