

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NUMBER: 2016/30550

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
3 JUNE 2021

In the matter between:

KHUMALO, SEBENZILE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

COWEN AJ:

Introduction

[1] The plaintiff, Sebenzile Khumalo, is claiming damages from the defendant, the Road Accident Fund (“RAF”), arising from injuries caused during a motor vehicle accident which occurred on 2 May 2012. The plaintiff was a passenger in a taxi (registration number [...] GP) driven by a Mr. Sithole, who is alleged to have lost control of the taxi which overturned. The plaintiff allegedly suffered severe injuries.

[2] The action was certified as trial-ready in October 2020 and projected to run for two to three days in circumstances where there were ongoing disputes about prescription, liability and quantum. The action came before me on the trial roll on 2 June 2021. Ms. Mabena appeared for the plaintiff. The RAF did not have legal representation. However, the claims handlers, Ms Mathebula and her senior Ms. Sibiya were present, together with a Mr. Ndlovu, an attorney currently employed by the RAF to assist with claims.

[3] As is well known, at the present time, the RAF routinely either does not appear at all in trials before this Court or its claim handlers appear without legal representation in circumstances where the RAF cancelled contracts with its previous panel of attorneys during 2020. Mr. Ndlovu happens to be an attorney with rights of appearance in this Court but he did not appear before me in that capacity and I approached the matter on the basis that the RAF was not legally represented. Mr. Ndlovu, however, is the person who was mandated by the RAF to attend a recent pre-trial conference with the plaintiff held under court order on 20 May 2021 and who signed the pre-trial minute.

[4] At the commencement of the trial, I stood the matter down for a short period to afford the parties an opportunity to explore settlement. As matters transpired, there was only one stumbling issue which stood in the way, being an ongoing “dispute” about whether the plaintiff’s claim had prescribed. I was informed that should I find in favour of the plaintiff on the issue of prescription, there would be no need to proceed with the remainder of the trial as the RAF indicated that, subject to prescription, it now concedes liability and a reasonable settlement offer would follow. In those circumstances the trial proceeded on the issue of prescription. There was however no separation of issues in terms of Rule 34 (4) of the Uniform Rules of Court. Rather, in order to facilitate the efficient conduct of the matter thereafter in the interests of both parties, I indicated that I would decide the issue of prescription overnight as a preliminary issue and should I find in the plaintiff’s favour, the trial could then proceed.

[5] In respect of prescription, two issues arise for decision:

- (a) Whether the RAF has duly raised the issue of prescription in the pleadings;
- (b) If so, whether the plaintiff's claim prescribed in terms of Regulation 2(1)(b) of the Regulations made under section 26 of the RAF Act ("the Regulations")¹.

The legislation and regulations

[6] Section 17 of the Road Accident Fund Act 56 of 1996 ("the Act") makes the RAF liable to pay compensation claims arising from the driving of a motor vehicle where either the identity of the owner or driver has been established (section 17(1)(a)) or where it has not (section 17(1)(b)). However, where it has not, the RAF's liability is subject to regulation made under section 26 which imposes a two-year prescription period. This is due to the heightened possibility of fraud and evidential difficulties the RAF faces in cases where there is an unidentified owner or driver.²

[7] Regulation 2 is entitled "Further provision for liability of Fund in terms of section 17(1)(b)". It provides as follows in relevant part:

2. Further provision for liability of Fund in terms of section 17 (1) (b)

(1) (a) A claim for compensation referred to in section 17 (1) (b) of the Act shall be sent or delivered to the Fund in accordance with the provisions of section 24 of the Act, within two years from the date upon which the cause of action arose.

(b) A right to claim compensation from the Fund under section 17 (1) (b) of the Act in respect of loss or damage arising from the driving of a motor vehicle in the

¹ The Regulations I refer to are those published in Government Gazette No 31249 as the Road Accident Fund Regulations under GNR of 21 July 2008 as amended by Notice R347 of Government Gazette 36452 of 15 May 2013.

