IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A126/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. NO

22/10/2021
DATE

SIGNATURE

In the matter between:

NOKHAYA KOHLISO **Appellant**

and

ROAD ACCIDENT FUND **Respondent**

JUDGMENT

MBONGWE J:

INTRODUCTION

[1] This is an appeal against the judgment and orders of the Regional Court Acting Magistrate granted on 10 February 2020 in terms of which the trial court upheld the Respondent special plea of prescription against the appellant's claim for damages emanating from bodily injuries sustained in a motor vehicle accident.

FACTUAL MATRIX

[2] The appellant, in accordance with a public invitation by the respondent for victims of motor vehicle accidents to personally lodge their claims directly with the respondent, had lodged her claim on the 18 January 2012 for funeral expenses she had incurred consequent to a motor vehicle accident which occurred on 21 May 2011 and in which her [relative] had sustained fatal bodily injuries.

[3] Despite an undertaking by the respondent that she would be contacted once investigations have been finalised, no such communication was received by the applicant resulting in her instructing her attorneys during January 2019 to assist with the further prosecution of her claim. The attorneys wrote to the respondent enquiring about progress in the appellant's claim and requesting to be furnished with copies of the claim documents for further prosecution of the claim.

[4] To its January 2019 letter in response, the respondent had allegedly attached a copy of a letter dated 1 August 2013 addressed to the applicant repudiating the claim on the alleged ground that the deceased had been negligent and that such negligence had caused the accident. The respondent denied that it had attached the copy of the letter of repudiation alleging that it had, on the contrary, received the letter from the appellant's attorneys.

APPELLANT'S ARGUMENT

[5] In argument on behalf of the appellant, counsel appeared to suggest that the repudiation of the appellant's claim had not been communicated to the appellant. In this regard counsel was emphatic that the failure of the respondent to produce proof of posting of that letter was sufficient to establish that the repudiation was never communicated. It was, however, not disputed that the addressee on the letter dated 1 August 2013 was the plaintiff/appellant and the address that she had provided to the respondent.

[6] Counsel argued in favour of the assumption that the appellant had only become aware of the repudiation of its claim in January 2019 when the respondent had attached a copy of the letter of repudiation to the appellant's attorneys. The essence of this contention was that the appellant was still within time and entitled to issue summons, as it did, on the 11 March 2019.

[7] It was further argued on behalf of the applicant that by virtue of the invitation to victims of motor vehicle accidents to lodge their claims directly with it, the respondent had the duty to ensure that the claims lodged directly do not prescribe. Where prescription had occurred, so goes the argument, the respondent ought to 'waive or condone it.

[8] The appellant submitted that it will accord with the law of prescription that the unspecified date in January 2019 (when the repudiation letter allegedly came to light) be deemed to be the date the appellant became aware of the prescription of its claim and that the issuing of the summons almost three months later, on 11 March 2019 be deemed to be within the three-year period envisioned in the Prescription Act of 1968 for a debt to prescribe. In that scenario the appellant's claim had not prescribed, it was submitted.

THE RESPONDENT'S ARGUMENT

[9] The respondent did not deny that the motor vehicle accident concerned had occurred on the 21 May 2011 and that it had received the appellant's claim on the 18 January 2012. However, the respondent argued that it had complied with the law, subsequent to investigating the circumstances of the accident, by dispatching a letter by registered post, to the appellant communicating the repudiation of the claim.

[10] The respondent denied that the invitation for motor vehicle accident victims to lodge their claims directly with it created a duty of care for the respondent to

ensure that the claims of the so-called direct claimants did not prescribe. The respondent further disputed the applicant's contention that the respondent could waive or condone prescription of the claims of direct claimants.

[11] The respondent contended that the appellant had sufficient time between 1 August 2013 (when the claim was repudiated) and 20 May 2016 to issue summons to interrupt the prescription of her claim. In terms of section 17 the appellant had 5 years from the date of accident to issue and serve summons to interrupt prescription; failure to do so will result in the claim prescribing in terms of section 23 of the Act. The appellant issued summons eight years after the cause of action had arisen and its claim had long become prescribed.

