NOT REPORTABLE

CASE NO. I 3235/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ALEX MABUKU KAMWI	**PLAINTIFF**

and

TRUSTCO GROUP INTERNATIONAL LTD	**1st DEFENDANT**
MAX HAMATA	**2nd DEFENDANT**
FREE PRESS (PTY) LTD	**3rd DEFENDANT**

CORAM: CORBETT, A.J

Heard on: 9 November 2011

Delivered on: 15 December 2011

JUDGMENT

CORBETT, A.J: .

[1] The plaintiff initially instituted action against a journalist, Tileni Mongudhi and the Informanté newspaper claiming that he had been defamed by certain articles written and published by them. The articles complained of appeared in the Informanté newspaper on 26 October and 9 November 2006. The action was withdrawn and removed from the roll. It is common cause that the Informanté newspaper is not a legal entity. The plaintiff then instituted this action against the current defendants claiming N$800,000.00 for defamation against the owner, editor and publisher of the Informanté newspaper. It amounts to exactly the same cause of action but against other parties.

Special plea

[2] The defendants take the point by way of special plea that the plaintiff's claim for defamation has become prescribed.

[3] It is unclear from the Court file as to when the present action was instituted, but it was either late September or early October 2010 since the defendants delivered a notice of intention to defend on 15 October 2010. Mr Dicks, who appeared on behalf of the defendants, contends that the plaintiff knew about the offending articles as early as 10 November 2006, and through a

simple process of enquiry would be aware of the author and the publisher thereof. He contends that since the summons *in casu* was issued some three years and ten months after the debt became due, the claim has accordingly become prescribed. The plaintiff, who appeared in person, seeks to counter this argument, by way of his heads of argument and further oral argument at the hearing of this matter, that he only had knowledge of the identity of the "*proper debtors*" much later and less than three years prior to issuing summons.

[4] The Prescription Act, No. 68 of 1969, as amended ("the Act"), in terms of section 10 (1) read together with section 11 thereof, provides that a debt of this nature would prescribe within a period of 3 years.

Knowledge by exercising reasonable care

[5] Critical to the facts of this case, is section 12 of the Act relating to the time when prescription begins to run, which states:

> "(1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.
>
> (2) …
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> (3) A debt which does not arise from contract 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."

[6] In this regard Diemont JA in the case of *Gericke v Sack* said: [1]

"The Act merely requires the creditor to seek such knowledge by the exercise of reasonable care; she is not required to issue summons - she is given a generous three years in which to institute proceedings. All that she is called on to do is to ask one question to establish identity and not to be content to play a purely passive role. If she could have acquired this knowledge by acting diligently, her inertia, ineptitude or indifference will not excuse her delay. A creditor who fails to exercise the reasonable care prescribed by the Act must pay the penalty for he is then deemed to acquire the knowledge necessary for the debt to become due and for prescription to begin to run."

[7] Section 12 (3) of the Act thus aims to achieve a balance between these two opposing interests and ensures that negligent, rather than innocent, inaction is penalized. [2] Accordingly, the yardstick to be used in determining the standard of care required of the creditor, is – [3]

"…to do no more than that which could be expected, in the circumstances, of a reasonable man."

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[1] 1978 (1) SA 821 (A), at 830 C - D
[2] Minister of Trade and Industry v Farocean Marine (Pty) Ltd, 2006 (6) SA 115 (C), at p. 125, para [35]
[3] Jacobs v Adonis, 1996 (4) SA 246 (C), 253 B

[8] The knowledge which is required, is the minimum to enable a creditor to institute action. In *Drennan Maud and Partners v Pennington Town Board* the Court decided as follows: [4]

> "Section 12 (3) of the Act provides that a creditor shall be deemed to have the required knowledge 'if he could have acquired it by exercising reasonable care'. In my view the requirement 'exercising reasonable care' requires diligence not only in the ascertainment of the facts underlying a debt, but also in relation to *the evaluation and significance of those facts.* This means that the creditor is deemed to have the requisite knowledge if a reasonable person in his position would have deduced the identity of the debtor and facts from which the debt arises."

[9] The court file in the earlier action brought by the plaintiff was made available at the hearing of the special plea. It was evident that the summons in that matter, although dated 10 November 2006, was issued on 5 December 2006. The plaintiff was accordingly aware of the publication of the offending articles during November 2006. Mr Dicks contends that the owner of the newspaper and the editor are stated in the newspaper. This may well be the case but there was no evidence before me to this effect.

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[4] 1998 (3) SA 200 (SCA), at 209 F

[10] The plaintiff submitted that he had no knowledge of the identity of the present debtors until around February 2008 when he saw the discovery affidavit of the second defendant, the then editor of the Informanté newspaper, but still did not have the identity of the owner and printer of the Informanté newspaper. He claims that he only had knowledge of the identity of the owner on 16 July 2009 and knowledge of the printer on 21 August 2010.

