

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

Case No: EL 359/2014

REPOTABLE: NO

In the matter between:

LINDELA JULY TOPOLO

PLAINTIFF

And

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

Madyibi AJ

Introduction

[1] This matter came before this Court for determination of two special pleas in terms of section 23(3) of the Road Accident Fund Act 56 of 1996 ('the Act'). The plaintiff instituted an action for damages which he allegedly suffered during a motor vehicle accident that occurred on 12 May 2009. During the time of the accident, the plaintiff was a passenger. The defendant resisted the action by raising the special pleas as aforementioned, contending that the plaintiff's claim had prescribed. Subsequent to an agreement between the parties, I ordered in terms of Uniform rule 33(4)¹ that the special pleas be adjudicated separately from the main case and the proceedings in the main case be stayed pending the outcome of this

¹ Uniform Rules of Court: Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa.

special plea.

The pleadings

[2] The plaintiff alleged in his particulars of claim that on 12 May 2009, he was a passenger in a motor vehicle, a Dyna Truck with registration letters and numbers YDP[...], driven by M Jezile of number 14[...] Nu 1[...] Mdantsane. The plaintiff further alleged that the aforementioned driver lost control of the truck and it overturned when he tried to avoid a head-on collision with an unknown oncoming motor vehicle. The accident occurred at Dust Street, Wilstonia in East London. According to the plaintiff, the accident was solely caused by the negligent driving of the unknown driver (insured driver). The plaintiff allegedly suffered damages in the amount of R1 859 544.16 of which R800 000 is for general damages (inclusive of pain, suffering and loss of amenities of life), R59 544.16 is for future medical and R1 million is for loss of earnings.

The special plea

[3] With regard to the first special plea the defendant pleaded that the plaintiff had until 11 May 2014 to serve summons on it. The plaintiff only served the summons on the defendant on 28 August 2014, some two and a half months after the expiry of the five years and as such plaintiffs claim has prescribed. The defendant relies on section 23(3) of the Act.

[4] The defendant further pleaded, in respect of the second special plea, that the plaintiff having lodged his claim with the defendant within the required period, failed to lodge the Serious Injury Report (RAF 4 Form) within five years from the date on which the cause of action arose. The defendant contended that plaintiff's claim of non-pecuniary loss had become prescribed. The plaintiff only lodged the RAF 4 form on 3 May 2016. On the date of hearing, the second special plea was abandoned by the defendant for lack of merit.

The plaintiff's replication of the special plea

[5] The plaintiff pleaded, in replication to the defendant's special plea, that after his accident, on 12 May 2009, he employed the services of Mr B. J Jekubeni ('the deceased') to assist him with his claim against the Road Accident Fund. The deceased lodged the plaintiff's claim with the defendant on 19 August 2009. The deceased prepared and issued the summons in East London Circuit Court on 24 March 2014 and thereafter died on the date of issue of summons, without having served the summons on the defendant. The deceased was a sole practitioner and the executor in the estate of the deceased was appointed on a later date. The executor only appointed the legal representative to administer the estate of the deceased which included the legal practice of the deceased in July 2014.

[6] The plaintiff further pleaded that his claim against Road Accident Fund had not prescribed as his attorney had died. It was impossible to have summons served as the plaintiff and the attorney was prevented by a superior force of death from serving the summons to the defendant timeously. The plaintiff pleaded further that the impossibility which prevented him from serving his summons on the defendant remained in existence until the time when the attorney was appointed to handle the legal practice of the deceased. The plaintiff relied on the Constitutional Court judgment in *Van Zyl N.O. v Road Accident Fund*.²

The Issues

[7] This Court is called upon to determine the merits of the defendant's special plea of prescription against the plaintiff's claim against Road Accident Fund and whether the version of the plaintiff is valid to constitute impossibility in law.

The stated case

[8] In a bid to assist in the adjudication of this matter, both parties filed a stated case in which they agreed on the following facts-

- (a) The cause of action arose on 12 May 2009.

