



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No: 22436/2018

In the matter between:

ARIELLE VAN DER MERWE

Applicant

versus

ISA CARSTENS ACADEMY

First Respondent

STELLENBOSCH UNIVERSITY

Second Respondent

**SUPERSTRIKE INVESTMENTS 121 (PTY) LTD
T/A ISA DAMESKOSHUIS (ISA LADIES RESIDENCE)**

Third Respondent

HEARING DATE: 19 April 2023

JUDGMENT DELIVERED ELECTRONICALLY ON 28 APRIL 2023

ADHIKARI, AJ

[1] The plaintiff instituted an action for damages in respect of certain injuries allegedly sustained by her during an event that took place on 22 January 2016.

[2] At the time, the plaintiff was a first-year student registered with the Isa Carstens Academy (Pty) Ltd ('the Academy') and resident at the Isa Dameskoshuis ('the Isa ladies' residence').¹

¹ Translated from Afrikaans to 'ISA Ladies' Residence'.

[3] The plaintiff, in the particulars of claim, contended that the Isa ladies' residence was controlled by the Academy and/or Stellenbosch University ('the University') and that she was injured during an event ('the welcoming event') that formed part of a welcoming programme ('the welcoming programme') arranged by persons described in the particulars of claim as "*mentors*", who the plaintiff averred were appointed and/or employed by the Academy and/or the University.

[4] The plaintiff issued summons against the Academy, as first defendant, and the University, as second defendant, for damages resulting from a back injury allegedly sustained during the welcoming event on 22 January 2016 ('the incident').

[5] The combined summons was served on the Academy and the University on 10 December 2018.

[6] The Academy, on 2 April 2019, delivered a special plea in which it contended that there had been a material non-joinder of Superstrike Investments 121 (Pty) Ltd ('Superstrike') and that there had been a misjoinder of the Academy which ought not to have been joined as a defendant in the action.²

[7] The plaintiff, on 15 May 2020, brought an application to join Superstrike as the third defendant in the action ('the joinder application').

[8] Superstrike opposed the joinder application, *inter alia*, on the basis that the plaintiff's cause of action had arisen more than three years prior and that any claim that the plaintiff may have had against Superstrike had prescribed.

² The University on 19 March 2019 also delivered a special plea in which it contended that the plaintiff was resident in a residence, "*operated by [the Academy] and/or its affiliated entity, Superstrike Investments 121 (Pty) Ltd trading as ISA Dameskoshuis*".

[9] This Court, per De Wet AJ, granted the joinder application, reasoning that while the joinder of Superstrike might result in some inconvenience, Superstrike was not deprived of the right to raise prescription as a special plea once joined, and that failure to join Superstrike would not finally determine the prescription issue in that it remained open to the plaintiff to issue fresh action proceedings against Superstrike, where the issue of prescription would doubtless arise.

[10] Consequently, the Court held that it would not be in the interests of justice to refuse the joinder application, and on 13 December 2021 granted an order joining Superstrike as the third defendant.

[11] The plaintiff amended her particulars of claim, *inter alia*, to join Superstrike as the third defendant and served the amended particulars of claim on Superstrike on 27 January 2022.

[12] Superstrike delivered a special plea of prescription on 14 February 2022.

[13] In a joint practice note delivered by the plaintiff and Superstrike, the parties recorded their agreement that the special plea of prescription be heard by way of argument only, and that the Court be requested to have regard to the pleadings in the action as well as to the affidavits filed in the joinder application, in adjudicating the special plea. Counsel for the parties confirmed at the commencement of the hearing of the special plea that the agreement between the parties was correctly recorded in the joint practice note.

[14] It is on this basis that the special plea was argued before me on 19 April 2023.

THE SPECIAL PLEA

Superstrike's contentions

[15] Superstrike contends in the special plea, that the plaintiff's claim prescribed at midnight on 22 January 2019, (that is 3 years after the incident took place) in that:

[15.1] Summons was issued and served on the Academy on 10 December 2018, at the Academy's registered address.

[15.2] The plaintiff had not issued summons against Superstrike prior to midnight 22 January 2022.

