

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case no. 4722/2019

In the matter between:

PHEELLO JONAS MAJAKE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT BY: **VAN RHYN J**

HEARD ON: **28 AUGUST 2023**

DELIVERED: **20 NOVEMBER 2023**

- [1] This matter concerns the determination of two special pleas raised by the Road Accident Fund, the defendant, against the plaintiff's particulars of claim. The plaintiff, an adult male born on 16 September 1982, instituted action against the defendant in terms of the provisions of the Road Accident Fund Act¹ (the "RAF Act") for the payment of damages arising from a motor vehicle accident which occurred on 8 June 2012.
- [2] The plaintiff averred that the accident was caused as a result of the sole negligence of the driver of a Toyota Quantum minibus with registration letters and number DYD[...]. As a result of the accident he sustained an open fracture of the left distal leg (tibia/fibula fracture) and a soft tissue injury to the right eye which left him with impaired range of motion in his left ankle. The plaintiff was a pedestrian when the incident occurred.
- [3] The facts of the matter relevant to the adjudication of the two special pleas are

¹ Act 56 of 1996

common cause and are as follows: The plaintiff's claim arose on 8 June 2012, being the date of the accident. The plaintiff lodged his claim with the defendant on 4 June 2015. Prior to issuing summons out of this court, the plaintiff issued summons under case number 693/2017, through his erstwhile attorneys, out of the Bloemfontein Regional Court on 2 June 2017.

- [4] The plaintiff thereafter, on 11 July 2019, cancelled the mandate of his erstwhile attorneys and appointed Tshangana & Associates Inc. as his attorneys of record. A second summons was issued on the 10th of October 2019 out of this court and served upon the defendant on 17 October 2019. The second summons bears the same cause of action and the plaintiff has not withdrawn the summons issued out of the Bloemfontein Regional court.

- [5] In its special plea the defendant pleads that the summons issued and served upon the defendant on 17 October 2019 occurred after the expiry of five (5) year period from the date on which the cause of action arose with the result that the plaintiff's claim has prescribed. In respect of the second special plea the defendant prays that the plaintiff's claim be dismissed on the basis that the summons issued out of the regional court by the plaintiff's erstwhile attorneys has not been withdrawn whereas a second summons had been issued during October 2019 out of this court. The defendant pleads *lis alibi pendens* in that the same cause of action is pending in another court.

- [6] The plaintiff in his replication denies that his claim has prescribed and admits the second special plea of *lis alibi pendens*. It is not disputed that the second summons was served on the defendant more than seven (7) years after the cause of action arose. The argument raised on behalf of the plaintiff is that the claim was submitted with the defendant within the prescribed time period and summons was issued and served out of the Bloemfontein Regional Court and served upon the defendant on 2 June 2017, being within the five (5) year prescribed time period.² Prescription of the plaintiff's claim was thus effectively interrupted by the serving of the summons. The summons in the regional court has not been withdrawn on the basis that in the event of the high court action not proceeding, the plaintiff will be able to proceed with his claim, albeit for a lesser amount, in the regional court.

² Section 23(3) of the Road Accident Fund Act, 56 of 1996.

- [7] According to the plaintiff, the reasons for the issuing of the second summons in this court are two-fold:
- 7.1 The quantum of the plaintiff's claim falls outside the monetary jurisdiction of the Bloemfontein Regional Court which court has jurisdiction in civil matters between the amount of R200 000.00 up to and including R400 000.00.
- 7.2 There is no procedure and/or statutory provision authorising the transfer of a matter from the Bloemfontein Regional Court to the Free State Division of the High Court.
- [8] Mr Thompson, counsel appearing on behalf of the plaintiff, argued that premised on the above, the plaintiff's claim was instituted in the wrong forum by his erstwhile attorneys. With reliance on **Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd**³ that prescription is interrupted by proceedings in the wrong forum, it is contended that prescription of the plaintiff's claim has been interrupted by service of the first summons issued out of the regional court and therefore the claim instituted in this court could not have become prescribed.
- [9] Ms Banda, appearing on behalf of the defendant, argued that the provisions of section 23 of the RAF Act regulates prescription of claims against the defendant. The effect of section 23(1) of the RAF Act is that where the cause of action arose from an accident where the driver or owner of the vehicle responsible for the accident has been identified, lodgement of the claim with the defendant has to take place within the period of three (3) years after the cause of action arose. The plaintiff lodged his claim against the defendant timeously.
- [10] Section 23(3) extends the prescription period by an additional two years within which summons has to be issued against the defendant (if the claim is not settled after the lodgement with the defendant). The summons in this court was issued after the period of five (5) years from the date on which the cause of action arose. The RAF Act does not make provision for the interruption of prescription. With reference to the judgment of the Constitutional Court in the matter of **Road Accident Fund v Mdeyide**⁴, Ms