[11] When these submissions were made in Court by the plaintiff, the Court explained to him that should he wish to rely on such allegations, he would need to be sworn in and testify concerning these crucial issues as to the timing of his knowledge. Despite being reminded of this fact more than once, the plaintiff declined to testify to these alleged facts under oath, but rather sought to rely on his submissions from the bar relating to these dates. There was accordingly no evidence before Court as to when exactly the plaintiff in fact had knowledge of the identity of the defendants.

[12] A replication is necessary where a party wishes to allege that prescription has been interrupted. [5] There has been some debate as to where the onus lies where reliance is placed by the plaintiff on the interruption of prescription. In the matter of *Yusaf v Bailey and Others* [6] the Court had to face a similar problem, namely which party must bear the *onus* of proof which arises where the date on

[5] Butler v Swain, 1960 (1) SA 527 (N), at 528 G
Hanson, Thomkin and Finkelstein v D. B. N. Investments (Pty) Ltd, 1951 (3) SA 769 (N), at 771 B – C
Naidoo v Santam Insurance Ltd and Another, 1986 (1) SA 296 (N)
[6] 1964 (4) SA 117 (W)

which the defamation was first brought to the knowledge of the claimant is in dispute. Vieyra J stated: [7]

> "Counsel told me that they could not find any decided cases dealing with this point. There are however two reported cases dealing with the point. The first is that of *Reid v. van der Walt,* 2 S. 285. Relying on *Voet*, 47.10.21 and *Groenewegen's* Note 6 to *Grotius* 3.35.3, the Court came to the conclusion that the *onus* of pleading and proving that the plaintiff was aware of a slander rested on the defendant. The other is *Holmes v Salzmann,* 1913 O.P.D. 111, in which the Court (Maasdorp, C.J.) came to the contrary conclusion (see at p. 118). It was pointed out that the authorities relied on in the earlier case did not bear out the inference drawn, as indeed is the case. Moreover it would be contrary to principle to cast an *onus* on a defendant in relation to the facts so peculiarly within the knowledge of the plaintiff. The earliest date from which the period laid down in sec. 3 (2) (*b*) (i) of the Prescription Act, 18 of 1943, can run is the date of the publication of the defamatory matter. In the vast majority of cases a defendant would have no means of establishing exactly when the plaintiff first learned of the defamation or ascertained the identity of the parties responsible. The conclusion is that the *onus* must lie on the plaintiff. I respectfully agree with the decision of the Orange Free State Court."

[13] This approach was rejected by Diemont, JA in the *Gericke v Sack* matter where the learned Judge of Appeal stated: [8]

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[7] at 119 C - G
[8] at 827 D – 828 A

"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 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. Nor does it seem to me that counsel can advance his argument by reliance on the rather unusual manner in which the allegations relating to this issue were pleaded. Mr *Cloete* pointed to the replication and argued that it was the appellant who alleged that it was not until 17 February 1971 that she learned the identity of the respondent – she did not content herself with a mere denial of the allegations contained in the special plea; in so doing she attracted an *onus*.

That submission is without substance; it overlooks the fact that it was the respondent, not the appellant, who raised the question of prescription. It was the

> respondent who challenged the appellant on the issue that the claim for damages was prescribed – this he did by way of a special plea five months after the plea on the merits had been filed. The *onus* was clearly on the respondent to establish this defence. He could not succeed if he could not prove both the date of the inception and the date of the completion of the period of prescription."

[14] In my view, this matter can be distinguished from the *Gericke v Sack* case. The defendants, in discharging the onus of establishing prescription, face no replication or countervailing evidence tendered by the plaintiff that prescription was interrupted on the dates claimed in argument. These remain no more than unsubstantiated claims with no evidentiary weight to be attached to them. By virtue of signing the original summons on 10 November 2006, I find that plaintiff was aware of the offending articles sometime between their publication and that date. Armed with a copy of the newspaper, it would, in my view, have been a simple and quick investigative process to have ascertained the facts underlying the debt and the identity of the debtors through exercising reasonable care. Instead what the plaintiff did was to issue summons against the author of the articles and the newspaper. These parties were simply wrong suited. The issuing of summons in 2006 against different parties did not interrupt prescription against the debtors in this action. Section 15 of the Act, which provides for the judicial interruption of prescription, has no application to the facts of this matter.

[15] In the circumstances, I find that the plaintiff's claim has prescribed. The following order is accordingly made:

1. The special plea of prescription is upheld.

2. The plaintiff's claim is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.

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CORBETT, A.J

ON BEHALF OF THE PLAINTIFF:

The plaintiff in person

ON BEHALF OF THE DEFENDANTS:

Adv. G Dicks

Instructed by Engling, Stritter & Partners