² *Van Zyl N.O. v Road Accident Fund* [2021] ZACC 44; 2022 (3) SA 45 (CC); 2022 (2) BCLR 215 (CC).

(b) The plaintiff lodged his claim on 19 August 2009 with the assistance of Mr BJ Jekubeni, the attorney.

(c) The summons on behalf of the plaintiff was issued by his erstwhile attorney, Mr B. J. Jekubeni on 24 March 2014. Mr Jekubeni died on 24 March 2014, the same date as the date of issue of summons.

(d) The date of expiration of the five-year period within which the plaintiff was required to serve the summons on the defendant was 11 May 2014.

(e) The plaintiff only served the summons on the defendant, on 28 August 2014, after the expiry of the five-year period.

The defendant's contention

[9] The defendant contends that the plaintiff's cause of action arose on 12 May 2009. The plaintiff's claim has prescribed on 11 May 2014. The defendant stated that the Act does not provide for condonation. The defendant further relied on section 23(1), (2) and (3) of the Act. The defendant contended that the plaintiff does not belong to the category of claimants listed in section 23(2)(a), (b) and (c), where the running of the prescription is suspended. The defendant added that the plaintiff was only failed by his erstwhile attorneys of Mr B J. Jekubeni in handling his matter expeditiously and not giving him proper legal advice.

[10] The defendant relied only on the stated case and did not lead any oral evidence.

The plaintiff's contention

[11] The plaintiff contented that his claim against the defendant has not prescribed for reason that he could not serve the summons on the defendant before the expiry of the five years for the following reasons:

(a) Mr Jekubeni, the erstwhile attorney of the plaintiff died on 24 March

2014, the same date of the issuance of summons.

(b) Mr Jekubeni was a sole practitioner and there was no one to attend to his office until the executor was appointed to wind up the estate of Mr Jekubeni including his legal practice. After appointment, the executor or executrix had to appoint a legally qualified person to deal with the practice of Mr Jekubeni.

(c) Plaintiff only came to know about the death of his erstwhile attorney on 21 May 2014, after his claim had already prescribed.

[12] The plaintiff further pleaded that the executor or executrix in the estate of Mr Jekubeni was appointed on 15 April 2014. The plaintiff pleaded further that the practice of Mr Jekubeni was transferred to attorneys, WT Mngqandi Attorneys, who then served the summons on the defendant on 28 August 2014. The plaintiff pleaded that it was impossible to serve the summons on the defendant as the matter was out of his hands. The plaintiff relied on *Van Zyl N.O. v Road Accident Fund*.³ The plaintiff further gave oral evidence to supplement the stated case.

The plaintiff's oral evidence

[13] The plaintiff testified that he was involved in a motor vehicle accident on 12 May 2009 wherein he was injured. During 2009 and after his accident, he was referred by his friend to Mr Jekubeni as an attorney who could assist him with his claim against the Road Accident Fund. The plaintiff further testified that he visited the office of Mr Jekubeni and thereafter entered into an agreement wherein Mr Jekubeni agreed to assist him with his claim against the Road Accident Fund.

[14] The plaintiff further testified that between 2009 and January 2014 Mr Jekubeni only made him see one doctor in Beacon Bay, East London, whom the plaintiff could not remember his or her particulars as well as Dr Olivier, an Orthopedic he visited in January 2014. The plaintiff further testified that he was

³ Above n 2 paras 50-127.

accompanied by Mr Peter, who was working with Mr Jekubeni, to see Dr Olivier in January 2014. However, Mr Peter told the plaintiff that he could not be seen by Dr Olivier because there were some problems. Mr Peter made appointment for another date of consultation with Dr Olivier. On the next appointment, the plaintiff testified that he went on his own to visit the surgery of Dr Olivier for his consultation and thereafter he went to visit the office of Mr Jekubeni, on the same date. The date of consultation with Dr Olivier as it appears in the medical report⁴ of Dr Olivier, is 21 May 2014. The plaintiff further testified that on his arrival at Mr Jekubeni's office, he found the office locked and some ladies were busy packing the files in some boxes. The ladies informed him that their father, Mr Jekubeni had died. The said ladies further informed the plaintiff that he should wait for a new person to telephone him and inform him who will take over his matter. The copy of the letter of executorship and death certificate were handed to court as exhibit A and B respectively.