[15.3] When summons was issued against the Academy, the plaintiff had knowledge of the identity of the debtor (being Superstrike) and of the facts from which the debt claimed against Superstrike arose, alternatively the plaintiff must be deemed to have had such knowledge, in that she could have obtained such knowledge through the exercise of reasonable care in that:³

[15.1.1] The plaintiff and her father had signed a memorandum of agreement ('the memorandum') with Superstrike one week before the incident took place, which records that Superstrike trading as Isa Dameskoshuis is the "*supplier*" of the accommodation in which the plaintiff resided at the time of the incident;

³ In the replying affidavit in the joinder application, it is stated on behalf of the plaintiff that she signed a memorandum of agreement with Superstrike trading as ISA Dameskoshuis on 15 January 2016. In terms of the memorandum Superstrike supplied the plaintiff with accommodation at ISA ladies' residence and certain other related services, for the academic year commencing January 2016.

[15.1.2] The plaintiff was aware of the fact that Superstrike is the legal entity through which Isa ladies' residence conducts business operations;

[15.1.3] The relationship between Superstrike and Isa ladies' residence is a matter of public knowledge as this information appears on the internet where a Google search provides links to an application form ('the application form') from which it is evident that "*Isa Dameskoshuis*" is the trading name of Superstrike, and to an information brochure ('the information brochure') from which it is evident that Isa ladies' residence conducts its business operations through Superstrike.

[15.1.4] Service of the summons on the Academy did not constitute service of the summons on Superstrike as they two are separate legal entities.

[15.1.5] Superstrike is not recognisable, alternatively not clearly recognisable, from the summons as an intended defendant in the action, and consequently Superstrike could not have known from the substance of the summons that it was an intended defendant.

[16] In summary, Superstrike's position is that:

[16.1] The plaintiff must be found *de facto* to have had knowledge of the identity of Superstrike as a defendant when the action was instituted, alternatively must be deemed to have had such knowledge because she could have gained same through the exercise of reasonable care, and that consequently prescription commenced running when the welcoming event took place (on 22 January 2016); and

[16.2] Service of the summons on the Academy did not constitute service of process on Superstrike for the purposes of interrupting prescription as contemplated in s 15(1) of the Prescription Act.

Plaintiff's contentions

[17] The plaintiff did not replicate to the special plea. However, nothing turns on this as reliance on s 12(3) of the Prescription Act 68 of 1969⁴ is foreshadowed in the plaintiff's pleadings.⁵

[18] The plaintiff resists the special plea on the following grounds:

[18.1] She and her legal representatives were unaware of the existence of the memorandum when the action was instituted;

[18.2] A company search revealed that Superstrike and the Academy share the same registered address, but at that stage there was still uncertainty as to which entity controlled the activities of students residing at Isa ladies' residence and which entity employed and/or controlled the mentors;

[18.3] When the action was instituted, the plaintiff and her legal representatives were unaware of the nature and extent of the involvement of Superstrike in controlling student activities at Isa ladies' residence, and controlling and/or employing the mentors;

⁴ Section 12(3) provides:

'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.'

⁵ In this matter reliance on s 12(3) of the Prescription Act was raised squarely by the plaintiff in the founding and replying affidavits in the joinder application.

[18.4] Even after Superstrike's identity came to light, the plaintiff and her legal representatives were not certain which entity controlled the activities of the students at Isa ladies' residence or which entity controlled and/or employed the mentors;

[18.5] The fact the Superstrike provided accommodation in terms of the memorandum did not necessarily mean that it was also in control of the students of the Academy or their activities, or that it employed and/or controlled the mentors;

[18.6] It remains unclear what Superstrike's role was at the time of the incident, aside from providing accommodation, and thus joinder was sought out of an abundance of caution based on the averments in the Academy's special plea;

[18.7] Because the summons was served on Superstrike's registered address, albeit addressed to the Academy and citing the Academy as first defendant, Superstrike would have known that the summons was intended for it and that the Academy was the "*wrong defendant*";

[18.8] Superstrike is clearly recognisable as a defendant from the combined summons; and

[18.9] An analysis of the pleadings makes it clear that the entity which the plaintiff intended to hold liable was the entity vicariously liable for the actions of the mentors and which was in control of the students residing at Isa ladies' residence when the incident took place.

