THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 727/2022

In the matter between:

ADVOCATE C BISSCHOFF N O
ON BEHALF OF DENZIL JOHN REYNERS **APPELLANT**

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA **RESPONDENT**

Neutral citation: *Bisschoff N O obo Reyners v Passenger Rail Agency Of South Africa* (Case no 727/2022) [2023] ZASCA 160 (28 November 2023)

Coram: MBATHA, MABINDLA-BOQWANA and MATOJANE JJA and NHLANGULELA and KATHREE-SETILOANE AJJA

Heard: 28 August 2023

Delivered: 28 November 2023

Summary: Prescription – interruption of running of extinctive prescription – claimant of unsound mind – prescription only begins to run from the date of

appointment of curator *ad litem*. Knowledge of the identity of the debtor and of the facts from which the debt arises:

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Mantame and Nuku JJ concurring and Le Grange J dissenting, sitting as a court of appeal):

1 The appeal is upheld with costs.

2 The order of the full court is set aside and replaced with the following:
'The appeal is dismissed with costs.'

JUDGMENT

Matojane JA (Mbatha and Mabindla-Boqwana JJA and Nhlangulela and Kathree-Setiloane AJJA concurring)

Introduction

[1] This is an appeal against the decision of the majority of the full court of the Western Cape Division of the High Court, Cape Town (the full court). The central issue, in this case, involves a question of whether the appellant's claim against the respondent became time-barred three years after an incident of a fall from a moving train or if the prescription period was extended until one year after the

relevant impediment that prevented the claim from proceeding, had ceased to exist.

[2] The appellant, Advocate C Bischoff, acting as curator *ad litem* (the Curator) on behalf of Mr Denzil John Reyners, sued the respondent, Passenger Rail Agency of South Africa (PRASA) for damages as a consequence of an incident where Mr Reyners fell from a moving train's open doorway on 20 February 2001, resulting in head injuries.

[3] The trial proceeded before Goliath DJP (the trial court). At the trial, PRASA argued a special plea of prescription raised in the pleadings that Mr Reyner's claim had prescribed, as prescription had commenced from the date of the incident in accordance with s 12(1) of the Prescription Act 68 of 1968 (the Act).

[4] In response, the Curator contended that Mr Reyners' mental defect prevented him from having knowledge of the debtor's identity and the facts from which the debt arose, as required by s 12(3) of the Act. Therefore, prescription would only have started running against Mr Reyners on 7 February 2013, when he was placed under curatorship.

[5] The Curator also contended that prescription did not commence to run from 20 February 2001 due to injuries suffered by Mr Reyners that rendered him a person of unsound mind, incapable of managing his own affairs and without the capacity to litigate. Alternatively, the Curator argued that Mr Reyners was rendered 'insane' as contemplated in s 13(1)*(a)* of the Act, and consequently, the running of prescription was delayed until a year after the relevant impediment had ceased to exist.

[6] In June 2020, the trial court issued a judgment, concluding that, in view of Mr Reyners' circumstances, he could not be deemed to have acquired the necessary knowledge about the debtor's identity and debt-related facts or to engage in litigation effectively. It accordingly held that the prescription period did not start to run while Mr Reyners was under a disability or impairment. As a result, the trial court dismissed the special plea of prescription and ordered PRASA to pay the Curator damages in the approximate amount of R3 million PRASA had conceded the merits. The Curator brought an application for leave to appeal the trial court order, which it refused. On 14 January 2021, this Court granted the Curator leave to appeal the trial court's order to the full court.

[7] Le Grange, Mantame, and Nuku JJ heard the appeal. Mantame and Nuku JJ upheld the appeal, set aside the order of the trial court dismissing the special plea of prescription, substituted it with an order that the special plea of prescription succeeds, and dismissed the Curator's claim. Le Grange J dissented and found that he would have made an order upholding the trial court's ruling and dismissing PRASA's special plea of prescription with costs. The appeal is before us with special leave of this court.

Common cause facts

[8] The common cause facts are that on 20 February 2001, Mr Reyners fell from a moving train operated by PRASA. He sustained head injuries and was taken to Somerset Hospital. He was later transferred to Groote Schuur Hospital for treatment, including surgery on his head. By March 2001, he was discharged, and his medical records indicated a full recovery. The traumatic brain damage suffered by Mr Reyners resulted in, amongst other things, temporal lobe epilepsy, memory loss, aggression, a change of personality, and permanent loss of cognitive abilities and executive functioning.