³ 2018 (5) BCLR 527 (CC).

⁴ 2011 (2) SA 26 (CC).

Banda argued that the Prescription Act⁵ (the “Prescription Act”) regulates the prescription of claims in general and the RAF Act is tailored for the specific area it deals with, namely claims for compensation against the Road Accident Fund for those injured in road accidents. The Legislature enacted the RAF Act and included provisions dealing with prescription in the RAF Act for the very reason that the Prescription Act was not regarded as appropriate for these particular claims.

[11] Section 23 of the RAF Act provides that:

- “(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 cause 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
 - (c) a person under curatorship.

[12] Section 23(3) provides as follows:

- “(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.”

[13] In **Kruger v Minister of Health and Others**⁶ it was held that the institution of proceedings in a court with or without jurisdiction does interrupt prescription.⁷ The **Kruger v Minister of Health and Others** matter did not, as can be inferred from the citation, deal with a claim against the Road Accident Fund. It was a so called “medical negligence” claim instituted in haste to obviate prescription, but in the wrong forum, being the North Gauteng High Court. The matter was duly transferred to the Free State

⁵ Act 68 of 1969.

⁶ 2016[ZAFSHC179].

⁷ At [36].

Division of the High Court in terms of the provisions of section 27(1)(a) of the Superior Court Act.⁸

- [14] The plaintiff in the matter at hand, furthermore relied upon the dicta in **Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd**⁹ where the majority judgment appears to accept as a general proposition that prescription is interrupted by proceedings in the wrong forum. This matter however does not deal with the provisions of the RAF Act, but with litigation of unfair dismissal claims under the Labour Relations Act¹⁰ and the question whether the Prescription Act applies to such claims.
- [15] I am of the view that the facts relevant to the **Kruger** and **Food and Allied workers Union** cases, relied upon by the plaintiff, are distinguishable and do not provide an answer for the issue at hand, namely whether the issue of summons in the Regional Court, Bloemfontein interrupted prescription of the plaintiff's claim. The plaintiff's claim was instituted in terms of the provisions of the RAF Act which specifically provides that summons has to be issued and served within 5 years prescribed by section 23(3) of the RAF Act.
- [16] Unlike the Prescription Act, the RAF Act does not have provisions prescribing for interruption of prescription save for claims, in respect of minors, persons with mental disability and persons under curatorship which are not affected by prescription as provided for in section 23(2) of the RAF Act. The Constitutional Court has time after time emphasised the essential role time limits play in bringing certainty and stability to social and legal affairs and maintaining the quality of adjudication.¹¹ Van der Westhuizen J explained the purpose of prescription periods as follows in **Mdeyide**:

“Without prescription periods, legal disputes would have the potential to be drawn out for indefinite periods of time bringing about prolonged uncertainty to the parties to the dispute. The quality of adjudication by courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be available to testify, or their recollection of events may have faded. The quality of adjudication is central to the rule of law. For the law to be respected, decisions of courts must be given as soon as

⁸ Act 10 of 2013.

⁹ At [209].

¹⁰ Act 66 of 1995.

¹¹ Road Accident Fund v Mdeyide 2011 (2) SA 26 (CC) at [8].

possible after the events giving rise to disputes and must follow from sound reasoning, based on the best available evidence.¹²

[17] The plaintiff lodged his claim with the defendant approximately 4 days prior to expiry of the three (3) year period provided for in terms of section 23(1) of the RAF Act. His erstwhile attorneys then instituted action out of the Regional Court, Bloemfontein within the time period stipulated in terms of the provisions of section 23(3) of the RAF Act. Summons was issued a mere 6 days before expiry of the five (5) year period provided for in section 23(3) of the RAF Act.