[19] In a supplementary affidavit deposed to by the plaintiff in the joinder application, and delivered after the replying affidavit, the plaintiff contends that:

[19.1] She first received a copy of the memorandum in July 2020, when it was sent to her by her attorney;

[19.2] On perusing the memorandum her memory was refreshed and she recalled that she had signed the memorandum on 15 January 2016, when the document was given to her by her father, who instructed her to sign a document, which she did, without reading the content of the document; and

[19.3] The plaintiff's late mother signed the indemnity that formed part of the memorandum ('the indemnity'), but the plaintiff was unaware of this fact until she saw her late mother's signature on the indemnity after it was provided to her by her attorney, along with the memorandum.

ONUS

[20] Superstrike correctly accepted that it bore the duty to begin, and the onus to prove the special plea.⁶

[21] Superstrike, however, contended that the plaintiff bore the onus of proof in respect of the alleged interruption of prescription. In support of this contention Superstrike relies on the judgment of the Supreme Court of Appeal in the matter of *ABSA Bank Bpk v De Villiers* 2001 (1) SA 481 (SCA).⁷

[22] In *ABSA Bank*, the Supreme Court of Appeal held that where reliance was placed on, *inter alia*, interruption of prescription, if on the evidence it was uncertain whether interruption had occurred the plaintiff's claim would necessarily have to fail. The replication raised by such a plaintiff in such circumstances is a

⁶ *Gericke v Sack* 1978 (1) SA 821 (AD) at 825H quoted with approval in *Jugwanth v Mobile Telephone Networks (Pty) Ltd* [2021] 4 All SA 346 at para [6]. See also *Macleod v Kweyiya* 2013 (6) SA 1 (SCA) ('*Macleod*') at para [10].

⁷ *ABSA Bank Bpk v De Villiers* 2001 (1) SA 481 (SCA) ('*ABSA Bank*').

separate issue in respect of which a separate onus in the sense of a full onus exists.

[23] Applying these principles, the plaintiff in *ABSA Bank* was held to bear the onus of establishing that prescription had been interrupted.⁸

[24] Mr Botha for the plaintiff submitted in respect of the onus of establishing that prescription had been interrupted as contemplated by s 15(1) of the Prescription Act,⁹ (on which the plaintiff places reliance) that the issue of who bears the onus is irrelevant if regard is had to the facts in Superstrike's answering affidavit in the joinder application. Mr Botha submitted that these facts clearly establish that prescription had been interrupted by service of the combined summons on the Academy.

[25] I am not persuaded that the issue of onus is irrelevant to the question of whether prescription has been interrupted, in light of the judgment of the Supreme Court of Appeal in *ABSA Bank*.

[26] Applying the principles set out in *ABSA Bank*, the plaintiff bears the onus of establishing that the running of prescription had been interrupted by service of the summons on Superstrike, and further that the plaintiff had claimed payment of the debt allegedly owed to her by Superstrike in the summons.

[27] In light of the foregoing, the crisp issues which I am called upon to determine are, whether:

⁸ *ABSA Bank* at 486E – 487D.

⁹ Section 15(1) provides:

'The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.'

[27.1] Superstrike has discharged the onus of proving the date on which the plaintiff obtained actual or constructive knowledge of the debt;¹⁰ and

[27.2] The Plaintiff has discharged the onus of proving that the debt was claimed in the summons and that the summons was served on Superstrike prior to midnight, 22 January 2019.

SECTION 12(3) OF THE PRESCRIPTION ACT

[28] Superstrike contended, in the first instance, that the plaintiff had actual knowledge of the identity of Superstrike as the debtor against whom she sought to claim and of the facts from which the debt arose when the action was instituted. In the alternative, Superstrike contended that the plaintiff could have obtained such knowledge through the exercise of reasonable care.

