THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**: 365/12**

REPORTABLE

In the matter between:

CHARLES ROBERT MACLEOD **APPELLANT**

and

BABALWA KWEYIYA **RESPONDENT**

Neutral citation: *Macleod v Kweyiya* (365/12) [2013] ZASCA 28 (27 March 2013)

Coram: Mthiyane DP, Tshiqi and Majiedt JJA and Plasket and Saldulker AJJA

Heard: **28 February 2013**

Delivered: **27 March 2013**

Summary: Section 12(3) of the Prescription Act 68 of 1969 – constructive knowledge – onus on the defendant to prove – no evidentiary burden on the defendant to testify unless prima facie case established – no negative inference to be drawn from failure by the defendant to testify – s 12(3) of the Prescription Act seeks to prevent not innocent but negligent inaction.

ORDER

On appeal from: Western Cape High Court, Cape Town (Gamble J sitting as a court of first instance)

The appeal is dismissed with costs.

JUDGMENT

TSHIQI JA (MTHIYANE DP, MAJIEDT JA AND PLASKET AND SALDULKER AJJA CONCURRING):

[1] The issue in this appeal is whether the respondent's claim for damages against the appellant, has prescribed. On 30 January 1988, when she was approximately four years old, the respondent sustained injuries and was rendered a paraplegic in a motor vehicle accident between two motor vehicles, a Valiant, in which she was a passenger, and a Toyota. The appellant is a practising attorney who was instructed by the respondent's mother to institute a damages claim in her personal capacity and in her capacity as the respondent's guardian against the statutory insurers of the two drivers. On 26 March 1993, the appellant issued summons in the Western Cape High Court, Cape Town claiming an amount of R25 000 in respect of the Valiant, and an amount of R870 220 in respect of the Toyota.

[2] On 18 March 1996 the claim was partially settled and the settlement agreement was made an order of court. In terms of that order it was stated that an amount of R25 000 had already been received from the statutory insurer of the Valiant and that the insurer of the Toyota agreed to pay 35 per cent of any damages the respondent's mother could prove, both in her personal capacity and in her capacity as the respondent's guardian. The amount of R25 000 paid by the insurer of the Valiant would be taken into account when the damages claim against the insurer of the Toyota was quantified. In

February 1997, subsequent to the order by the high court, the particulars in respect of the unsettled claim were amended, thereby increasing the claim to an amount of R2.3 million. In May 1997, the claim was settled at an amount of R99 500, which when added to the R25 000 amounted to R124 500. It is undisputed that the appellant was at all times at that stage acting on the instructions of the mother and that she accepted the settlement amount.

[3] On 5 March 1998, the appellant wrote a letter to the respondent's mother giving her a detailed account reflecting that she was entitled to receive an amount of R14 000 in cash; that payment in the amount of R30 081.05 together with agent's fees in the amount of R27 337.90 was made for a house bought and registered in her name in Khayelitsha; and that several disbursements including experts' and legal fees were also paid. The original title deed was enclosed. At the bottom the letter states: '… as you know, we had some difficulty with the final settlement but our Counsel advised that in the circumstances it was a good settlement.'

[4] At the time of the settlement the respondent was approximately 13 years old, and almost 14 years old at the time the accounting was made to her mother. On 29 April 2005, she reached the majority age of 21 years. In early 2006 the respondent visited the offices of the appellant and was, according to the appellant, 'in quite a state' because she had been 'kicked out' of the house by her mother and wanted to know what she could do to get the house back. It is uncontroverted that the details of the claim were not discussed during that meeting and that they were in any event not available as the file had already been archived. The appellant could also not assist the respondent with the dispute because of conflict of interest. She was instead referred to the Legal Aid Board, was told there was no more money payable to her and was promised that the full documentation would be sent to her by Ms Stroud, the appellant's candidate attorney. There may have been another meeting between the respondent and Ms Stroud after the first meeting, but nothing turns on that. On 19 April 2006, Ms Stroud sent an e-mail to the respondent enclosing the court order, a letter from the Road Accident Fund confirming the settlement amount paid, a breakdown of the payments made to the company that

built the house and the detailed account sent to her mother. It was suggested in the letter that she should consult the Legal Aid Board and its telephone numbers were furnished.

