IN THE KWAZULU-NATAL HIGH COURT, DURBAN REPLUBLIC OF SOUTH AFRICA

Case No: **13668/2008**

In the matter between:

RAMESH ANIRUDH Plaintiff

and

HAROLD GUNASE Defendant

JUDGMENT

HUGHES-MADONDO AJ

This is a matter concerning a special plea of prescription.

On the 9 July 1992, the plaintiff, Ramesh Anirudh was involved in a motor vehicle collision. He instructed the defendant, Harold Gunase, then an attorney, in early 1993 to lodge a third party claim against the Road Accident Fund (RAF) in terms of the Motor Vehicle Act No.93 of 1989, on his behalf.

On the 24 January 2006 he discovered that the defendant had not lodged the third party claim as instructed and the time frame to do so had come and gone. His third party claim against the RAF had actually prescribed on the 8 July

1995.

As a consequence of the defendant's failure to lodge his claim timeously, the plaintiff issued summons on the 28 October 2008. The plaintiff alleged that the defendant's negligence in failing to lodge his claim, resulted in him suffering a loss of R2 375 500.00, which would have ordinarily been paid by the RAF.

The plaintiff alleged in the particulars of claim "During or about the period 1992 and 1993…the Defendant accepted the Plaintiff's instructions to lodge" his third party claim. By the acceptance of such instructions an implied term was that the defendant would perform his services in a proper and professional manner and without negligence. The defendant acted negligently by failing to lodge his claim timeously or at all.

The defendant raised a special plea of prescription. The defendant stated that in terms of Section 11(d) of the Prescription Act 68 of 1969 the plaintiff had three years to institute an action against him. That more than three years had lapsed after which time the Plaintiff ought to have had knowledge or could by reasonable care have had knowledge that his claim had not been lodged and thus prescribed. The plaintiff should have served his summons commencing this action within three years from the alleged failure or negligence of the defendant.

The plaintiff replicated to the defendant's special plea and plea. In his replication he admitted that section 11(d) of the Prescription Act is applicable.

However averred that in terms of section 12(3) of the Prescription Act, he was entitled to serve his summons only when he had specific knowledge of who the debtor was and the facts from which the debt arose. He replicated that he only became aware of the defendant as being the debtor, during or about January 2006, when his present legal representative ascertained from the RAF that his claim had not been lodged. He then served his summons against the defendant on the 11 November 2008.

The issue for that I am tasked to determine is whether the plaintiff's claim against the defendant has indeed prescribed as pleaded by the defendant in his special plea.

The plaintiff was a panel beater at the time he was involved in the motor vehicle accident pertinent to this matter. He is a fifty year old gentleman with a standard eight level of education. He is currently in receipt of a disability grant. He identified the defendant positively in court as being the person he had instructed to lodge his third party claim in early 1993. He testified that he use to frequent the defendant's offices on a monthly basis for a period of "three years" to establish progress with his claim. His evidence was that he did so because he was informed by the defendant's office that 'they would be working with the case and I must keep on going down there.' He recalled that the defendant had moved premises and that he had also visited these new premises.

On one of such visits, on the 1 July 2001, he found the offices closed down. That was the last time that he went to the defendants offices. He did nothing thereafter until 2005 when his sister after some investigation established that Aggie Govender, an attorney, had taken over the defendant's practice. His sister attended on Govender's offices on his behalf and on the 29 March 2005 she was advised by Govender's offices that his file was lost. She relayed this information to him. His friend Vijay Pillay then assisted him by referring him to his erstwhile attorney, he did so to because as he says 'I thought that my file and everything was lost and I received some money.'

On the 28 April 2005 he attended at his erstwhile attorney offices for the first time. Two months after his initial consultation provide his attorney information on a slip of paper which contained the date that the collision took place, the defendant's details as the "old attorney", Govender's details as the "new attorney", his address and contact numbers and also the information received from Govender that his file was lost. This slip formed part of his paper and was indexed as "details of the plaintiff's endeavors to obtain his file".