[18] Particulars regarding the quantum of the plaintiff's claim instituted in the regional court are not available. What is available is the quantum of the claim instituted in this court on 17 October 2019 by his current attorneys. The initial claim against the defendant in this court amounted to R280 000.00 and was pleaded as follows:

"8. As a result of the aforesaid accident the Plaintiff suffered:

8.1 General damages including loss of amenities of life – R280 000.00

8.2 Future medical treatment; (Section 7(4)(a) Undertaking.

TOTAL R280 000.00"

[19] Why the plaintiff issued summons in this court during October 2019 in the above mentioned amount is not fully explained. The reason clearly is not as a result of the fact that the quantum of the plaintiff's claim exceeded the monetary jurisdiction of the regional court because the claim remained within the parameters of the regional court's monetary jurisdiction. Almost a year and nine months later, on 28 July 2021 the plaintiff filed a notice to amend in terms of Rule 28(1) of the Uniform Rules of Court when paragraph 8 of the particulars of claim was amended to read as follows:

"8.1 As a result of the aforesaid accident the Plaintiff suffered;

8.1.1 Past and future loss of earnings and/or loss of earning capacity in that at the time of the accident the Plaintiff was employed as a tyre fitter and operative wheel balance (*sic*) at Kwik Fit. Due to the injuries sustained in the accident he is no longer able to return to work and is regarded as an unfair competitor in the open labour market;

8.1.2 The Plaintiff has suffered general damages in an amount of R800 000.00;

8.1.3 The Plaintiff has suffered past loss of earnings in the amount of R 339 487.00;

8.1.4 The Plaintiff will suffer a loss of future income in the amount of R 1 631 374.00.

8.1.5 The Plaintiff's total loss of earnings (*sic*) is thus R2 770 861.00."

¹² At [8].

- [20] The defendant subsequently filed an amended plea raising the two special pleas against the plaintiff's amended particulars of claim. From the medical reports, the Free State Emergency Services, more specifically the "Ambulance Form" obtained by the plaintiff's erstwhile attorneys, it appears that the plaintiff's injury is noted as an open fracture of the left leg or Tibula/Fibula fracture. It is also indicated that the plaintiff is unemployed. In the "serious injury report" (RAF4) compiled by Dr J J Schutte on 25 October 2016 the diagnosis of a "distal tibia and fibula fracture with severe residual symptoms, ankylosed ankle left" was noted. A diagnosis based impairment of 34% and whole person impairment of 14% were made by Dr Schutte.
- [21] From the medical records discovered by the plaintiff it seems as if the plaintiff was involved in a further incident on 11 April 2013 when a forklift was lifting a "big wheel and accidentally dropped it on the patient's left foot." The x-rays revealed the previous injury to the left foot and the old tibial fracture with screws was observed. In the medico legal report compiled by Dr LF Oelofse, an orthopaedic surgeon, dated 25 October 2016, it is opined that the plaintiff was unable to return to his former employment at a tyre company doing fitting and balancing of tyres due to the debilitating effect of his left lower leg/ankle injury on his physical abilities.
- [22] The extent of the plaintiff's injuries and his prognosis regarding future medical treatment and his possible future loss of income and employability were available prior to the issue of summons in this court during October 2019, yet the amount claimed remained within the monetary jurisdiction of the regional court. The medico legal report by Dr Schutte was obtained by the plaintiff's erstwhile attorneys in October 2016. The same applies to the report compiled by an occupational therapist who evaluated the plaintiff on 24 February 2017, the report by an industrial psychologist dated 22 June 2017 and the actuarial report dated 11 July 2017. From the calculations done by the actuary the loss of income ranged between R1 294 693.00 to R1970 861.00 subject to the question whether the plaintiff would be able to continue his work as a gardener or becomes unemployed.
- [23] Notwithstanding the opinions obtained by these experts regarding the quantum of the plaintiff's claim, the appellant persisted with his claim in the regional court until October 2019 when summons was issued in the high court. Evidently the contents of the numerous expert reports were not taken into consideration when summons was issued

in the regional court, nor initially, in this court. The attorneys acting on behalf of the plaintiff ought to have issued summons in the high court prior to 8 June 2017.