[9] After the accident, Mr Reyners continued to live with his parents and resumed his unskilled job at The Argus newspaper. He discussed the incident and its consequences with friends and family. He continued working at The Argus for an additional six months and then worked on an *ad hoc* basis until his services were no longer required. Following that, he worked intermittently as an unqualified carpenter for about a year and later as a painter for six months. Throughout this period, he continued to live with his parents and became a father to two children.

[10] In June 2010, more than three years after the train incident, Mr Reyners instructed his current attorneys to file a claim against PRASA. On 7 February 2013, the Curator was appointed as *curator ad litem* to help Mr Reyners with his legal affairs. On 23 August 2013, more than three years after instructing his attorneys, the Curator issued a summons against PRASA, seeking damages arising from the injuries sustained by Mr Reyners in the train incident.

The evidence

[11] The Curator led the evidence of two lay witnesses, Mr Llewellyn Grove, a friend who was with Mr Reyners on the train at the time of the incident and Ms Natasha Cupido, Mr Reyners' sister. The Curator also called five expert witnesses, including Dr Lawrence Tucker, a specialist neurologist; Ms Mignon Coetzee, a clinical psychologist; and Dr Keir Le Fèvre, a practising psychiatrist. Notably, PRASA did not present any evidence to counter that which was led on behalf of the Curator.

[12] Mr Grove testified that Mr Reyners became aware of the incident after he and his family communicated the details to him. Under cross-examination, Mr Grove maintained that Mr Reyners could instruct an attorney about his fall from a moving train and explore the possibility of filing a claim. Additionally, Mr

Grove stated in cross-examination that if Mr Reyners was aware of the potential claim, he had the capacity to pursue it.

[13] Ms Cupido testified that Mr Reyners' head injury had a significant impact on his memory. She testified that she was told by Mr Reyners that a neighbour, Mr Chadwick, had informed him about the possibility of making a claim and referred him to an attorney. Ms Cupido mentioned that Mr Reyners knew that he fell from a train and suffered head injuries, but his family was unaware that they could file a claim after the accident. She believed that if Mr Reyners had been informed about the possibility of filing a claim six months after the incident, he would likely have taken immediate action rather than waiting for nearly a decade.

[14] Dr Tucker testified that Mr Reyners suffered a severe head injury during the fall, which resulted in a depressed compound skull fracture, a subdural hematoma, and a midline shift in his brain. This injury caused both a specific focal injury and more general diffuse damage. Dr Tucker also pointed out that Mr Reyners displayed emotional instability, emotional incontinence, and susceptibility to seizures or epilepsy as a direct result of the incident. Additionally, Dr Tucker confirmed the presence of temporal lobe epilepsy through an EEG test. PRASA did not present evidence of a neurologist to challenge Dr Tucker's evidence.

[15] Ms Coetzee prepared a report and testified about Mr Reyners' level of cognitive functioning. She emphasised several key points:

(a) Cognitive decline: Mr Reyners had experienced a significant diminution in his cognitive abilities. He has difficulty processing and encoding information, and he struggles to retain it even when information is repeated.

(b) Brain damage: Mr Reyners suffered brain damage as a result of his fall. This brain damage has had a notable impact on his cognitive functioning and memory.

(c) Executive dysfunction: There were clear signs of executive dysfunction exhibited by Mr Reyners. He struggles with tasks that involve planning, decision-making, and organisation.
(d) Memory impairment: Mr Reyners's memory impairment is pronounced, affecting his ability to recall and retain information effectively.
(e) Impact on day-to-day functioning: Mr Reyners' physical symptoms, including headaches and epileptic brain activity resulting from the injury, have a significant effect on his daily life. These symptoms affect his ability to function normally and;
(f) Psychological well-being: The psychological toll of his condition is also evident. Mr Reyners experiences embarrassment due to his seizures, has lost his career prospects and is dealing with a decline in social connections within his family, especially in comparison to his more successful siblings.

[16] Ms Coetzee testified that Mr Reyners' medical condition originated from the fall on 20 February 2001. She also mentioned that as of that date, Mr Reyners was incapable of handling his affairs and needed the assistance of both a curator *ad litem* and a curator *bonis* to assist him. Her evidence remained unchallenged.

