THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case no: 206/2017

In the matter between:

NTUNTU DAVID KEKANA **APPELLANT**

and

ROAD ACCIDENT FUND **RESPONDENT**

Neutral citation: *Kekana v Road Accident Fund* (206/17) [2018] ZASCA 75 (31 May 2018)

Coram: Shongwe ADP, Leach and Mbha JJA and Pillay and Mothle AJJA

Heard: 15 May 2018

Delivered: 31 May 2018

Summary: Interpretation – s 12(3) of the Prescription Act 68 of 1969 – whether knowledge of a duty of care constitutes a factual or legal conclusion – whether acceptance of offer by a claimant with hindsight and new information constitute facts from which the debt arose – appeal dismissed.

ORDER

On appeal from: Gauteng Division, Pretoria (Janse van Nieuwenhuizen J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Shongwe ADP (Leach and Mbha JJA and Pillay and Mothle AJJA concurring)

[1] This appeal, with leave of the court a quo, is against the judgment and order upholding a special plea of prescription. The crisp question before the court a quo was thus whether the appellant had actual or deemed knowledge of the facts from which the debt arose. In essence it concerns the proper construction of s 12(3) of the Prescription Act 68 of 1969 (the Act).

[2] The background facts are that on 8 August 1996, the appellant, a 57 year old male detective employed with the South African Police Services, was involved in a motor vehicle accident in which he sustained bodily injuries. He subsequently lodged a direct claim for damages against the respondent, the Road Accident Fund (the Fund), a juristic person incorporated in terms of the Road Accident Fund Act 56 of 1996 (the RAF Act). The Fund proposed a settlement figure of R48 853.31, which the appellant rejected. On 2 August 1999 the Fund made an improved offer in the sum of R63 088.45 in full and final settlement. The appellant was still unhappy, as he could not understand

why the offer was below his medical costs. The Fund explained to the appellant that in 1998 he had injured his loin in an unrelated incident; that the offer was fair and reasonable in the circumstances; that if he appointed an attorney to assist him such costs would be for his own account; and that his claim was nearing prescription. In order to avoid further costs, the appellant accepted the offer.

[3] In 2013 the appellant read a newspaper report on how a certain person, who had been under-compensated by the Fund, but who after consulting an attorney was able to 'resuscitate' his claim under similar circumstances. The appellant consulted with an attorney who advised him that he had been under-compensated. Hence the summons was issued in 2013. The cause of action was that the Fund had failed to act in the best interests of the appellant in that it ignored a report of a neurosurgeon specialist who examined him and found that he had a permanent disability; that the Fund failed to discharge its duties by advising him properly as a direct claimant; and that the Fund failed to act in accordance with its policy to treat the direct claim fairly and compensate the appellant accordingly.

[4] The Fund raised, *in limine*, a special plea of prescription, arguing that the appellant's claim had prescribed, more than three years having expired after it had arisen , in terms of s 11 of the Act. The motor vehicle accident occurred in 1996 and the settlement was concluded in 1999. However, the summons was issued and served in 2013. The court a quo upheld the special plea and consequently dismissed the appellant's claim.

[5] The appellant contended that prescription only started to run when he read the newspaper report in 2013. Until then he lacked the required knowledge of the necessary facts as contemplated in s 12(3) of the Act.

[6] On the other hand the respondent contended that the period of prescription in this case is three years (s 11(*d*) of the Act). Thus, it acknowledged that it bore the onus to show when the debt became due. (See *Macleod v Kweyiya* [2013] ZASCA 28; 2013 (6) SA 1 (SCA) para 10.) The respondent further contended that the appellant knew the identity of the respondent as debtor and knew that the respondent was obligated to compensate him. Despite believing that the offer was inadequate, the appellant accepted it, which in the respondent's view that was the end of the matter.

[7] It is trite that prescription commences to run as soon as the debt becomes due. In this light, it is instructive to examine the provisions of s 12 and more particularly s 12(3) of the Act. It provides that:

'12. When prescription begins to run.

(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.

(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.'

[8] The facts of this case are clear. The accident occurred on 8 August 1996. The appellant filed his claim on time and he accepted the offer of settlement in

1999, albeit under protest. He knew that he would be responsible for the legal fees incurred. However the appellant did nothing until approximately 14 years later when he acquired information that he could revive his claim. The information he acquired in 2013 had no relation to the facts from which the debt arose. It had to do with a legal conclusion that the respondent could be liable on the basis of a duty of care. Summons was served on 18 October 2013 which was well over the three year period prescribed in s 11(*d*) of the Act. Counsel for the appellant readily conceded that no valid cause of action was pleaded. The appellant alleged in the particulars of claim that the cause of action was premised on the duty of care, which is in fact and in law not a cause of action. Clearly the appellant appreciated and believed from as early as 1999, that a wrong had been committed against him by the respondent. Between 1999 and 2013 there were no new facts that emerged which the appellant could present to the respondent. The newspaper reports the appellant read in 2013 was merely an opinion in the form of a conclusion that there had been negligence, which opinion was based on the same facts which had been available from 1996 and or 1999.

[9] In *Truter & another v Deysel* 2006 (4) SA 168 (SCA) paras 16 and 17 the court observed that: '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. In a delictual claim, the requirements of fault and unlawfulness do not constitute *factual* ingredients of the cause of action, but are *legal* conclusions to be drawn from the facts'.

(See also *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838D-H; M M Loubser *Extinctive Prescription* (1996) para 4.6.2 at 80 – 81.) In delictual actions the presence or absence of negligence is not a fact. It is a conclusion of law to be drawn by the trier of facts in all the circumstances of the particular case. (See *Mkhatswa v Minister of Defence* 2000 (1) SA 1104 (SCA) paras19 and 23.)

[10] Section 12(3) of the Act contains a deeming provision that the creditor is deemed to have such knowledge if he could have acquired it by exercising reasonable care. The appellant was a police officer who ought to have known that he could approach an attorney for legal advice at any time, one may even go further to say that he was aware that he could get the necessary help but did not want to pay legal fees.

[11] In conclusion, if the appellant failed to appreciate the legal consequences which flowed from the facts, his failure to do so did not delay the running of prescription. (See *Claasen v Bester* [2011] ZASCA 197; 2012 (2) SA 404 (SCA) para 15; *ATB Chartered Accountants (SA) v Bonfiglio* [2010] ZASCA 124; [2011] 2 All SA 132 (SCA) paras 14 and 18.) I am unable to find fault with the order and judgment of the court a quo.

[12] In the result the appeal is dismissed with costs.

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J B Z Shongwe
Acting Deputy President
Supreme Court of Appeal

Appearances

For the Appellant:	D J Joubert SC (with him M Kgomongwe) Instructed by: T L Kekana Attorneys, Pretoria; Phatshoane Henney Attorneys, Bloemfontein
For the Respondent:	J Myburgh Instructed by: Mothle Jooma Sabdia Incorporated, Pretoria; Maduba Attorneys, Bloemfontein