[29] In *Links v Department of Health*,¹¹ the Constitutional Court held that to require knowledge of causative negligence for the test in s 12(3) to be satisfied, would set the bar too high.¹²

[30] In *Mtokonya v Minister of Police*¹³ the Constitutional Court considered the interpretation of s 12 of the Prescription Act, and in particular the exception in s 12(3) as well as the proviso in the section.¹⁴ The Constitutional Court, with reference to the long-standing jurisprudence of the Supreme Court of Appeal, confirmed that s 12(3) does not require knowledge of legal conclusions on the part of a creditor before a debt can be said to be due,¹⁵ and that s 12(3) does not require a plaintiff to have knowledge of any right to sue the debtor or to have

¹⁰ *Macleod supra* note 6 at para [10].

¹¹ *Links v Department of Health* ('Links') 2016 (4) SA 414 (CC).

¹² *Links* at para [42].

¹³ *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC) ('*Mtokonya*') at para [62].

¹⁴ *Mtokonya* at paras [32] and [34].

¹⁵ *Mtokonya* at paras [47] – [51].

knowledge of legal conclusions that may be drawn from the facts from which the debt arises.¹⁶ The facts from which a debt arises are the facts of the incident in question which, if proved, would mean that in law the debtor is liable to the creditor.¹⁷

[31] In summary, the legal position is that the facts from which the debt arises, are facts which the creditor would need to prove in order to establish the liability of a debtor. This does not require a creditor to have knowledge of the law or legal opinion or conclusions or even the availability in law of a remedy.

[32] As I have already indicated, the parties elected not to lead evidence and confined themselves to the record.¹⁸

[33] I requested counsel to address the question of the status of the affidavits filed in the joinder application and in particular, the status of the factual averments in those affidavits for the purposes of determining the special plea.

[34] Mr Botha submitted that the affidavits stood as evidence before the Court, and that all of the factual allegations in the affidavits are facts in evidence before the Court. Mr Botha further submitted that the factual averments in the affidavits do not fall to be evaluated in accordance with the *Plascon-Evans*¹⁹ rule, in light of the fact that the parties had elected to confine themselves to the record and not to lead oral evidence.

[35] Mr Rademeyer for Superstrike correctly accepted that the factual averments in the affidavits constitute part of the evidentiary material before the Court, and that the plaintiff's supplementary affidavit, delivered after the replying

¹⁶ *Mtokonya* at para [36].

¹⁷ *Mtokonya* at para [45].

¹⁸ The record to which the parties had agreed to confine themselves for the purposes of the hearing of the special plea comprised the pleadings in the action and the affidavits in the joinder application.

¹⁹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I-635D.

affidavit, was properly before the Court and thus also constitutes evidence to which the Court is entitled to have regard.

[36] Mr Rademeyer correctly accepted that Superstrike bore the onus of establishing that the plaintiff:

[36.1] had knowledge of all the facts that she would need to prove in order to establish that Superstrike is liable for the damages suffered by her as a consequence of the incident; and

[36.2] knew that Superstrike was liable for such damages, whether wholly or in part.

[37] Given that the plaintiff claims in delict for damages suffered as a consequence of her participation in the welcoming event, the facts that the plaintiff would need to prove in order to establish a claim against Superstrike are that:

[37.1] She was resident at Isa ladies' residence at the time of the incident;²⁰

[37.2] The activities of the students who were resident at Isa ladies' residence when the incident occurred, were controlled by Superstrike.

[37.3] Superstrike employed and/or exercised control over the mentors;

[37.4] The mentors arranged the welcoming event;

[37.5] The mentors, in arranging the welcoming event, were acting in the course and scope of their duties;

²⁰ This fact is not in dispute.

[37.6] She was injured at the welcoming event; and

[37.7] She suffered damages as a result of the injury sustained at the welcoming event.

[38] The plaintiff, in the particulars of claim (prior to amendment), pleaded that:

[38.1] The mentors arranged the welcoming event;

[38.2] The mentors were acting in the course and scope of their duties in arranging the welcoming event; and

[38.3] She was injured at the welcoming event.

[39] Consequently, there is no dispute as to the plaintiff's knowledge, at the time that the action was instituted, of these pleaded facts.