² *Geldenhuis & Joubert v Van Wyk and another; Van Wyk v Geldenhuis & Joubert and another* [2005] 2 All SA 460 (SCA).

case where the identity of neither the owner nor the driver thereof has been established, shall become prescribed upon the expiry of a period of two years from the date upon which the cause of action arose, unless a claim has been lodged in terms of paragraph (a).

...

Has the RAF raised the issue of prescription in terms of Regulation 2(1)(b) on the pleadings?

[8] The plaintiff's summons was apparently issued on 5 September 2016. This is within five years of the cause of action arising as contemplated by section 23(3) of the Act.³ The plaintiff had lodged its claim in July 2014. The RAF's plea is dated 15 September 2016. In its plea, the RAF did not plead prescription in any form. Rather, on 31 October 2018, it sought to introduce a special plea raising prescription under Regulation 2(1)(b). In response, and within ten days, the plaintiff filed a notice of objection to the amendment. The RAF apparently did not thereafter apply for leave to amend its pleadings and in turn the plaintiff filed no pleading in response.

[9] Under Rule 28(1) of the Uniform Rules of Court, a party desiring to amend any pleading "shall notify all other parties of his intention to amend and shall furnish particulars of the amendment." Rule 28(2) provides that the notice shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected. If an objection is delivered within 10 days, the party wishing to amend may, within 10 days, lodge an application for leave to amend (Rule 28(4)). If there is no objection, then the parties who received notice of the proposed amendment are deemed to have consented thereto and the party who

³ Section 23(1) provides for a three-year prescription period for section 17 claims. However section 23(3) provides: '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.'

gave notice may, within 10 days effect the amendment by delivering each relevant page in its amended form (Rule 28(5) and (7)).

[10] On the face of it, the plea was thus at no stage amended to incorporate the special plea. In turn, prescription under Regulation 2(b) has at no stage been pleaded and is not a live issue before this Court. If this is correct, as it appears to be, then the issue of prescription is not a live one before the Court and the plaintiff is entitled to persist with its claim. In this regard, it is not without significance that the recent pre-trial minute records the “issue” of prescription to be not in dispute and “n/a”. However, Mr Ndlovu informed the Court that at the time he did not have access to the relevant file information and I am approaching this matter on the basis that the RAF is unrepresented.

[11] There are two considerations that could be raised against a *prima facie* conclusion that the issue of prescription is not a live one before the Court. The first is that the plaintiff has conducted pre-trial preparations on the assumption that it is a live issue at least until the recent pre-trial conference. Thus, when this Court was approached to certify the matter as trial-ready in October 2020, prescription was identified as a live issue in the plaintiffs’ practice note.⁴ The second is that on 31 October 2018, when the RAF filed its notice of intention to amend its claim, it also filed its amended plea including the special plea. This is, on the face of it, irregular. This Court is neither apprised of the circumstances in which this occurred nor how the plaintiff responded. It is possible given the timing that it was only intended as a matter of convenience to assist the plaintiff to consider any objection – this is not infrequently done in practice but when it is done, this is via draft and without delivery to the Court. To the extent that it was an irregular step, however, the plaintiff had at its disposal the remedy of Rule 30 governing irregular proceedings but did not invoke it. These issues and the status of the purported amendment could have been the subject of discussion and agreement between the specific attorneys representing the parties at the time,

⁴ Notably, however, Adams J did not pertinently identify prescription as an issue for trial although in view of the plaintiffs’ practice note, the RAF may reasonably regard it as embraced in the reference to liability and merits.

neither of whom are currently involved and the Court is not apprised of detailed information. In these circumstances, I am willing to assume in favour of the RAF (but without deciding) that the RAF may competently defend the claim on the basis of prescription in terms of Regulation 2(1)(b) and I will refer to this as “the special plea”. In turn I will assume that the dispute is defined as foreshadowed by the purportedly amended plea and the notice of objection.

Has the claim prescribed in terms of Regulation 2(1)(b)?