[15] The plaintiff further testified that he was later telephoned by Mr Mnqandi who informed him that he would take over his file. Mr Mnqandi further gave him directions to his office. They met in the office of Mr Mnqandi and signed some documents. Mr Mnqandi took him to two doctors; however, he did not finalise his claim. The plaintiff testified that an attorney from Mr Mnqandi's office informed him that they could no longer continue handling his matter because his summons was not served on the defendant in time and his claim had prescribed. The plaintiff further testified that Mr Jekubeni never told him about time limits and when his claim would prescribe. The plaintiff further testified that between the two appointments with Dr Olivier in January and May 2014, he never visited the offices of Mr Jekubeni.

[16] The plaintiff then closed his case without calling any further witnesses.

Analysis

[17] Section 23 of the Act provides-

⁴ Court bundle to miscellaneous index at 27.

'(1) notwithstanding anything to the contrary in any law contained, but subject to subsection

(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.

(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.'

[18] In *Van Zyl NO v Road accident Fund*,⁵ Theron J concerning *Road Accident Fund v Mdeyide*⁶ stated that prescription of claims in terms of section 17 of the Act is regulated exclusively by section 23 of the Act and not the Prescription Act 68 of 1969.

[19] The significance of the non-applicability of the Prescription Act in RAF matters is that the prescription is triggered from the date of the accident as the cause of action lies in the accident. It is common cause that the cause of action arose on 12 May 2009, the date of the accident. The defendant correctly submitted that the plaintiff had until 11 May 2014 to serve the summons on the defendant. The defendant presented a prima facie defence of the special plea of prescription which then shifted the onus on the plaintiff to rebut it.

[20] The fact that Prescription Act finds no application in respect of claims against RAF is not dispositive of the matter. The Constitutional Court was confronted with such a situation in *Van Zyl N.O. v Road accident Fund*. This case concerned a claim brought by a curator on behalf of a mentally incapacitated person who did not fall into one of the two exceptions which cater for the delay in running of

⁵ Above n 2 para 12.

⁶ *Road Accident Fund and Another v Mdeyide* [2010] ZACC 18; 2011 (2) SA 26 (CC); 2011 (1) BCLR 1 (CC) para 45.

prescription against such persons in section 23(2)(b) and (c)⁷ of the Act. The majority found that 'for as long as the disability arising from Mr Jacob's mental condition persisted, prescription did not begin to run. Under section 23(1), prescription also did not begin to run against Mr Jacobs. This is because before the curatrix was appointed, it was impossible for him to comply with the section ...'⁸

[21] The Constitutional Court further explained that:

'[T]he impossibility principle originates as a rule of natural law and justice. Of natural justice, Finnis writes: "Principles of this sort would hold good, as principles, however, extensively they were overlooked, misapplied, or defied in practical thinking, and however, little they were recognised by those who reflectively theorise about human thinking. That is to say, they would "hold good" just as mathematical principles of accounting "hold good" even when, as in the medieval banking community, they are unknown or misunderstood."' ⁹

"Grounded in nature, science and reality, the impossibility principle is an extension of logic. Like Einstein's laws of gravity and Pythagoras' theorem, the impossibility principle enjoys a natural durability. Fundamental to the impossibility principle is an awareness of a human condition, our capacities and indeed, possibilities. The impossibility principle flourishes because it distinguishes rationality, logic and reasonableness from the opposite. Drawing on the writings of Aquinas, Davitt writes:

"The construction that a judge will give to a piece of legislation should

⁷ Section 23(2)(b) and (c) of the Act provides as follows:

- '(2) Prescription of a claim for compensation referred to in subsection (1) shall not run against-
- (a) ...;
 - (b) any person detained as a patient in terms of any mental health legislation;
 - or
 - (c) a person under curatorship.'

