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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 7316/2022

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE: 12/2/25

SIGNATURE:

In the matter between:

THERESA RAMATSIMELE MAKGATI

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MULLER J:

The plaintiff instituted action against the RAF¹ (main and alternative claims) to recover damages for inter alia breach of contract for allowing a claim instituted by the plaintiff to prescribe in terms of section 23 in its hands. The claim for damages has had its origin in the injuries she sustained in a motor vehicle collision on 22 March 2016 at Lenting crossing when she was a passenger in a motor vehicle. The particulars of claim make neither mention of the name of the driver(s) of the motor vehicle(s) nor whether they were known or unknown to the plaintiff.

A combined summons was issued by the plaintiff on 7 July 2022 and was served on the RAF. The main and the alternative claims are based on the allegation that the claim has prescribed after the plaintiff and the RAF entered into an agreement that the RAF shall assist the plaintiff to lodge her claim and that the RAF negligently breached the mandate given to it to advise her when the claim will become prescribed and what steps she should take to prevent the claim from prescription.

In answer to these allegations the RAF delivered a special plea that claim 1² has prescribed since the summons was not issued within a period of five years as required by section 23(3) of the RAF Act.³

The plaintiff in a reply delivered to the special plea averred that the plaintiff terminated the mandate of the RAF to deal directly with the claim on 5 July 2022 when the summons was issued.⁴ The claim could therefore not have prescribed in the hands of the RAF. The plaintiff pleaded that it was held in *Lottering v RAF and Another*.⁵

“that where the RAF represents to a claimant that it will assist in settling a claim without external legal advice, a greater duty of care rests upon the RAF to take all reasonable steps to prevent claims prescribing in its hands which steps would include responding to the claimant’s enquiries, bringing the matter to finality and

¹ The defendant. (Hereinafter referred to as the RAF).

² Referring to the main claim in the particulars of claim.

³ Act 56 of 1996.

⁴ The plaintiff signed a power of attorney on 22 April 2022 in terms of which the attorney was appointed to act on her behalf.

⁵ (2021) ZANHC 36 (13 August 2021).

informing the claimant about the rejection of prescription of the claim. In the absence of evidence by the defendant to take reasonable steps to contact the plaintiff or to properly process the claim, it would be unjust for the defendant to benefit from the inaction on its part.”

When the matter was called the court enquired whether the compulsory pre-trial conference was held prior to the trial date. The minute is replete with references to a claim based on the provisions of section 17. After a totally inadequate explanation was proffered for the failure to comply with their obligation to do so, the court directed that the legal representatives hold a pre-trial conference that afternoon dealing specifically with the special plea. They were also informed that the court will only entertain the special plea the following day, and not the merits.

The following day a pre-trial minute was presented. The special plea was not addressed as requested. Instead it was recorded on behalf of the plaintiff that the claim has been settled 100% in favour of the plaintiff. The defendant denied the allegation and recorded that it is unaware of such a settlement.

The plaintiff also placed on record that:⁶

“[On] or about 27 March 2016 and at approximately at Around 21H00, at Lenting Crossing Lebowakgomo, Limpopo Province I was a passenger in a motor vehicle bearing registration letters and numbers D[...] a white Polo driven by RB MAELANE (“the insured driver”) collided with a Blue Toyota bearing registration letters and numbers C[...] driven by JM MAJALEFA (“the second insured driver”).

It was also recorded that both the merits and quantum were in dispute. However, the following was added to the minute in manuscript:

“The plaintiff records that the aspect of liability an undertaking were settled as part of direct claim settlement on the 4th of May 2017.”⁷

⁶ Under the heading “NATURE OF ACTION”.

When the court endeavoured to determine what was agreed by the parties the legal representatives confirmed when questioned that they agree on the date of the collision; the date that the claim was lodged; the date that the summons was issued and date of service of same.

The legal representative of the RAF also agreed that an undertaking referred to in the handwritten manuscript was issued by the RAF. There was, therefore, no dispute that the RAF issued such an undertaking in terms of section 17(4)(a) in relation to the Plaintiff on 4 May 2017 in respect of bodily injuries that she sustained in a motor vehicle accident that occurred on 27 March 2016 at or near Lenting Road Limpopo Province.

Counsel for the plaintiff applied for an amendment to the reply to the special plea to introduce the allegation that the RAF admitted liability by issuing the undertaking. The RAF objected and insisted on proper notice of the amendment in terms of rule 28. Counsel elected during the argument to abandon the application.