[17] Dr Le Fèvre testified on the impact of the traumatic brain injury on Mr Reyners. He stated that the injury, which occurred when Mr Reyners fell from a train, led to a permanent loss of cognitive abilities and executive functioning. As a result, Mr Reyners could not instruct his attorney or manage his affairs. Dr Le Fèvre recommended the appointment of curators *ad litem* and *bonis* to help with Mr Reyners' legal and financial matters. Again, there was no challenge to Dr Le Fèvre's evidence.

[18] PRASA submitted a report prepared by Dr Hemp, a neuropsychologist, to counter Dr Le Fèvre's findings in respect of Mr Reyners. In her report, Dr Hemp

stated that Mr Reyners had no personal memories of the train incident and learned about it while in the hospital. She stated that Mr Reyners could communicate this information, having already shared it with a friend who provided a lawyer's contact. Dr Hemp assessed Mr Reyners' general abilities as upper borderline with some in the low average range and concluded that he was not cognitively impaired, given his reported full recovery upon hospital discharge. Along with other experts, she had recommended that Mr Reyner be assisted by a *curator bonis*, but later explained that the recommendation was based on Mr Reyners' illiteracy, limited education, history of dagga usage, and poor social judgment rather than his inability to communicate about the incident.

[19] Dr Hemp's report was included in the trial bundle, but she was not called to testify in the trial. As a result, her report is of limited evidentiary value because both parties agreed to include the reports in the bundle for what they purported to be without admitting that their conclusions were correct.

The law

[20] Sections 12(3) and 13(1)*(a)* of the Prescription Act are relevant to the determination of this appeal. Section 12(3), under the heading 'When prescription begins to run', states that a debt is not considered due until the creditor knows the identity of the debtor and the relevant facts underlying the debt. This section also specifies that a creditor is considered to have this knowledge if they could have reasonably obtained it through proper diligence.

[21] Section 13(1)*(a)* provides that completion of prescription will be delayed in certain circumstances, including when the creditor is a minor or is insane or is a person under curatorship or is prevented by superior force, including any law or any order of the court from interrupting the running of prescription

[22] In *Truter and Another v Deysel*,[1] this Court held that the term 'debt due' encompasses any type of debt, including delictual debts, that is both owing and payable. A debt is considered due when the creditor has a complete cause of action to recover the debt. This means that all the facts and conditions required for the creditor to successfully pursue their claim against the debtor are in place. In other words, the debt becomes due when all the circumstances are in order, allowing the creditor to take legal action to collect the debt.

[23] In *Mtokonya v Minister of Police*,[2] the Constitutional Court held that interpreting the phrase 'the knowledge of . . . the facts from which the debt arises' to include knowledge that the debtor's conduct is wrongful and actionable in law would make the law of prescription ineffective. The court stated that this would result in an unacceptably high percentage of people in the South African population against whom prescription would not run when they have claims to pursue in the courts. The court emphasised that s 12(3) does not require a creditor to have a suspicion that the debtor's conduct is wrongful and actionable but rather requires knowledge that such conduct is wrongful and actionable in law.[3]

[24] In *Van Zijl v Hoogenhout*,[4] this Court stated that knowledge required for a creditor to take legal action includes the ability to identify the responsible party and the awareness that harm had been done to them. The concept of prescription focuses on punishing prolonged inaction rather than the inability to act. Therefore, when a statute mentions that prescription starts when wrongdoing is first known to the creditor, it assumes that the creditor can recognise that they have suffered harm caused by someone else.

---

[1] *Truter and Another v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) para 15.
[2] *Mtokonya v Minister of Police* [2017] ZACC 33; 2017 (11) BCLR 1443 (CC); 2018 (2) SA 22 (CC).
[3] Ibid paragraph 63.
[4] *Van Zijl v Hoogenhout* [2004] ZASCA 84; [2004] 4 All SA 427 (SCA); 2005 (2) SA 93 (SCA) para 19.

[25] In Mr Reyners' case, the crucial question is whether, at the time he was discharged from the hospital after falling from the moving train, he had knowledge of the debtor's identity and the facts which related to the claim or if he could have reasonably acquired that knowledge. Importantly, it is not necessary for Mr Reyners to be aware of the legal consequences of these facts. Even if he does not have actual knowledge of the facts but could have obtained such knowledge through reasonable care, it is considered equivalent to having actual knowledge.[5]

The approach of the majority on appeal

[26] Mantame J and Nuku J wrote separate concurring judgments. Mantame J found Dr Le Fèvre's testimony unconvincing in her judgment because he did not explain how Mr Reyners could manage multiple jobs, some lasting a year, while supposedly needing a curator.