[5] On 8 April 2009, when she was almost 25 years old and 11 years after the appellant had accounted to her mother, she caused a summons to be issued against the appellant in the Western Cape High Court, Cape Town. She alleged that in settling the quantum of the claim against the statutory insurer of the Toyota, the appellant had acted negligently, in breach of contract and duty of care. She stated that the claim should have been settled at an amount of about R2,1 million. She quantified the monetary value of that amount (at the time she issued the summons), to be about R4,8 million less the settlement amount of R124 500 and claimed an amount of about R4,7 million. In her particulars of claim she anticipated a possible plea of prescription by stating that she only became aware of the terms of the settlement agreement when she received the e-mail from Ms Stroud on 19 April 2006. She further alleged that she first consulted with her present attorneys on 4 February 2009, and that it was only then that she became aware that the appellant had acted negligently. She contended that prescription only began to run from either of those dates. In his plea the appellant denied knowledge of those facts and also filed a special plea of prescription contending that between 1997 (at the time the claim was settled with the RAF), 1998 (at the time the final account was rendered to the respondent's mother), by at least April 2002 (when she was 18 years old) and by April 2005 (at the time she attained the majority age of 21 years), the respondent knew or could have reasonably known the identity of the debtor and the facts on which her debt against the appellant arose.

[6] During the hearing, before Gamble J, the issue of prescription was separated by the court and heard before the commencement of the main trial in terms of rule 33(4) of the Uniform rules. The appellant testified and also led the evidence of Ms Stroud. The respondent did not testify and closed her case without calling any witnesses. The court concluded that it had not been shown that the respondent could reasonably have acquired knowledge of the facts material to her claim before 19 April 2006 and ruled that

her claim had not prescribed. The special plea was consequently dismissed with costs. The appeal to this court is with the leave of that court.

[7] Two interrelated issues arise in this appeal: (a) whether the respondent knew or could have reasonably known the identity of the debtor and the facts on which her debt against the appellant arose before April 2006; and (b) whether an adverse inference should be drawn from the failure by the respondent to give evidence about her state of mind, circumstances or conduct during that period, or at any stage prior to the service of summons on 8 April 2009.

[8] As to the first issue the appellant contends that the plaintiff's mother knew, or at least could reasonably have known, the facts relating to the alleged debt, as well as the identity of the debtor in May 1997, when the claim was settled or in March 1998 when the full account was furnished to her. On that basis, the argument continues, it should be inferred that there is at least a prima facie case that the respondent, who at all times lived with her mother, also had that knowledge or could have reasonably acquired it. In so far as further information was needed, it could have been obtained from the appellant who was at all times accessible from 1996 onwards. The contention by the appellant amounts to an assertion that the respondent should have been suspicious of her mother and the appellant and that she should have demanded to know the details of the settlement and should then have been able to establish at that stage if there was negligence on the part of the appellant. He asserts that she would have been in a position to sue him within one year of turning 21 years old. The respondent, on the other hand, submits that it was perfectly innocent and reasonable for her, at the age of twelve, when the settlement agreement was concluded, to trust that her mother and the appellant had acted in her best interests. Once she reasonably formed that belief when she was twelve, there was no reason for her to alter that belief without new evidence. There was no reason for her to actively search for information implicating her mother or the appellant. However, when she, by chance, obtained information about the settlement on 19 April 2006, she sued the appellant within three years.

Prescription

[9] In terms of s 11*(d)* read with s 12(1) of the Prescription Act 68 of 1969, civil debts prescribe three years from the date the debt is due.[1] Section 12(3) of the Prescription Act, which is at the heart of this matter, delays prescription in certain circumstances. It reads:

'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.'