The RAF, as far as the special plea was concerned, closed its case without calling any witnesses. The plaintiff was called to testify. She testified that she was a passenger in a vehicle when the vehicle was involved in an accident on 22 March 2016. She regained consciousness three days later in hospital. She lodged a claim at the offices of the RAF in Polokwane in 2016. She was never informed that she needed to take steps within a period of time. She does not know the meaning of prescription. According to her, prescription refers to the document she needed to get medicine. She said she was told that there is an offer R3mil. No document was presented or shown to her by the staff of the RAF. She agreed verbally to the offer made. She was taken to Pretoria in February 2017 where she was put up in a hotel. (It was clear that she enjoyed her first visit to Pretoria (presumably to be examined by professionals appointed by the RAF)). She was informed that she will be updated and should be patient. She waited four years until her son in 2022 arranged for her to see her an attorney. She instructed her current attorney on 22 Aril 2022 when she signed a power of attorney to enable him to institute action to recover the damages she sustained

⁷ Under the heading "ISSUES IN DISPUTE."

in the motor vehicle accident. She stated in cross-examination that she consulted a lady with the name of Mapula at the offices of the RAF in Polokwane. She was told what documents were required and that she needed to pay R750 to obtain the hospital records. She did not attend the offices of the RAF between 2019 and 2022 because she was told to relax and wait for the RAF to respond. It was her son who suggested that she consult with an attorney. That concluded the case of the plaintiff.

The RAF persisted during argument with their contention that the claim has prescribed in terms of section 23(3) due to the failure by the plaintiff to institute action before expiry of the five year period.⁸ The plaintiff, on the other hand, placed reliance on the judgment of *Lottering supra*.⁹

Section 23 provides:

“(1) Notwithstanding anything to the contrary in any law contained, but subject to subsections (2) and (3), the right to claim compensation under section 17 from the Fund or an agent in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity of either the driver or the owner thereof has been established, shall become prescribed upon the expiry of a period of three years from the date upon which the case of action arose.

(2) Prescription of a claim for compensation referred to in subsection (1) shall not run against –

(a) a minor;

(b) any person detained as a patient in terms of any mental health legislation; or

⁸ The attorney for the RAF despite being requested for authority for the proposition simply stated that it is clear from a reading of section 23.

⁹ Counsel for the plaintiff was unable to supply the court with a copy of the unreported judgment. He was only in possession of a summary of the said judgment. Nor was he able to address the court adequately on the contents of the judgment. Not one of the representatives referred to or has drawn the attention of the court to the important constitutional court judgments on the subject referred to in this judgment.

(c) a person under curatorship.

(3) Notwithstanding subsection (1), no claim which has been lodged in terms of section 17(4)(a) or 24 shall prescribe before the expiry of a period of five years from the date on which the cause of action arose.”

It is admitted in the reply to the special plea that the motor vehicle accident occurred on 22 March 2016.¹⁰ It is also common cause:

- (a) that a claim was lodged with the RAF on 26 August 2016;
- (b) that the RAF acknowledged lodgement of the claim on 5 September 2016;
- (c) that an undertaking in terms of section 17(4)(a) was issued by the RAF on 4 May 2017 which formed part of the settlement of the plaintiff's claim;
- (d) that the plaintiff appointed her current attorneys on 22 April 2022 when she signed a power of attorney;
- (e) that a combined summons was issued on 5 July 2022 and served on the RAF on 7 July 2022.

There is no doubt that the failure of the RAF to process a claim to completion where it has undertaken to do so, is to be deprecated in the strongest terms.

It is common cause that the claim was duly lodged within the prescribed period of three years. The exceptions contained in section 23(2)(a) (b) and (c) do not apply. The summons was issued and served outside the five year period (which expired in March 2021). In *Van*

¹⁰ The plaintiff testified that it occurred on 22 March 2016 as stated in the particulars of claim. The pre-trial minute records the date as 27 March 2016.

*Zyl NO v Road Accident Fund*¹¹ it was held with specific reference to the meaning of the provisions of section 23 that:

“The opening words of this section read: “notwithstanding anything to the contrary in any law contained”. This plainly suggests that when enacting the RAF Act, Parliament was aware of the existence of other laws which regulated prescription of claims arising from motor vehicle accidents like the Prescription Act. The purpose of those opening words was to give pre-eminence to prescription imposed by section 23(1) which is subject only to the exceptions in subsections (2) and (3).

This means that section 23(1) supersedes all other laws which govern prescription of the claims in question, even if those laws say something that contradicts what section 23 stipulates with regard to prescription.”¹²

Prescription in terms of section 23 starts to run from the date of the accident regardless of provisions to the contrary in any other law. The Prescription Act¹³ that deals with prescription generally, is not incorporated into the RAF Act through section 23 and does not apply to matters governed by the RAF Act.¹⁴ It will be recalled that the plaintiff testified that the RAF has failed to inform her of the applicable period of prescription when her claim was lodged and processed.