- [24] In **Oosthuizen v Road Accident Fund**¹³ the Supreme Court of Appeal held that it is a plaintiff who chooses the forum in which to litigate and not a defendant. In the Oosthuizen matter the facts were that the plaintiff issued summons in the magistrates' court. Later, when it was found that the claim exceeded the monetary jurisdiction of the magistrates' court, the plaintiff applied to have the case transferred from the magistrates' court to the high court having jurisdiction. The plaintiff was unable to withdraw the claim instituted in the magistrates' court and issue a fresh summons in the high court as the claim had already prescribed. The Supreme Court of Appeal held that there is no statutory provision authorising such transfer. Bosielo JA held as follows:

“The appellant had a right to institute action in the appropriate forum to the full extent of his claim. Prescription has extinguished part of his claim. For that consequence his attorneys are to blame.”¹⁴

- [25] In **Oosthuizen v Road Accident Fund** it was held that Mr Oosthuizen was legally represented and fully informed about all the implications of the injuries sustained by him. His attorneys, even when they became aware of the full extent of his claim, nevertheless persisted in the path that led them to eventually apply for the matter to be transferred to the high court. The attorneys ought to have switched forums when it became clear that they should do so to protect their client's interests. The claims against the Road Accident Fund are time bound in terms of the provisions of section 23(1) and section 23(3) and like any other litigant the Road Accident Fund is entitled to raise a defence based on prescription.¹⁵

- [26] If a claim is not instituted within the prescribed time, a litigant may be barred from having the dispute adjudicated upon by a court. As held by Van der Westhuizen J the **Mdeyide** matter, this principle has been recognised, not only in our legal system, but in many others, for centuries.¹⁶ I am therefore not convinced of the argument raised on behalf of the plaintiff that the summons issued in the regional court successfully interrupted prescription. It is clear from the judgment in the **Oosthuizen** case that,

¹³ (258/10) [2011] ZASCA 118 (6 July 2011).

¹⁴ At [26].

¹⁵ At [23]. See also *Shabangu v Road Accident Fund* 2013(3) SA 245 (GNP)

¹⁶ *Mdeyide* (supra) at [2].

albeit that the high court has inherent jurisdiction to regulate its own process, the powers do not extend to the assumption of jurisdiction which it does not otherwise have. The plaintiff's claim, instituted in this court, has prescribed.

[27] Based on the argument that a plea of *lis pendens* does not have the effect of an absolute bar to proceedings in which the defence is raised, the plaintiff contends that the court has a wide discretion whether or not to stay the proceedings or hear the matter depending on what is just and equitable to do in circumstances of the matter.¹⁷ Having regard to the nature of the action which had been instituted timeously in the regional court, the quantum of the plaintiff's claim, the aim and object for which the RAF Act was enacted and the interest of justice, the argument on behalf of the plaintiff is that a stay of the action in this court would amount to an injustice to the plaintiff.

[28] The relief claimed by the plaintiff is that the plea of *lis alibi pendens* by the defendant be upheld and that an order be issued that the plaintiff should withdraw his action in the Bloemfontein Regional Court and allow the claim to be adjudicated in this court. In **Oosthuizen v Road Accident Fund** it was held that a transfer of the matter from the magistrates' court to the high court would be akin to breathing new life into a part of the plaintiff's claim that has been extinguished by prescription. As a result of the finding that the plaintiff's claim has been extinguished by prescription, the inevitable result is that the special plea of *lis alibi pendens* be upheld.

[29] The order that I consequently make is as follows:

1. The Defendant's first special plea of prescription of the Plaintiff's claim is hereby upheld.
2. The Plaintiff's claim has become extinguished by prescription.
3. The Defendant's second special plea of *lis alibi pendens* of the Plaintiff's claim is upheld.
4. The Plaintiff's claim against the Defendant is accordingly dismissed with costs.

¹⁷ Ferreira v Minister of Safety and Security & Another (1696/2011) [2015] ZANHC 14 (4 September 2015) at [8].

I VAN RHYN
JUDGE OF THE HIGH COURT,
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On behalf of the Plaintiff:

Instructed by:

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On behalf of the Defendant:

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