[40] What is in dispute, however, is whether the plaintiff was aware when the action was instituted, that the activities of the students who were resident at Isa ladies' residence were controlled by Superstrike and that Superstrike employed and/or exercised control over the mentors ('the material facts').

[41] I have had regard to the content of the memorandum; the indemnity; the welcoming programme; the affidavits filed in the joinder application; and the documents²¹ annexed to Superstrike's answering affidavit in the joinder application.

²¹ Three documents were annexed to the answering affidavit, first, a screenshot of a Google search page reflecting the search results returned in respect of a search done on the phrase 'isa dameskoshuis'; second, a copy of the accommodation form downloaded from a link on the website of the Academy (www.isacarstens.co.za); and third a copy of the 2020 Information brochure of the Isa ladies' residence also downloaded from a link on the website of the Academy.

[42] The memorandum is, in essence, a lease agreement concluded between the plaintiff and Superstrike trading as the Isa ladies' residence.

[43] Aside from the recordal in the memorandum that the trading name of Superstrike is "*ISA DAMESKOSHUIS*", and that payment of the fees due in terms of the memorandum are to be made to the bank account of "*Isa Dameskoshuis*", there are no further references in the memorandum to Isa ladies' residence.

[44] While the memorandum makes it clear that accommodation is being provided to students of the Academy or the University for the duration of the academic year for which the students are registered at either institution, crucially the memorandum contains no indication of the role that Superstrike plays in respect of:

[44.1] The activities of students of the Academy;

[44.2] The activities of students residing at Isa ladies' residence; or

[44.3] The employment or any other means of control over the mentors.

[45] While the plaintiff's claim is delictual in nature and not contractual, in order to determine whether on the probabilities the plaintiff, having regard to the terms of the memorandum, could reasonably be said to have had knowledge or deemed knowledge of the material facts, I am required to interpret the terms of the memorandum in light of the established legal principles.

[46] It is settled law that interpretation of contracts is a unitary exercise where the words of the document are considered in the light of all relevant and admissible context.²²

²² *Bothma-Batho Transport v S Bothma & Seun Transport* 2014 (2) SA 494 SCA at para [12].

[47] The memorandum defines "*the Agreement*" as "*this supply of accommodation package*".²³ The memorandum further records that Superstrike, being the "*supplier*", supplied to the plaintiff, being the "*recipient*", a room with communal facilities at Isa ladies' residence, along with cleaning of the communal facilities, maintenance, electricity supply and furniture for the full academic year for which the plaintiff was registered with the Academy. The memorandum sets out the fees due by the plaintiff for the accommodation provided to her at Isa ladies' residence and other matters related to the provision of accommodation to the plaintiff as a student of the Academy.

[48] Having regard to the terms of the memorandum, Superstrike's submission that the memorandum, properly interpreted, states that Superstrike trading as "*Isa Dameskoshuis*" is the "*supplier*" of the accommodation in which the plaintiff resided at the time of the incident and that Superstrike is the legal entity through which ISA ladies' residence operates, cannot be faulted.

[49] However, the sensible interpretation of the memorandum, on the authority of Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*²⁴ is that it does no more than set out the terms upon which the plaintiff let a room at Isa ladies' residence, from Superstrike.

[50] I am not persuaded that the terms of the memorandum elucidate Superstrike's role in respect of the nature and extent of its control, if any, of the activities of students of the Academy residing at Isa ladies' residence or Superstrike's role, if any, in respect of the employment and/or control of the mentors.

[51] I am in agreement with the plaintiff's submission that the fact the Superstrike, as lessor, provided accommodation to students of the Academy in

²³ Clause 1.1.2 of the memorandum.

²⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) ('*Endumeni*').

terms of the memorandum does not, without more, mean that Superstrike was also in control of the students or their activities, or that it employed and/or controlled the mentors.

[52] Superstrike's contentions in this regard do not accord with the language of the memorandum itself, would lead to an insensible, unbusinesslike result and would undermine the objectively ascertainable purpose of the memorandum, and thus do not withstand scrutiny.²⁵

[53] Superstrike contends that the fact that the plaintiff signed the memorandum on 15 January 2016 and that she was an adult (19 years old) when she did so, constitutes proof that she had knowledge of the material facts, alternatively with reasonable care could have obtained such knowledge. However, this does not accord with the undisputed contentions in the plaintiff's supplementary affidavit.