⁸ Above n 2 para 126.

⁹ Above n 2 para 52.

be guided by humane discretion, because the best of enactments can not possibly include all the imaginable cases that could arise under it. Hence, where a literal construction of a statute would work harsh injustice in individual cases, the judge's decision should be according to equity - the intention of the law."¹⁰

"For a law to be applied as law, compliance must be possible. Conversely and by necessary application, a law which is impossible to comply with cannot be applied as law. It is this which sets the impossibility principle apart from other principles of common law. Fennis embraced the impossibility principle when he distinguished between "acts that (always or in particular circumstances) are reasonable-all-things-considered (and not merely relative-to-a-particular purpose) and acts that are unreasonable-all-things-considered". The impossibility principle would apply not only to tasks "which are absolutely impossible but tasks which, in the circumstances, are not reasonably capable of performance."¹¹

[22] It was further held that 'this case is much narrower. It concerns the absolute impossibility to perform tasks. The impossibility is determined by objective conditions, by science, nature and reality. Determining impossibility in this instance is not an exercise of discretion informed by subjective opinions and worldviews. It is this condition that distinguishes the impossibility principle from "any law". In turn it is impossibility that informs incapacity in the context of this case.... As it appears in Nichols, the *lex non cogit ad impossibilia* maxim is part of the rule of law, one of the foundational values of our Constitution. In that way the principle forms part of the Constitution'.¹²

[23] Objective impossibility is a requirement of the very stringent provisions of common law doctrine of supervening impossibility of performance.¹³

¹⁰ Above n 2 para 53.

¹¹ Above n 2 para 54.

¹² Above n 2 para 55 and 125.

¹³ *Matshazi v Mezepoli Melrose Arch Pty Ltd & Another* [2020] ZAGPJHC 136; (2021) 42 ILJ 600 (GJ) para 36.

[24] The plaintiffs erstwhile attorney, Mr Jekubeni, died on 24 March 2014, the same date as the date of issuance of summons from East London Circuit Court. The plaintiff only came to know about the death of his erstwhile attorney on 21 May 2014, after the expiry of five years. It was impossible for the plaintiff to assist in any manner, as the plaintiff had no knowledge about the death of his erstwhile attorneys until after the expiry of five years. The plaintiff also had no knowledge that his claim was in danger of prescribing due to none service of summons on the defendant, prior to the expiry of five years. The plaintiff only visited the offices of his erstwhile attorneys on 21 May 2014, when the summons ought to have been served on 11 May 2014.

[25] This Court finds that the death of the plaintiffs erstwhile attorney, Mr Jekubeni, on 24 March 2014 prevented the service of summons on the defendant, prior to the expiry of the period of five years. The impediment to serve summons on the defendant continued until an attorney, Mr Mngandi, was appointed to assist the plaintiff with his claim. Mr Mngandi caused the summons to be served on the defendant on 28 August 2014.

Conclusion

[26] Having considered all the above, this Court is satisfied that the plaintiff made out a case in common law, of impossibility to postpone the running of prescription against him.

Order

[27] Accordingly, the following order will be issued:

1. The defendant's special plea of prescription is dismissed.

The defendant is ordered to pay the plaintiffs costs on party and party scale.

T MADYIBI

**ACTING JUDGE OF THE HIGH
COURT OF SOUTH AFRICA**

Appearances

Counsel for the Defendant	:	<i>B Mlinganiso</i>
Attorneys for the Defendant	:	State Attorney EAST LONDON
Counsel for the Plaintiff	:	B Nduli
Attorneys for the Plaintiff	:	B Nduli & Company EAST LONDON
Date Heard	:	24 July 2023
Date Delivered	:	26 September 2023