

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2014/03112

In the matter between:

JOHANNESSEN RALPH

Plaintiff

And

THE ROAD ACCIDENT FUND

Defendant

J U D G M E N T

SIWENDU NT, AJ:

- [1]. This matter concerns a determination of a special plea of prescription in terms of section 23(3) the Road Accident Fund Act No 56 of 1996. For convenience, the Road Accident Fund Act will be referred to as "the Act" throughout the judgment. The parties had agreed to separate the merits of the claim and postpone the determination thereof *sine die* in terms of Rule 33(4).

An application to amend the plaintiff's particulars of claim to correct the date, the time as well as the details of the motor vehicle was granted to the plaintiff. In addition, an amended plea in replication to the defendant's special plea was sought and there being no objection to the same, was granted to the plaintiff.

[2]. The facts, which were largely common cause between the parties are in brief that, the plaintiff, who was a passenger in a motor vehicle was injured on 12 October 2005 following a collision. He was admitted at the Garden City Hospital for a week. Subsequent to his discharge from hospital, he had lodged a claim on 1 November 2005 with the defendant utilising the internal claim settlement system established by the defendant. This system was established by the defendant to assist claimant's process their claims without recourse to outside attorneys. The cut-off date for the lodgement of the plaintiff's claim would have been 11 October 2008. The plaintiff's right to claim compensation would have prescribed on 11 October 2010. Notwithstanding the timeous lodgement of the claim, summons commencing action were issued on 31 January 2014 and served on the defendant on 3 February 2014, approximately five (5) years after the prescribed period of prescription envisaged in terms of Section 23(3) of the Act.

[3]. It was also common cause that the plaintiff was at first assisted by an employee of the defendant known to him as "Mr Sebenzile" in lodging his claim. He had filled in a form handed into court as Exhibit A. An examination of the form confirms the date of the lodgement of the claim.

The section dealing with the terms and conditions on the form, shows that the final date for submitting the form is reflected as the 11 October 2008. The date of prescription of the claim was left in blank. The conditions are accompanied by a disclaimer that:

"It is your responsibility to notify the RAF 1 month before, should prescription or lapsing of your claim looming, and seek legal advice if necessary at your own cost."

- [4]. The plaintiff alleges that the defendant negligently breached a duty of care owed to him by failing to deal with the claim in a diligent manner and by allowing the claim to prescribe in its hands. In replication to the defendant's special plea, the plaintiff alleges that the defendant should be estopped from raising the defence of prescription.
- [5]. The defendant disputes liability to the plaintiff on two grounds. The first ground is that the plaintiff has not discharged the burden placed on him to prove all of the facts upon which the duty of care is premised. The duty of care owed to the plaintiff was time bound, coincided with the prescription period and arose during 2010. Such a duty would have arisen from 2005 when the claim was lodged until 2010 when the claim would have prescribed in the normal course and not beyond this period.
- [6]. Secondly, it relies on the RAF Guidelines and submits that to succeed on the ground of estoppel, the plaintiff must show that the defendant had and demonstrated an "*outward manifestation of an intention not to invoke prescription*". In view of a presumption against waiver of rights, the onus is on the plaintiff to prove an intention to waive or estoppel.

The plaintiff had failed to provide the proof required on which to base estoppel, and at best, the representation made by the defendant would have been that the plaintiff's claim would be settled timeously before it prescribed on 10 October 2010.

- [7]. The plaintiff was the only witness called. He testified that "Mr Sebenzile" had represented to him that there was no need to instruct an outside attorney as the defendant would assist him pursue and finalise the claim on his behalf.
- [8]. Between the period 2006 and 2007, he followed up on the progress of his claim through telephone calls and on occasion(s) had attended at the defendant's offices in person to no avail. He testified that it was only in 2008 that he was attended to by a certain MacDonald, another employee of the defendant. It was then that he was advised that Sebenzile was no longer in the employ of the defendant. He testified further that MacDonald advised him that the defendant would make an offer to him after he had been examined by the defendant's nominated medical doctors. None of this materialised. According to him, no such offer was made or received by him.
- [9]. During 2010, when no progress was made, he had consulted with attorneys who were not able to assist him. He was advised that the claim had "lapsed". He got discouraged as a result. His hopes were resurrected in 2012, when he consulted with a fresh set of attorneys who took up the matter on his behalf. Summons was however only issued in January 2014 and served on the 3 February 2014.