Much reliance was placed on the judgment in the *Lottering* case by the plaintiff. In that case the RAF raised two special pleas. The first was that the plaintiff has failed to submit a valid claim within three years and secondly, that summons was not issued within five years. The plaintiff relied on section 12(3) of the Prescription Act in that when the plaintiff became aware of the full particulars of her claim against the defendant she instituted action within eight months of so learning. The learned Judge dealt as follows with the second plea which was based on the failure to comply with section 23(3).¹⁵ The court followed the judgment in

¹¹ [2021] ZACC 44 (19 November 2021).

¹² Par 112-113.

¹³ Act 68 of 1969.

¹⁴ *Road Accident Fund v Mdeyide* 2011 (2) SA 2 (CC) par 50.

¹⁵ The learned Judge made no mention of the judgments of the Constitutional Court in *Mdeyide* and *Van Zyl NO*.

*Ralph v The Road Accident Fund*¹⁶ where Siwendu AJ (as she then was) in dismissing a similar special plea, said with regard to the provisions of section 23:

“In my view, the consequences of the decision in *Mdeyide* is that where as in this case, the defendant represents to claimant that it will assist in settling the claims without external legal advice, a greater corresponding duty is created on the defendant to take all reasonable steps to prevent claims prescribing in its hands. Such reasonable steps entail but are not limited to positively responding to the claimant’s inquiries, bringing the matter to finality, but also advising a claimant of the date when a claim would prescribe. The right conferred by section 23 must be counter balanced by efficiency on the part of the defendant.”¹⁷

Froneman J, in *Road Accident Fund v Mdeyide*¹⁸ in a minority judgment when dealing with the constitutionality of section 23 acknowledged that:

“The Prescription Act, as the benchmark legislation for the operation of prescription, requires knowledge, actual or reasonably deemed, as a necessary precondition to enable someone to exercise their right of access to court. This is also evident in various other laws and past decisions of this court. The object of this requirement is aimed at preventing prescription running against a person who, by reason of lack of knowledge and the inability to acquire it by the exercise of reasonable care, is unable to institute action. Where knowledge is not expressly recognised in this way, access to courts may also be preserved by providing courts with the power to grant condonation in deserving cases.

The provisions of s 23(1) of the Road Accident Fund Act (RAF ACT) go against this. It has no knowledge requirement and it does not provide courts with the power to grant condonation.”¹⁹

¹⁶ 2014/ 03112 [2016] ZAGPJHC 94 (5 May 2016).

¹⁷ Par 15.

¹⁸ 2011 (2) SA 26 (CC).

¹⁹ Par 103-104.

The above statement is with equal force applicable to the provisions of section 23(3). What it means is that prescription starts to run when the cause of action arose.²⁰ A court has no power to grant condonation for a late claim. The RAF Act makes no provision, in contrast to the Prescription Act, for circumstances in terms whereof prescription do not commence or that prescription has been interrupted or has been delayed, except for the three instances provided for in section 23(2) in respect of which prescription shall not run.²¹

The right of access to courts is no doubt an important right. It was held that the limitation of the right to access to courts by section 23(1), and by parity of reasoning also by section 23(3), was held to be justifiable and reasonable under section 36 of the Constitution.

The plaintiff instituted various claims based on contract to which the provisions of 17 and section 23 do not apply. I was called upon in the pleadings to concern myself with a special plea premised on the acceptance that the main claim was instituted in terms of section 17 which has prescribed in terms of section 23(3) of the RAF Act. Both the legal representatives misconceived the basis of the claims in the particulars of claim. Section 23 is not applicable to the claims instituted and should be dismissed on that basis.

The costs remain. The manner in which the litigation was conducted leaves much to be desired. The rules were simply ignored. The impression gained was that non-compliance with the rules and the practice of this court is not regarded with the seriousness expected from practitioners. The direction issued by the court that the parties at the pre-trial should deal with the issues relating to the special plea was simply ignored.²² Be that as it may, after careful consideration of all the facts and the history of the case the court is of the view that the plaintiff cannot be deprived of her costs.

ORDER

1. The special plea is dismissed.

²⁰ Section 23 establishes prescription periods limited to claims under section 17 against the RAF or an agent in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity of either the driver or the owner thereof has been established.

²¹ *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) par 19-20 and 47-49.

²² Fn 7.

2. The defendant is to pay the costs.

G.C MULLER
JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

FOR THE PLAINTIFF : ADV D. MASHAU
INSTRUCTED BY : MPHAHLELE M.R ATTORNEYS
FOR DEFENDANT : MR M.C MAFIRI
INSTRUCTED BY : STATE ATTORNEY, POLOKWANE