At the time that he had his first consult with his current attorney, he knew that Govender had taken over the defendants practice and that they had advised that his file was lost. His evidence is that he explained the history of his matter to his attorney at the first consultation. He conceded that he was advised at that consult that his claimed could have prescribed had it not been lodged. He

further conceded that the summons was served some three years after his first consultation with his attorney.

Plaintiff's evidence is that after 2000 he had thought that the RAF must have paid the defendant and the defendant had not paid over these monies to him. However he did nothing about these thoughts until he was advised by his friend to see his erstwhile attorney on 28 April 2005.

He added that to his knowledge summons had been served on the defendant to "check where his file is or whether they collected any monies."

The plaintiff's sister, Mira Singh, gave evidence on his behalf. Nothing much turns on her evidence since she could not assist with the dates for when specific events took place. However she did confirm that she had introduced the plaintiff to the defendant. At the first consultation with the defendant she was present and he had been instructed to lodge a third party claim. She confirmed that the plaintiff had informed her that he had discovered that the defendant had closed offices. She had established Govender had taken over the defendant's practice and they advised her that the plaintiff's file was lost. She also positively identified the defendant.

The plaintiff's erstwhile attorney, Anushka Parbhoo, gave evidence. She reaffirmed that the first consultation with the plaintiff was on the 28 April 2005. She was advised by the plaintiff at that consult that he had been waiting

for money in respect of his claim and had not received it as yet. Her evidence is that at the first consultation with the plaintiff, he handed to the attorney an affidavit that he had made to the police dated 5 April 2006 and the slip of paper that contained the details of his endeavors to obtain his file. At that stage even though she had information before her that the injuries had occurred 13 years ago she did not call the attorney who had represented the plaintiff to establish what had happened to his claim, but she did ask him to bring the file contents so that she could have a look at it. She next consulted with him on the 18 January 2006. On the 24 January 2006 she then established from the RAF that plaintiff's claim had not been lodged. On the same day she states that she advised the plaintiff of the fact that his claim was not lodged. A letter of demand was sent to the defendant on the 23 June 2006, she went on maternity leave thereafter and the summons was only issued and served on her return on the 11 November 2008.

In terms of section 12(1) of the Prescription Act, prescription commences to run 'as soon as the debt is due'. It is settled that, in the broadest sense, "debt" in relation to the Prescription Act refers to "an obligation to do something, whether by payment or by the delivery of goods and services, or not to do something" – see *Burley Appliances Ltd v Grobbelaar* **2004 (1) SA 602 (C)** at **613B-C**.

A debt will only be said to be claimable immediately if the creditor has the right to immediately institute an action for the recovery of such debt. In order to do so the creditor need have a complete cause of action in respect of that

debt. - see *HMBMP Properties (Pty) Ltd v King* **1981(1) SA 906 (N) 909A-B.**

In *Evins v Shield Insurance Co Ltd* **1980 (2) SA 814 (A) at 838** the meaning of the term 'cause of action' was discussed:

"The meaning of the expression 'cause of action', as used in various statutes defining the jurisdiction of courts or proving for the limitation of actions and in other contexts, has often been considered by Courts. In *McKenzie v Farmers Co-operative Meat Industries Ltd* **1922 AD 16** this Court held that, in relation to statutory provision defining the geographical limits of the jurisdiction of the magistrate's court, 'cause of action' meant-'…every fact which it would be necessary for the plaintiff to prove, if transverse, 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.' "

In light of the above, in the present case there is no evidence before me that the defendant had not been instructed by the plaintiff to institute a third party claim against the RAF. It therefore stands that the defendant was obliged to deliver a service to the plaintiff. It cannot be disputed that the defendant failed to deliver such a service since he allowed the plaintiff's claim to prescribe when he failed to lodge the claim. The evidence of the plaintiff supports this conclusion; consequently the defendant owed the plaintiff a 'debt'.