[54] The plaintiff states in her supplementary affidavit that:

[54.1] Her father was solely in control of all the administration and arrangements for her intended studies at the Academy;

[54.2] Her father instructed her to sign "*one of the documents*" that he had in his possession on 15 January 2016;

[54.3] Her father showed her where to sign and she signed the document without reading it; and

[54.4] She first received a copy of the memorandum at the end of July 2020 when her attorney mailed a copy to her.

²⁵ *Endumeni* at para [18]. See also *National Credit Regulator v Opperman and Others* [2012] ZACC 29; 2013 (2) SA 1 (CC) fn 105, and *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Others* [2015] ZACC 12 (CC); 2015 (5) SA 370 (CC).

[55] Superstrike led no evidence, either at the hearing of the special plea or in the joinder application, to gainsay the plaintiff's evidence that she did not in fact read the document that she signed on 15 January 2016 and that she did not have a copy of the memorandum prior to July 2020.

[56] Superstrike did not seek leave in terms of Rule 6(5)(e) to file a further affidavit in the joinder application to gainsay the plaintiff's contentions in the supplementary affidavit, nor did it seek to strike out the supplementary affidavit or any portion thereof.²⁶ In the circumstances, as Mr Botha correctly pointed out, the plaintiff's allegations as to the nature and extent of her knowledge of the content of the memorandum and the welcoming programme when the action was instituted, stand uncontested.

[57] I must therefore accept on the evidence, that the plaintiff was not aware of the content of the memorandum or the welcoming programme at the time of the incident or when the action was instituted, and that she had sight of these documents for the first time at the end of July 2020.

[58] Although Superstrike no longer appears to rely on the indemnity, it bears mention that while the indemnity provides for the indemnification of "*the employees, agents and directors of*", inter alia, the Academy, Superstrike and "*the House Committee*" in respect of "*any claims whatsoever due to injuries during the execution of any student activities of the residence*", the indemnity was signed only by the plaintiff's late mother. In the plaintiff's supplementary affidavit in the joinder application she states that she cannot recall whether her late mother signed the indemnity and further that the indemnity was signed without her knowledge or consent. These contentions are not disputed by Superstrike.

[59] There is no evidence before the Court that the plaintiff had sight of or was aware of the existence of the indemnity or its contents when the action was instituted. Consequently, the indemnity does not assist Superstrike in

discharging the onus on it to prove the requisites of s 12(3) of the Prescription Act.

[60] The welcoming programme sets out the purpose of what is described as the University's welcoming programme, and states that the University's objective in respect of the welcoming programme is to provide new students with an unforgettable experience together with their fellow students, arranged in an organised manner so that those who are in charge of the programme take responsibility for the safety of new students.²⁷

[61] The front page of the welcoming programme states that the University is driven by its values and that "*Maties*"²⁸ treat others with respect and human dignity, especially those who are newcomers.

[62] The welcoming programme contains various references to the University, the Academy, Isa ladies' residence and to an entity referred to as "*IMM*", however, it is not clear from the welcoming programme what, if any, relationship there is between these entities.

[63] The welcoming programme sets out the objectives of what is referred to as the Isa ladies' residence welcoming programme in detail. However, it is not clear from the welcoming programme that the programme was arranged by, or under the control of Superstrike trading as Isa ladies' residence. Indeed, there is no reference at all in the welcoming programme to Superstrike.

[64] Further, it is not readily apparent from the memorandum, read together with the welcoming programme, that Superstrike was the entity in control of the welcoming programme or that Superstrike was the entity that employed and/or controlled the mentors responsible for arranging the welcoming programme.

²⁶ *Tantoush v Refugee Appeal Board*, 2008 (1) SA 232 (T) at para [51].

²⁷ FN Translated from her Afrikaans version of the welcoming programme.

²⁸ The students of Stellenbosch University are nicknamed "*Maties*".