[12] In my view, on the evidence before me the special plea cannot succeed and the plaintiffs’ claim has not prescribed in terms of Regulation 2(1)(b). It is common cause that the plaintiff’s claim was lodged with the RAF on 28 July 2014, which is in excess of two years of the cause of action arising on 2 May 2012. Accordingly, if the claim is a claim in terms of section 17(1)(b), then it would have prescribed in terms of Regulation 2(1)(b). The plaintiff submits, however, that the claim is a claim in terms of section 17(1)(a), not section 17(1)(b), because it is a claim in which the identity of the driver has been established. I agree.

[13] The Accident Report Form is dated on the same date as the accident, being 2 May 2012. It includes the particulars of the driver, being a Mr. Sithole and his identity number and the car registration details. There is no dispute about whether the Accident Report Form what it purports to be and it can be and is received as evidence in these proceedings. In this case, it is clear from the Accident Report that the identity of the driver was in fact established. Moreover, in the plaintiffs’ affidavit prepared in terms of section 19(f) of the Act, the plaintiff indicated that the registration details would be provided: she did not state that the identity or registration details had not been established.

[14] Mr. Ndlovu explained to the Court that the RAF takes the view that the failure specifically to include the details of the driver in the RAF1 form renders the claim prescribed. The only issue that may be competently before me is whether the claim is

prescribed in terms of Regulation 2(1)(b). In my view, a failure specifically to include the details of a driver in the RAF1 form does not have that effect. This may have implications for whether a claim was duly lodged in terms of section 24 of the Act, which in turn may raise a question whether the extended five-year prescription period in section 23(3) is available to a plaintiff but that issue has at no stage been raised, even in the notice of amendment or the special plea purportedly filed and it would be unfair in the circumstances to adjudicate this matter on that basis. Moreover, difficult legal issues arise. In this regard, it is important to note that whatever the legal merits of such contentions, they may be difficult to sustain in the absence of any objection to the claim in terms of section 24(5) of the Act.⁵ My attention has not been drawn to anything which suggests that any such objection was forthcoming.

[15] Finally, Mr. Ndlovu explained that it appears on the information before the Court that the Accident Form, and in turn the driver's details, were only supplied to the RAF when summons was instituted in 2016. However, even if that is so (which I do not decide) it was not explained how, if in fact the driver's identity had been established, this would then convert the claim to one in terms of section 17(1)(b). In my view, it does not.

[16] I conclude that the claim is a claim in terms of section 17(1)(a) and that it did not prescribe in terms of section 17(1)(b). Accordingly, the plaintiff can pursue her claim against the RAF. I delivered the order reflected in paragraph a. below at 10am on 3 June 2021. The parties thereafter settled the matter of quantum and under the current practice directives, the settlement is now to be referred to the settlement court.

[17] I make the following orders (paragraphs b. and c. by agreement):

- a. The special plea of prescription in terms of Regulation 2(1)(b) of the Road Accident Fund Act is dismissed.

⁵ Section 24(5) provides: If the Fund or the agent does not, within 60 days from the date on which a claim was sent by registered post or delivered by hand to the Fund or such agent as contemplated in subsection (1), object to the validity thereof, the claim shall be deemed to be valid in law in all respects.

b. The RAF is liable to compensate the plaintiff for damages (at 100%) arising from the accident which occurred on 2 May 2012 at or near Mkhulandoda, Weenen involving the motor vehicle with registration number [....] GP driven by a Mr. Sithole.

c. The matters of quantum in respect of future medical expenses and past and future loss of earnings, and costs, having become settled, the matter is removed from the trial roll and referred to the settlement roll. It is recorded that the parties stated that the settlement offer, which is authorized and accepted, has at this stage been made verbally and entails an undertaking in terms of section 17(4)(a) of the RAF Act (in respect of future medical expenses) and the amount of R383 870.35 (in respect of past and future loss of earnings).

S. J. COWEN

*Acting Judge of the High Court
Gauteng Local Division, Johannesburg*

Heard: 2 June 2021

Judgment: 3 June 2021

Plaintiff's Counsel: Adv. N. Mabena

Instructed by: N T Mdlalose Incorporated

Defendant: No representation