612/2019Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates	YES/NO

17 NOV 2023

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: 2319/2020

In the matter between:-

RUAN JANSE VAN VUUREN Applicant

and

WJB STIEGER KONSTRUKISE (PTY) LTD Respondent

ORDER

The following order is made:

i) Leave to appeal to the Full Court of this Division is granted;

ii) The costs of the application for leave to appeal forms part of the costs of the appeal, save where the

applicant does not pursue the appeal in which case the applicant is to pay the application for leave to appeal.

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

FMM REID J

Introduction:

[1] This application for leave to appeal is against the whole order dated 30 March 2023 in which the special plea of prescription was dismissed.

[2] The respondent's (who is the plaintiff's *a quo)* claim against the applicant (who is the defendant *a quo)* is for contractual damages suffered in compensation of major structural defects in a residential property (or house) that the defendant built for the plaintiff in Cashan, Rustenburg, North West Province.

[3] The court *a quo* had to determine the date that the cause of action arose or the date that the plaintiff could have been reasonably expected to have become aware of the cause of

action. In this matter, this factual question is interesting and quite a difficult question to answer. The facts were mostly common cause. What remained to be determined was the application of the legal principles of prescription to the facts in determining whether the respondent's claim has become prescribed.

[4] In essence, the applicant's special plea was that the respondent lodged a complaint at the National Home Builders Registration Council on 8 June 2021, in which form the respondent stated that he first noted the defects in the building, and the builder was notified of the defects, in **December 2016**. The applicant contends that this date is the date that the cause of action arose.

[5] On **5 October 2018** the applicant attempted to correct the structural damage. In his evidence, Mr Stieger testified that the attempt to correct the structural damage was no admission of liability (which was accepted by the court *a quo*), but done to see if he would be able to fix the damage on the basis that he and the respondent, Mr van Vuuren have been friends for many years. He testified that the civil

engineer is to be held responsible for any defects in the construction since the civil engineer periodically provided clearance certificates on which further building would continue.

[6] In the judgment *a quo,* I found that it is reasonable that the respondent was under the impression that the construction defects would be repaired by the applicant, up and until 5 October 2018 which sets the date for the cause of action at 5 October 2018. The summons was issued on 20 January 2021, within the three (3) year period and subsequently the claim has not become prescribed.

[7] The applicant applies for leave to appeal on *inter alia* the following grounds (as summarised):

7.1. That the court erred in finding that it was reasonable for the respondent to be under the impression that the applicant will cure the construction defects up to 5 October 2018;

7.2. That the finding of the applicant's actions did not amount

to an admission of guilt is mutually destructive of a finding that the respondent was aware of the claim in December 2016, when the complaint was lodged;

7.3. That the court erred in finding that the debt only became due on 5 October 2018;

7.4. That the court ventured out of the scope of the pleadings and evidence presented in coming to its judgment;

7.5. That the court erred in application of the legal principles relating to prescription.

7.6. That the court misplaced the onus regarding reasonableness of the applicant in electing not to testify; and

7.7. That the court incorrectly applied and interpreted the relevant provisions of the **Housing Consumer Protection Measures Act** 95 of 1998.

[8] The test to be applied in an application for leave to appeal is

set out in section 17(1)(a) of the **Superior Courts Act** 10 of 2013 which provides that:

> *"(1) Leave to appeal **may only be given** where the judge or judges concerned are of the opinion that-*
>
> *(a) (i) the appeal **would have a reasonable prospect of success**; or*
>
> *(ii) there is some **other compelling reason** why the appeal should be heard, including conflicting judgments on the matter under consideration;"*
>
> (own emphasis)

[9] This application is on the ground that the appeal has a reasonable prospect of success.

[10] The Supreme Court of Appeal recently aptly described the test to grant leave to appeal in **Cook v Morrisson and Another** 2019 (5) SA 51 (SCA) as follows:

> *"[8] The existence of reasonable prospects of success is a necessary but insufficient precondition for the granting of special leave. Something more, by way of special circumstances, is needed. These may include that the appeal raises a substantial point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or to the public. This is not a closed list (Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1986 (2) SA*

555 (A) at 564H – 565E; Director of Public Prosecutions, Gauteng Division, Pretoria v Moabi 2017 (2) SACR 384 (SCA) ([2017] ZASCA 85) para 21)."

[11] These sentiments are echoed in **MEC for Health, Eastern Cape v Mkhita** 2016 JDR 2214 (SCA) the Supreme Court of Appeal emphasised the application for the test for leave to appeal and found as follows in paragraphs [16] to [18]:

> *"[16] Once again it is necessary to say that **leave to appeal**, especially to this court, **must not be granted unless there truly is a reasonable prospect of success**. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the **appeal would have a reasonable prospect of success**; or there is some other compelling reason why it should be heard.*
>
> *[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. **A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal**.*
>
> *[18] In this case the requirements of 17(1)(a) of the Superior Courts Act were simply not met. The uncontradicted evidence is that the medical staff at BOH were negligent and caused the plaintiff to suffer harm. The special plea was plainly unmeritorious. **Leave to appeal should have been refused. In the result, scarce public resources were expended: a hopeless appeal was prosecuted at the expense of the Eastern Cape Department of Health and ultimately, taxpayers; and valuable court time and resources were taken up in the hearing of the appeal**. Moreover, the issue for decision did not warrant the costs of two counsel."*
> (own emphasis)

[12] The above illustrates that the legislation and the Supreme Court of Appeal requires more than a mere possibility than that another judge might come to a different conclusion. The test is whether another judge would come to a different conclusion.