[65] Superstrike in its answering affidavit in the joinder application, states that the Academy *"is the entity that provides education and training for the beauty industry and had nothing to do with the [incident]"* and that Superstrike *"is a completely different entity and is the entity that provides accommodation for students"*. These statements do not provide any clarity as to the role, if any, played by Superstrike in respect of the activities of the students at Isa ladies' residence or in respect of the employment and duties of the mentors.

[66] As regards the three documents annexed to Superstrike's answering affidavit in the joinder application, the Google search result shows that Isa ladies' residence provides accommodation for students of the Academy, and the two documents downloaded from a link on the Academy's website indicate that Superstrike is the legal entity through which accommodation is provided at Isa ladies' residence. None of these documents contain any indication as to the role, if any, played by Superstrike in respect of the activities of the students at Isa ladies' residence or in respect the employment and duties of the mentors.

[67] Consequently, Superstrike has failed to establish on a balance of probabilities that the plaintiff knew that Superstrike was the entity that controlled the activities of the students at Isa ladies' residence; that Superstrike controlled and/or employed the mentors; or that the plaintiff could have obtained such knowledge with reasonable care.

SECTION 15(1) OF THE PRESCRIPTION ACT

[68] In light of the conclusion that I have reached in regard to s 12(3) of the Prescription Act, it would appear to be unnecessary for me to deal with the contentions of the parties in relation to the applicability of s 15(1) of the Prescription Act, however, bearing in mind the views of the Constitutional Court

in *S v Jordan & others (Sex Workers Education and Advocacy Task Force and others as Amici Curiae)*,²⁹ I intend to do so.

[69] It is common cause that the summons was served on the Academy at its registered address on 10 December 2019. It is further common cause that the Academy and Superstrike share the same registered address and at least some of the same directors. Further, the Academy and Superstrike are both represented by the same attorney, Mr Kruger of MacGregor Stanford and Kruger, who deposed to Superstrike's answering affidavit in the joinder application and who prepared the Academy's special plea of non-joinder and misjoinder. It is also common cause that the Academy and Superstrike are separate legal entities.

[70] Mr Botha urged me to find that the fact that the Academy had received and considered the combined summons, means that Superstrike must also have had the same knowledge. Mr Botha further contended that the fact that Mr Kruger represents both the Academy and Superstrike and prepared the Academy's special plea means that Superstrike must have had knowledge of the contentions in the special plea as regards its role and that of the Academy.

[71] I must accept, in the absence of evidence to the contrary, that Mr Kruger was acting on the instructions of the Academy when he prepared the Academy's special plea. The plaintiff led no evidence to substantiate the contention that Mr Kruger was on record for Superstrike at the time that he prepared the Academy's special plea,³⁰ or that Mr Kruger conveyed his knowledge of the contentions in the Academy's special plea to Superstrike. Indeed, Mr Kruger could only have done so on the express instructions of the Academy. There is, however, no such evidence before me.

²⁹ *City of Cape Town v Premier of the Western Cape and Others* 2008 (6) SA 345 (C) at [167].

³⁰ The record reflects that Mr Kruger prepared the special plea during April 2019. The record further reflects that Mr Kruger delivered a notice of opposition on behalf of Superstrike in respect of the joinder application on 21 May 2020, approximately a year after the special plea was delivered.

[72] I am not persuaded that Mr Kruger's knowledge in his capacity as the attorney of record for the Academy can be imputed to Superstrike in light of the evidence.

[73] The highwater mark of the plaintiff's evidence as regards the relationship between the Academy and Superstrike is the contention in the replying affidavit in the joinder application, deposed to by the plaintiff's attorney, Ms Botha, that the plaintiff's attorneys had *"discovered that one Jacobus Gerhardus Roos and his wife (the daughter of Isa Carstens), are the directors of [the Academy] and [Superstrike], and that Mr Roos was a director of the First Respondent"*.

[74] The plaintiff, however, led no evidence that Mr Roos was a director of both Superstrike and the Academy at the time that the Academy's special plea was prepared or that Mr Roos had knowledge of the contentions contained in the special plea.

[75] There is thus no evidentiary basis on which I can impute the knowledge of the Academy to Superstrike.