In order to successfully invoke s 12(3) of the Prescription Act, either actual or constructive knowledge must be proved.[2] Actual knowledge is established if it can be shown that the creditor actually knew the facts and the identity of the debtor. The appellant places no reliance on actual knowledge but on constructive knowledge. Constructive knowledge is established if the creditor could reasonably have acquired knowledge of the identity of the debtor and the facts on which the debt arises by exercising reasonable care. The test is what a reasonable person in his position would have done,[3] meaning that there is an expectation to act reasonably and with the diligence of a reasonable person. A creditor cannot simply sit back and 'by supine inaction arbitrarily and at will postpone the commencement of prescription'.[4] What is required is merely the knowledge of the minimum facts that are necessary to institute

[1] In order for the debt to be due under s 12(1), it must be immediately claimable (see *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 532G-I), or in other words, the various components of the cause of action should have fully accrued (see *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838-839).

[2] *Gericke v Sack* 1978 (1) SA 821 (A) at 826A-827B.

[3] *Drennan Maud & Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) at 209F-G.

[4] *Gunase v Anirudh* 2012 (2) SA 398 (SCA) paras 14-15; *Uitenhage Municipality v Molloy* 1998 (2) SA 735 (SCA) at 742A-C.

action and not all the evidence that would ensure the ability of the creditor to prove its case comfortably.[5]

Evidentiary burden

[10] This court has repeatedly stated that a defendant bears the full evidentiary burden to prove a plea of prescription, including the date on which a plaintiff obtained actual or constructive knowledge of the debt. The burden shifts to the plaintiff only if the defendant has established a prima facie case. In *Gericke v Sack* 1978 (1) SA 821 (A) 827D-E the court stated:

'…it will at times be difficult for a debtor who pleads prescription to establish the date on which the creditor first learned his identity or, for that matter, when he learned the date on which the delict had been committed.

But that difficulty must not be exaggerated. It is a difficulty which faces litigants in a variety of cases and may cause hardship - but hard cases, notoriously, do not make good law. It is not a principle of our law that the *onus* of proof of a fact lies on the party who has peculiar or intimate knowledge or means of knowledge of that fact. The incidence of the burden of proof cannot be altered merely because the facts happen to be within the knowledge of the other party. See *R.* v. *Cohen*, 1933 T.P.D. 128. However, the Courts take cognizance of the handicap under which a litigant may labour where facts are within the exclusive knowledge of his opponent and they have in consequence held, as was pointed out by INNES J, in *Union Government* (*Minister of Railways*) v. *Sykes*, 1913 A.D. 156 at p. 173, that

"less evidence will suffice to establish a *prima facie* case where the matter is peculiarly within the knowledge of the opposite party than would under other circumstances be required".'

But the fact that less evidence may suffice does not alter the onus which rests on the respondent in this case.

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[5] *Van Staden v Fourie* 1989 (3) SA 200 (A) at 216B-F; *Nedcor Bank Bpk v Regering van die Republiek van Suid Afrika* 2001 (1) SA 987 (SCA) paras 11-13; *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Planning and Local Government, Gauteng* 2009 (3) SA 577 (SCA) para 37; *Claasen v Bester* 2012 (2) SA 404 (SCA) paras 10-16.

[11] Bearing in mind the fact that the appellant bore the onus, there is no basis, on the facts of this matter, to conclude that it was necessary for the respondent to lead evidence in rebuttal. The facts are largely common cause. There was nothing in the appellant's evidence that the respondent needed to rebut. Equally, no adverse inference can be drawn from her failure to testify.