[13] The bar has been raised and a judge considering leave to appeal has a duty to ensure that the appeal has a strong prospect of success. Due to the ever increasing workload in the judiciary, the judge considering the application for leave to appeal has a duty to ensure that unmeritous appeals do not become part of the workload of full courts or the Supreme Court of Appeal. Appeals without merits should not be granted leave to appeal.

Analysis

[14] The issue of prescription of a claim is an issue in our law that has been the topic of many textbooks and doctrines. In certain circumstances, such as these unique facts in this matter, prescription is not a "clear cut" event.

[15] In the matter of **Mtokonya v Minister of Police** 2018 (5) SA 22 (CC) the Constitutional Court held that:

> *"[34] The second exception, in ss (3), is that a debt is 'not deemed to be due until the creditor has knowledge of' two things. The first is knowledge of the identity of the debtor. The second is knowledge 'of the facts from which the debt arises'. However, this exception is itself subject to another exception provided by way of the proviso in ss (3). The exception reads: 'Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.' So, if a debtor delivers a special plea of prescription and the creditor seeks to meet it by saying prescription did not run because, before a certain date, he did not have knowledge of the identity of the debtor or of the facts from which the debt arose, the debtor can come back and say: but you could have acquired that knowledge before that date if you had exercised reasonable care, but you failed to exercise such care, and, therefore, prescription did commence to run before that date.*
>
> *[35] We know that in the agreed statement nothing is said to the effect that the applicant did not have knowledge of the identity of the debtor. In fact, the judgment of the High Court makes it clear that counsel appearing for the applicant in that court said that the applicant knew the identity of the debtor and the facts from which the debt arose, but what he did not know was whether the conduct of the police was wrongful and actionable. Therefore, any lack of knowledge of the identity of the debtor is not one of the issues that the High Court was called upon to decide. The other thing that the creditor must have knowledge of in terms of s 12(3) is referred to in the section as 'the facts from which the debt arises'.*

[36] Section 12(3) does not require the creditor to have knowledge of any right to sue the debtor nor does it require him or her to have knowledge of legal conclusions that may be drawn from 'the facts from which the debt arises'. Case law is to the effect that the facts from which the debt arises are the facts which a creditor would need to prove in order to establish the liability of the debtor. In his founding affidavit in support of his application for leave to appeal to this court, the applicant in effect criticises the fact that s 12(3) refers only to knowledge of 'the facts from which the debt arises' and does not also refer to knowledge of legal conclusions that must be drawn from those facts. He says in the affidavit that this creates a lacuna in s 12(3) and that that is the question he is asking this court to decide, namely whether s 12(3) requires a creditor to also know that the conduct of the debtor is wrongful and actionable before a debt may be deemed to be due or before prescription may begin to run. It is not necessary to deal with the third exception which is provided for in ss (4) because it does not arise in the present case.

[37] The question that arises is whether knowledge that the conduct of the debtor is wrongful and actionable is knowledge of a fact. This is important because the knowledge that s 12(3) requires a creditor to have is 'knowledge . . . of the facts from which the debt arises'. It refers to the 'facts from which the debt arises'. It does not require knowledge of legal opinions or legal conclusions or the availability in law of a remedy.

[38] The reference to 'knowledge . . . of the facts' in s 12(3) raises the question of what a question of fact is as distinct from, for example, a question of law or a value judgment. The distinction between a question of fact and a question of law is not always easy to make. How difficult it is will vary from case to case. In ***Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd***

('Perskor') 1992 (4) SA 791 (A) *the Appellate Division had to consider this question. In that case the court said:*

> *'In principle, therefore, there need not be a rigid classification of all matters to be decided by a Court of law as being either questions of fact or questions of law.'*

(footnotes omitted)

[16] In the application of the legal principles of prescription to the specific facts, I hold the view that a court of appeal might come to a different conclusion than I have.

[17] This is not a novel point in law or any other reason why the matter should be referred to the Supreme Court of Appeal. In my view the full court of this Division will be the appropriate court to consider these legal aspects on appeal.

[18] It follows that leave to appeal should be granted to the Full Court of this Division.

[19] The normal order in appeals is that the costs of the application for leave to appeal forms part of the costs of the appeal, save where the applicant does not pursue the appeal in which case the applicant is to pay the application for leave to appeal. I find no reason to deviate from this principle.

Order:

[20] In the premise, I make the following order:

iii) Leave to appeal to the Full Court of this Division is granted;

iv) The costs of the application for leave to appeal forms part of the costs of the appeal, save where the applicant does not pursue the appeal in which case the applicant is to pay the application for leave to appeal.

FMM REID
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG

DATE RESERVED: **20 OCTOBER 2023**

DATE HANDED DOWN: **17 NOVEMBER 2023**

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