[27] Mantame J held that Mr Reyners was aware of his circumstances after he sustained a head injury from the fall, as he took immediate action by wrapping his shirt around his head and walking towards the N1 Highway to seek help. She noted that despite sustaining a head injury, Mr Reyners continued to lead an everyday life for a decade and even became a father, which indicated that he was functioning well.

[28] Mantame J concluded that the conversation between Mr Reyners and his neighbour Mr Chadwick was sufficient proof that Mr Reyners had the relevant mental capacity to institute a claim long before their conversation, as his condition was ‘stable’, and he knew that he got injured. Mantame J furthermore found that Mr Reyners provided coherent answers and shared information with

[5] *PriceWaterhouseCoopers Inc & others v National Potato Co-operative Ltd & Another* [2015] ZASCA 2; [2015] 2 All SA 403 (SCA) para 14.

his parents without distortion. This, according to Mantame J, contradicted the experts' findings of cognitive and executive function loss. Nuku J, in turn, found that if Mr Reyners had acted in the same manner as he did after meeting Mr Chadwick, he would have been able to pursue his claim against PRASA in the same way that he did, albeit many years later. The majority erred by basing its findings on Mr Reyner's conversation with Mr Chadwick. This was inadmissible hearsay evidence as both Mr Reyners and Mr Chadwick were not called to testify at the trial.

[29] PRASA failed to present any evidence to counter the claims of the Curator's expert witnesses regarding Mr Reyners's disability and his need to be assisted by a curator *ad litem* from the time of the incident. In this regard, the joint minutes of neuropsychologists Dr Hemp and Ms Coetzee confirmed that Mr Reyners required the assistance of both a curator *ad litem* and a curator *bonis*. The joint minutes of the occupational therapists, Ms Else Burns-Hoffman and Ms Herculene van Staden, also indicated unanimous agreement on this need. When experts are tasked with providing facts based on their investigations, and they reach an agreement with the opposing party's experts regarding these facts, the agreed-upon facts hold the same legal weight as facts that are explicitly agreed upon in the pleadings in a pre-trial conference, or through an exchange of admissions.[6]

[30] The majority assumed, in the face of uncontested expert evidence to the contrary, that Mr Reyners had the same cognitive abilities as a person without brain damage or disability. In doing so, the majority failed to acknowledge that while Mr Reyners had some residual capacity to engage with society, his complex attention and memory deficits, as noted by Ms Coetzee, made it difficult for him

[6] Thomas v BD Sarens (Pty) Ltd para 11

to utilise his intellectual ability effectively. This was supported by Ms Cupido's evidence regarding Mr Reyners' memory lapses. Despite having some functional abilities, Mr Reyners' post-incident lifestyle did not negate his disability.

[31] I, therefore, agree with the conclusion of Le Grange J, in the minority judgment, that Mr Reyners' capability to continue with some form of life after the fall could not possibly mean that he must have obtained knowledge of all the material facts from which the debt arose or which he needed in order to institute an action. Given his physical and mental condition, pain, memory function, and social environment, his failure to acquire such knowledge can hardly be regarded as unreasonable.

[32] On the conspectus of the evidence as a whole, it is clear that Mr Reyners has been under a disability or impediment since the incident, which prevented the interruption of the running of prescription as contemplated in the Act. Even though a curator was appointed approximately 12 years later, it was clear that Mr Reyners needed a curator after the incident. Prescription began to run from the date of the appointment of the curator *ad litem*. For all of these reasons, the appeal must succeed.

[33] In the result, the following order is made:

1 The appeal is upheld with costs.

2 The order of the full court is set aside and replaced with the following:

'The appeal is dismissed with costs.'

K E MATOJANE

JUDGE OF APPEAL

Appearances

For appellant:	C Webster SC
Instructed by:	Jonathan Cohen & Associates Attorneys, Cape Town
	Matsepes Inc, Bloemfontein
For respondent:	T D Potgieter SC
Instructed by:	Bossr Inc, Durbanville
	Lovius Block, Bloemfontein.