[12] In her particulars of claim the respondent alleged that she 'first became aware of the terms of the settlements on or about 19 April 2006' when the appellant's candidate attorney e-mailed certain documents to her. She further alleged that it was only on 4 February 2009, when she consulted her attorneys that she 'first became aware that the defendant had acted negligently, or had possibly acted negligently, in breach of contract and in breach of his duty of care'. And she also alleged that she 'first had knowledge of the facts from which the debt owing to her arises…on 4 February 2009 [the date of the consultation with her attorneys]; alternatively…on 19 April 2006 [the date on which she received the e-mail from Stroud]'. Her contention amounts to this. She needed more than just the knowledge that her claim had been settled to be able to appreciate the alleged negligence. She at least needed to appreciate that there was a substantial under-recovery. That appreciation entailed not only knowledge of the minimal facts of the claim but also an appreciation that those facts afforded her a claim against the appellant.

[13] It is the negligent, and not an innocent inaction that s 12(3) of the Prescription Act seeks to prevent and courts must consider what is reasonable with reference to the particular circumstances in which the plaintiff found himself or herself. In *MEC for Education, KwaZulu-Natal v Shange* 2012 (5) SA 313 (SCA) para 11 this court had to consider whether a 15 year old learner who had been hit with a belt on the side of his eye by his teacher acted reasonably in waiting more than five years to institute action against the teacher's employer. As in the present matter, the plaintiff became aware of the possibility of a claim by chance. He had initially accepted the teacher's explanation that it was an accident. A family friend noticed that he was wearing an eye patch and suggested that he should approach the Public Protector. An advocate in that office

advised him of the possibility of a claim against the teacher. Snyders JA held that the delay was innocent, not negligent. She stated:

'He was a rural learner of whom it could not be expected to reasonably have had the knowledge that not only the teacher was his debtor, but more importantly, that the appellant was a joint debtor. Only when he was informed of this fact did he know the identity of the appellant as his debtor for the purposes of the provisions of s 12(3) of the Prescription Act'.

[14] Similarly in this matter the respondent visited the offices of the appellant merely because she had a dispute with her mother pertaining to the occupancy of the house which had been bought with some of the money that had been received as the settlement amount. The visit did not concern the details of the settlement amount. There is no suggestion that at that stage she was concerned about the quantum at all. The version of the appellant confirms that there was no discussion pertaining to the quantum of the claim, the cost of the house and the amount given to her mother. There is no basis to conclude that she should have appreciated that there was something wrong with the quantum of the claim nor with any other aspect of the claim at that stage. More importantly, there is no basis to conclude that she must have realised that there was an under-recovery nor that there was a possible claim for negligence against the appellant. She probably believed, innocently, that the settlement amount was the best under the circumstances. It was not unreasonable of her to trust her mother's and the appellant's judgment. In all probability she thought that they had acted in her best interests.

[15] There is no conceivable reason why that belief would change merely because she had attained majority. The question is not whether she could or could not have obtained the documents from her mother or the appellant but rather whether she was negligent or innocent in failing to do so. There is no basis to arrive at the conclusion that she was negligent. There is also no basis to conclude that once she turned 21, without any intervening factor, she ought to have suddenly become suspicious or eager to know the details of the claim settled by her mother on her behalf nor to have felt a sudden urge to investigate it. It is logical that only some new knowledge or event would displace that

belief. Counsel for the appellant has listed several factors which he suggested cumulatively required the respondent to explain the delay. All those factors are in my view neutral. There is no basis to conclude that she should have appreciated earlier that she had a claim against the appellant. It follows that prescription only began to run on 19 April 2006. The respondent does not need to explain the delays until 18 April 2009, as such period was within the three-year prescription period. Therefore, the second of the two interrelated issues referred to in paragraph 7 above must be decided in the respondent's favour. The appeal must accordingly fail.

[16] I make the following order:

The appeal is dismissed with costs.

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Z L L TSHIQI

JUDGE OF APPEAL

APPEARANCES:

For Appellant:	PBJ Farlam
	Instructed by:
	Norton Rose South Africa (Incorporated as Deneys Reitz Inc), Cape Town
	Webbers, Bloemfontein
For Respondent:	SP Rosenberg SC
	Instructed by:
	Malcolm Lyons & Brivik Inc, Cape Town
	Matsepes Inc, Bloemfontein