5/11/2010

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DATE 5/11/10 SIGNATURE

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case number: 11261/2001

In the matter between:

DIMITRIOS MONOKANDILOS Plaintiff

and

GÉNÉRALE DES CARRIERS ET DES MINES SA Defendant

JUDGMENT

FABRICIUS J:

1. The Plaintiff herein issued summons against the Defendant, and in the context of the First claim alleged that Defendant had defamed him in a Greek newspaper, that such defamation was wrongful, and that as a result his personal creditworthiness and reputation was severely damaged, that he lost various grants and allowances from the Greek Government, certain shareholding in various companies and other profits, which he would otherwise not have

lost or made.

2. Plaintiff's Second claim is one based on malicious prosecution. Again, so it was pleaded, certain damages resulted. In the context of the Second claim, the particulars of claim were amended from time to time over the years, and one of the issues before me was whether or not such amendments introduced a new cause of action, or, as Defendant's counsel would have it "*introduced new claims not recognisable from the original particulars of claim*". He submitted that that was indeed the case, whilst Plaintiff's counsel briefly submitted that the augmentation of Plaintiff's claim for damages was part and parcel of the original cause of action, and merely represented a fresh quantification of the original claim.[1]

3. In this context I do not intend dealing with the debate (if there is one) whether or not one should use the terminology used by the Appellate Division in **Evins v Shield**, or whether one should, as Defendant's counsel would have it, apply the test whether or not a new claim is "*unrecognisable from the original particulars of claim*".

4. Such a debate, if there is one, lacks substance. In the context of

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[1] See: **Evins v Shield Insurance Company Ltd**, 1980 (2) SA (A) 814 at 836D

legal proceeding a "*cause of action*" is a very well known phrase, which requires allegations of - and proof of "*every fact which it would be necessary for the Plaintiff to prove if traversed in order to support his right to the 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.*"[2]

5. In my view, the particular amendments (details of which I need not deal with herein) do not constitute the introduction of new causes of action, nor are they "*unrecognisable*" from the original allegations relating to quantum, as a result of the alleged defamatory actions.

6. Accordingly, the special plea, in the context of the Second claim, cannot be upheld.

7. In the context of the claim for damages resulting from defamation, the parties also agreed to argue that special plea *in limine* as my decision would have a material effect on the further proceedings in the action, and the necessary decisions that would have to be

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2 See: **Read V Brown, 22 QBD 131; McKenzie v Farmers Co-operative Meat Industries Ltd, 1922 AD 16 at 23 and Dusheiko v Millum, 1964 (4) SA 648 (A) at 658A**

taken if the proceedings were to continue. (I must add that Plaintiff disavowed any reliance on allegations made in respect of what occurred in Zambia).

8. In this context, the special plea is to the effect that the relevant delict was committed during June 1996, that the summons was served during May 2001, that this date is more than 3 (three) years after the date upon which the claim arose, and that accordingly, it had become prescribed in terms of Section 11 of the Prescription Act, 68 of 1969.

9. In Plaintiff's reply to the special plea, it was pleaded that "*the entire cause of action emanates, and all the actions relating to all the elements thereof, were committed in Greece.*" It was further pleaded that the parties had formally agreed that the *lex causae*, i.e. the Law of Greece, was applicable in this action, and that the Plaintiff bore the onus to prove the relevant Greek law in this particular context. It was pleaded that according to both Greek and South African law, the law relating to prescription forms part of the substantive law of the land, and thus the Greek law relating to prescription applies, and not the South African law. In this context I was then referred to (and this was also pleaded) Section 937 and Section 250 of the Greek Civil Code. This provides for a

prescription period of 20 (twenty) years, alternatively 5 (five) years, depending on not whether the delict relied upon was also a crime or not. The prescription of a claim both in South African law and Greek law is suspended by the issue of a summons which, *in casu*, occurred within the prescription period of 20 (twenty) years, alternatively 5 (five) years.

10. The parties had agreed, as I have said, that the *lex causae* pertaining to this action was the law of Greece. Both causes of action arose in their entirety in Greece. It was also contended that even if this had not been agreed upon, it would, in terms of Private International Law, have been the correct legal position in any event.