ANALYSIS

INCONSISTENCIES IN APPELLANT'S CASE

[12] Both contentions by the appellant relating to the alleged failure of the respondent to communicate the repudiation of the appellant's claim, and the appellant becoming aware of the prescription of its claim only in January 2019 prove to be devoid of the truth and merit. These allegations are soundly refuted in the written reasons of the trial court uploaded on caselines. At paragraph 4 of the REASONS FOR JUDGMENT the trial magistrate states:

> 4. *"The plaintiff's counsel further argued that the plaintiff only became aware of the prescription when she came to their offices. He further argued that the plaintiff received a letter of repudiation from the defendant but did not understand it because no one called her to explain what it meant.* [own emphasis]. *The matter was wrongly repudiated. The Handler had to do a post prescription waiver for the file to be condoned to ensure that it does not prescribe."*[sic]

LACK OF CRUCIAL INFORMATION

[13] It is regrettable that the record of the proceedings in the trial court, including the judgment, was not uploaded on caselines and therefore not available for the benefit of this Court. No explanation has been given for this.

ANALYSIS AND FINDINGS

[14] It is apparent from paragraph 4 of the REASONS FOR JUDGMENT quoted above, that the appellant did receive the letter of repudiation of it's claim. That was approximately seventeen months since the appellant had lodged the claim. The respondent had contravened its own Regulations which require that it communicates its attitude towards the claim within 90 days from the date of receipt thereof. However, the contravention did not entitle the appellant to sit on its laurel and not make enquiries on progress and/or instruct an attorney to pursue the matter in light of the lengthy period of silence from the respondent.

[15] The discredited allegation that the appellant did not receive the respondent's letter of repudiation of the claim and the arguments associated therewith only serve as an indication that the appellant is clutching at straws to enhance its chances of success in this appeal. The applicant knew she was to receive correspondence from the respondent from the date she lodged her claim and that she would need assistance to understand the contents thereof. She had a few options open to her; to seek the assistance of a neighbour or member of her community who could read, or, approach an attorney, as she ultimately did, or go to the respondent's offices for an explanation of the repudiation of her claim. She chose to approach her attorneys six years after she had received the letter of repudiation of her claim.

[16] There simply is no legal basis for the argument that the respondent owed the appellant a duty of care and of ensuring that the claim did not prescribe. No substantiation either has been given of how the respondent could have done

so nor has the appellant pleaded the alleged duty of care. In fact, this bold allegation of the respondent's duty of care goes against the vein of the principle in *Stedall vs Aspeling* (1326/2016) **[2017] ZASCA** 172 (1 December 2017) wherein the Supreme Court of Appeal expressly stated that; The facts pleaded *"in support of the alleged legal duty represent the high-water mark of the factual basis of which the Court will be required to decide the question"*

[17] In addition, the respondent is a creature of statute and therefore operates within the confines of the provisions of the Road Accident Fund Act. There is no provision in the Act that the respondent could grant or waive prescription where a claim has indeed become prescribed.

FINDINGS

[18] It is trite that a Court hearing an appeal must exercise restraint from interfering with the factual findings of the trial court, unless it is convinced by the evidence that the trial court's decision was wrong see R v DHLUMAYO AND ANOTHER 1948 (2) SA 677(A). There is nothing in this matter to suggest that the trial court had erred in its findings on the facts of this case or that its decision was based on any misdirection. In fact this Court agrees fully with the reasoning and orders of the trial court.

CONCLUSION

[19] The order of the trial court, with the exclusion of the order for costs, is confirmed.

ORDER

[20] In light of this judgment the following order is made:

1. The appeal is dismissed.
2. Order 2 of the court a quo is set aside.

M. MBONGWE J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

VORSTER AJ
ACTING JUDGE OF THE HIGH
GAUTENG DIVISION, PRETORIA

APPEARANCES

On behalf of the Appellant: Adv Netsianda

Instructed by

On behalf of the Respondent: Adv Kgomongwe

Instructed by

Date of hearing 1 June 2021

JUDGMENT ELECTRONICALLY TRANSMITTED TO THE PARTIES ON 21 OCTOBER 2021.