[76] Further, the fact that the summons was served on the Academy at its registered address which also happens to be the registered address of Superstrike does not, without more, establish that Superstrike had knowledge of the content of the combined summons when it was served.

[77] A perusal of the particulars of claim (before amendment), reveals that the only reference to Isa ladies' residence is in paragraph 4.1 thereof, where the plaintiff pleads that she was accepted as a resident of Isa ladies' residence, which was controlled by the Academy or the University.

[78] Critically, there is no averment in the original particulars of claim that could reasonably be interpreted as a contention that Isa ladies' residence (or the entity through which it conducted its business operations) was in control of or

responsible for the activities of the students of the Academy; was in control of or responsible for the events that formed part of the welcoming programme; and/or employed the mentors.

[79] In the particulars of claim the plaintiff contended that the entity in control of and/or which employed the mentors is vicariously liable for the damages that she purports to have suffered at the welcoming event. However, as the pleadings stand, the respective roles of Superstrike and the Academy remain unclear as regards which entity, if any, exercised control over the activities of the students who were resident at Isa ladies' residence at the time of the incident, and which entity, if any, employed and/or exercised control over the mentors.

[80] I am not persuaded that on an objective reading of the original particulars of claim, Superstrike could reasonably have been aware that it was the entity which the plaintiff sought to hold liable.

[81] Both parties placed reliance on the judgment of the Supreme Court of Appeal in *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd*³¹ in support of their respective contentions regarding s 15(1) of the Prescription Act.

[82] In *Blaauwberg Meat Wholesalers* an action was mistakenly instituted in the name of Creditor 'A', but after the expiry of the prescription period it appeared that a different creditor, Creditor 'B' was the true creditor and the summons was duly amended to reflect the name of the true creditor. The Supreme Court of Appeal held that the summons which was served on the defendant failed entirely to communicate to the defendant the intention of the true creditor to claim payment, and thus did not serve to interrupt prescription in terms of s 15(1).

³¹ *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* 2004 (3) SA 160 (SCA) ('*Blaauwberg Meat Wholesalers*').

[83] In the plaintiff's heads of argument reliance was placed on the following statement in *Blaauwberg Meat Wholesalers*:³²

'While the entitlement of the debtor to know it is the object of the process is clear, in its case the criterion fixed in s 15(1) is not the citation in the process but that there should be service on the true debtor (not necessarily the named defendant) of process in which the creditor claims payment of the debt. Proof of service on a person other than the one named in the process may thus be sufficient to interrupt prescription if it should afterwards appear that that person was the true debtor.'

[84] As Mr Rademeyer correctly contended, the aforementioned statement is *obiter*, but in any event, the statement does not assist the plaintiff in that there is no evidentiary basis on which to find that the summons was served on Superstrike (as the "true debtor").

[85] The return of service in the record shows that service was effected on one Mrs Roux, an employee of the Academy at the registered address of the Academy. The fact that the Academy and Superstrike share the same registered address does not take the matter any further, in the absence of evidence establishing that Mrs Roux as a fact conveyed the summons to Superstrike or could reasonably have been expected to do so. Indeed, there is no evidence that Mrs Roux had any connection whatsoever to Superstrike. There is, in short, no evidence that the summons came to the knowledge of Superstrike prior to midnight, 22 January 2019.

[86] The evidence does not establish there was service on Superstrike of process in which the plaintiff claimed payment of the debt, nor is the plaintiff's

³² *Blaauwberg Meat Wholesalers* at para [18].

intention to hold Superstrike liable, reasonably ascertainable from the process itself.³³

[87] Consequently, the plaintiff has failed to establish on a balance of probabilities that the running of prescription was interrupted as contemplated by s 15(1) of the Prescription Act.

COSTS

[88] As regards the issue of costs, there are no special circumstances that warrant a departure from the ordinary rule that costs should follow the result.

[89] In the result, the following order is made.

ORDER:

1. The special plea of prescription is dismissed.
2. The Third Defendant is to pay the Plaintiff's costs, such costs to include the costs of two counsel, where so employed.


ADHIKARI, AJ

³³ *Blaauwberg Meat Wholesalers* at para [13].

APPEARANCES:

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