This debt will become claimable when the creditor has a right to institute an

action and in order to do so the creditor must have a complete cause of action. In this case the cause of action is simple; the defendant allowed the plaintiff's claim to prescribe by his negligence in not lodging the claim as instructed. The plaintiff therefore had a claim against the defendant as a result of his negligence.

This claim the defendant contends has in turn prescribed. The plaintiff had three years in terms of Section 11(d) of the Prescription Act to institute his action, but only did so on the 11 November 2008 when summons was served. This the defendant alleges was way beyond the three years after the defendants negligence arose or when the plaintiff ought to have knowledge or could by the exercise of reasonable care have knowledge that his claim had not been lodged and thus prescribed.

The plaintiff correctly concedes that Section 11(d) is applicable in the circumstances of this case. The plaintiff replicates that in terms of Section 12(3) of the Prescription Act, he was entitled to serve his summons when he did, because that was the time when he had specific knowledge of who the debtor was and had the knowledge of the facts from which this debt arose. The plaintiff's case is that this knowledge only came to hand 'during or about January 2006'.

On a careful examination of the conduct of the plaintiff it is noted that for three years after his initial consultation with the defendant in 1993 he

frequented the defendant's offices once a month. His undisputed evidence is that he was advised on each visit that they were waiting for results and he should keep coming to check, which he did. This three year period would then take us up to 1996. His claim prescribed around the 8 July 1995. Within that period he was never advised that his claim had prescribed and this evidence was not challenged by the defendant.

The plaintiff called on the defendant on 1 July 2001 and discovered that he has vacated his offices. He also stated that sometime after 2000 he did think that the defendant must have received his money and not advised him. Even though he has this suspicion he is still under the impression that he has a valid claim. After some investigation by his sister in 2005 he now becomes aware that his file is in fact lost. He is advised by his friend to consult another attorney, he does so. His evidence is that the reason behind him going to see his current attorney was "I thought my file and everything has been lost and I received some monies". Yet again the plaintiff was still under the impression that his claim had been lodged and now he thought that it must have been finalised and paid.

The only time that he receives information to the contrary is on the 24 January 2006, when the current attorney establishes from the RAF that the claim was never lodged and it's now clear that the claim has prescribed. It is my view that on that date the plaintiff now had before him all the facts which he required in order to succeed with his claim against the defendant. In my mind

this is when prescription began to run, see *Truter v Deysel* **2006 (4) SA 168 SCA paragraph 16** " 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."

It is trite that the onus rest with the defendant to prove when the plaintiff could have acquired this knowledge of the debt. Mr. Pillimer who represented the defendant put the defendant's version to both the plaintiff and his sister, but did not substantiate the defendant's version by calling the defendant to give this evidence under oath so that it could be tested under cross examination.

Ms. Stitch also made some submissions which were not contained in the plaintiff's replication. These pertained to section 12(2) of the Prescription Act, which says that if a debtor willfully prevents the creditor from coming to know of the existence of a debt, prescription would only start to run once the creditor becomes aware of the existence of the debt. In this instance the defendant willfully withheld from the plaintiff the fact that he had not lodged the plaintiff's claim thereby allow it to become prescribed. This information was within the defendant's knowledge and by preventing the plaintiff from getting to know about this fact, in turn prevented the plaintiff from having the entire

relevant factor necessary to institute an action against the defendant.

I therefore conclude, that at 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. The special plea of the defendant must fail and is dismissed.

In respect of the costs, I am not in a position at this stage to speculate whether any damages will be proven in due course, or whether these will fall within the jurisdiction of this court or the Magistrates court. I therefore propose to reserve the issue of costs for the trial court.

I make the following order:

1. The special plea is dismissed.
2. The costs are to be reserved for the determination of trial court.

HUGHES-MADONDO AJ

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APPEARANCES:

Counsel for the Plaintiff: Ms T Stretch

Attorneys for Plaintiff: Du Toit Havemann & Lloyd

Counsel for the Defendant: Mr P Pillemer

Attorney for Defendant: Nichols Attorneys

Heard on: 31 March 2010 and resumed on the 14-15 June 2010

Delivered on: September 2010