11. On behalf of the Plaintiff it was argued that it was trite law that where there was a difference in content between the laws of different legal systems, the rules of the Conflict of Laws should be applied to determine which system of law ought to be applied by the Court. It was similarly trite that the starting point for this process was the determination of the legal category into which the disputed point of law, or issue, fell. If such a rule was procedural of nature, the *lex fori*, *in casu* would be South African law, whilst if the issue formed part of the substantive law, the *lex causae* would

apply.[3]

12. In contrast to its predecessor, the South African Prescription Act, 68 of 1969, is substantive in character. If that is so, the *lex causae* would apply (the Greek law).[4]

13. Because the Prescription Act of 1969 is a part of substantive law, (Section 10 extinguishes a debt) the once interesting question whether a particular law is of substantive or procedural nature is of lesser importance (if of any at all) in these or other similar proceedings. The notion that if a matter is one of procedure it must be tried according to South African procedural laws, is not one that has survived the impact of modern jurisprudence. The traditional rule and its results has been discussed by Schutz J (as he then was) who, already in 1993, suggested the adoption of the *via media* approach, according to which the Court has regard to both the *lex fori* and the *lex causae* before determining the characterisation of the issue between the parties.[5]

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3 See: **Laconian Maritime Enterprises Ltd v Agromar Linias Ltd, 1986 (3) SA 509 D, especially at 518 to 521**

4 See also: **Kuhne & Nagel, AG Zurich v APA Distributors (Pty) Ltd, 1981 (3) SA 536 W**

14. The Supreme Court of Appeal, in a judgment that has unfortunately not been reported in one of the recognised Law Reports,[6] also noted that prescription rules are increasingly characterised as substantive for the purposes of Private International Law, and that in recent years there has in any event been a distinct movement in the common law countries away from the English common law "*dual*" classification of prescription / limitation rules to a substantive characterisation of such rules (see paragraph 29). It commended the approach of Van Zyl J[7] who held that under South African Law prescription was part of substantive law and governed by the *lex causae*. The *lex causae* was the law with which the cause of the claim (in that instance a contract) was most closely connected. That approach of course was the essential question where the *lex fori* regards prescription as a matter of substantive law.

15. In the **Society of Lloyds** decision of the Supreme Court of Appeal, it was made clear that where there is a potential conflict between two applicable systems of law, the *via media* approach is the appropriate one to follow, in that it takes cognisance of both the *lex fori* and *lex causae* in characterising the relevant legal rules. It also

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6 See: **Laurens v Von Höhne, 1993 (2) SA 104 WLD at 115 J and further**

5 See: **Society of Lloyds v Price; Society of Lloyds v Lee, [2006] JOL 17577**

7 In **Society of Lloys v Romahn and 2 other cases, 2006 (4) SA 23 CPD**

enables the Court, after the characterisation has been made, to determine in a flexible and sensitive manner which legal system has the closest and most real connection with the dispute before it. The selection of the appropriate legal system on that basis must then be sensitive to considerations of international harmony or uniformity of decisions, as well as the policies underlying the relevant legal rule.

16. In the present case, it was correctly agreed that the *lex causae* must apply and that that is the law of Greece. In that particular context, there is no potential conflict between the two applicable legal systems on the topic whether or not prescription is part of substantive or procedural law, subject to what I will say hereunder.

17. It was contended by Defendant's counsel that the Plaintiff bore the onus of proving the Greek law on this topic and that it had failed to do so. The question is of course covered by the Law of Evidence Amendment Act.[8] Schutz J[9] was of the view that foreign law is a question of fact which normally is proven by experts, although the

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[8] Act 45 of 1988: "*Section 1(1) Any Court may take judicial notice of the law of a foreign state of indigenous law insofar as such law can be ascertained readily and with sufficient certainty...*"

[9] In **Laurens v Von Höhne supra at 116 B**

mentioned Evidence Amendment Act gave the Court the power to take judicial notice of any law if it was readily ascertainable with sufficient certainty. It was contended that in the present case, such expert evidence had to be produced. I do not agree. Plaintiff's counsel handed to me a translation (I was assured that it was up to date) of the Greek Civil Code.[10] Prescription therein, in the present context, is dealt with.[11] It is clear that those provisions are part of the substantive law of Greece, in as much as they are contained in the Civil Code. In my view, I can take full notice of that law, inasmuch as I am of the view that it can be ascertained readily and with sufficient certainty. No expert evidence is necessary to tell me what the Civil Code says on the topic. It is clear that the period is either 5 (five) years or 20 (twenty) years, depending on whether the delict complained of is also a criminal offence. It is not necessary to decide that, since it is common cause in these proceedings that if the prescriptive period is indeed 5 (five) years, the Defendant's special plea on the Plaintiff's First claim must fail. I hold this to be the case.

18. Accordingly, Defendant's special pleas are dismissed with costs,

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[10] Translated by C Taliadoros, Sakkoulas Publishers, Athens, 2000

[11] See: Section 249, 250 and 937

including the costs of one senior counsel.

DATED at PRETORIA on this the 5 day of November 2010.

SIGNED: HJ FABRICIUS
JUDGE OF THE HIGH COURT,
NORTH AND SOUTH GAUTENG DIVISION

Counsel for Plaintiff:	Adv. PJJ de Jager SC Instructed by Geyser Van Rooyen Attorneys, Pretoria
Counsel for Defendant:	Adv. GM Young Instructed by Klopper Jonker Attorneys, Johannesburg
Date of Hearing:	29 October 2010
Date of Judgment:	5 November 2010