[10]. During cross examination, he confirmed that it was never explained to him that he may need to seek the services of an attorney. He had understood and trusted Sebenzile's advice, that, the defendant would help him. Between 2010 and 2011, he had decided he was going to "leave it". When pressed further on having "given up" on the claim, his response was that after 2008, he had suffered a stroke and gotten discouraged. He was obliged to accept that the claim was "dead" as he did not wish to suffer another stroke. He conceded undercrosss examination that he was aware that the claim would not remain open for an indefinite period but that he had been waiting for the fund. When asked to account for the delay in issuing summons against the fund, his explanation was that he had to refill and resubmit various forms. Further testified that, he had to be examined by six (6) doctors at the instance of the new attorneys. He confirmed under cross examination that he was never advised that the claim would be rejected or that it was invalid or that the claim would prescribe. The plaintiff who is a lay person, answered questions put to him in a frank manner, conceded where it was necessary and came across as a credible witness.

[11]. Mr Mokale on behalf of the plaintiff, argued that the defendant created a duty about themselves by making a representation that they would take care of the plaintiff's claim. As a lay person, the plaintiff would believe what was said. He argued that I should give the plaintiff the benefit of the doubt. He submitted further that the defendant should have advised the plaintiff that the claim would be rejected or would prescribe.

[12]. Mr Adam on behalf of the defendant did not dispute the representation made and accepted the duty of care owed to the plaintiff. However, he argued that this legal duty of care would have ended in 2010, this being the reasonable period when a reasonable person would have given up on the claim. The defendant submitted further that the matter could not be left pending indefinitely and a reasonable person ought to have realised that the matter was not going anywhere.

[13]. The question before me is whether the legal duty already conceded by the defendant and owed to the plaintiff was extinguished by the prescription period provided for in Section 23 of the act as claimed. If so whether, the defendant ought to be estopped from raising prescription as a defence. In this case, it is not necessary to delve into the nature of that duty or to categorize whether it arises in delict or contract. For the purposes of this case, once conceded, the question is whether that duty was extinguished by the prescription period as claimed. It is trite in a law that the onus of proving prescription rests on the party asserting it. Prior to addressing this, it is material to point to certain institutional aspects of the defendant which will provide context for the reasoning in this judgment.

[14]. The defendant is a creature of statute and a fund that performs a public function. It was not disputed that the defendant had established an internal claims settlement system to assist affected members of the public. As a creature of statute, the defendant has a duty to promote, protect and fulfil the rights recognised in the constitution. In the nature of its functions, which amongst others involves settlement as well as defending claims against it, it

is not difficult to conclude that it deals with numerous claims of this nature. Section 23 of the act limits the time period within which claimants may bring claims as well as legal proceedings against the defendant. The defendant is thus insulated from liability and indefinite legal disputes in this sense.

[15]. The justiciability of Section 23(1) raised by the defendant in its special plea has already been determined by the Constitutional Court in the decision *Road Accident Fund and Another v Mdeyide 2011(2) SA 26*. The principle that the provision of the time bound prescription in this section does not breach the right to access to court in terms of the constitution was enunciated upon. 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 of care 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.

[16]. There was no evidence placed before me by the defendant to refute the version of the plaintiff. It was open to the defendant to adduce evidence to demonstrate that the defendant had taken reasonable steps to warn the plaintiff of the date his claim would prescribe. This would have been apparent from Exhibit A which was left blank. Failing this, the defendant could have led evidence not only to refute the plaintiff's assertions but to

demonstrate that it too steps to contact the plaintiff or process the claim as had been promised to him. In the absence of this evidence, the plaintiff's version that he had contacted the defendant on numerous occasions to no avail remains. In this regard, the defendant breached its legal duty of care towards the plaintiff. The plaintiff cannot be said to have rested on his laurels on available evidence. From his testimony, he was instead met with an unresponsive institution which resulted in his resignation. That he had given up on his claim is of no moment in view of this.

[17]. In the absence of a demonstration of the reasonable steps called upon it above, the defendant's submission that its legal duty of care persisted up to the prescription date cannot be sustained. Such a conclusion would create unjust results and would benefit the defendant from what on the present facts is an inaction on its part. It would render a finding that there was a breach of its legal duty on its part hollow.

[18]. Based on the particular facts of this case, the defendant's special plea of prescription cannot succeed based on the defendant's conduct. In the circumstances, it is not necessary to address the question of estoppel, which in any event is not a cause of action on its own.

[19]. It is ordered that:

[19.1] The Special Plea of prescription is dismissed;

[19.2] The defendant is ordered to pay the plaintiff's costs

**SIWENDU, NT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO. : 03112/2014

HEARD ON : 27 JANUARY 2016

FOR THE PLAINTIFF : ADV. M. H. MOKALE

ATTORNEYS FOR PLAINTIFF : MOSUNGWA ATTORNEYS.

FOR THE DEFENDANT : ADV. L. ADAMS

ATTORNEYS FOR THE DEFENDANT : LINDSEY KELLER ATTORNEYS

DATE OF JUDGMENT : 5 MAY 2016