Reportable:	Yes/No
Circulate to Judges:	Yes/No
Circulate to Magistrates:	Yes/No

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO.: 1541/2018
Date heard: 11-09-2020
Date delivered: 13-08-2021

In the matter between:

Katrina Lennet Lottering **Plaintiff**

and

Chief Executive Officer of the Road Accident Fund N.O **1st Defendant**

The Road Accident Fund **2nd Defendant**

CORAM: WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. The plaintiff, Ms Katrina Lennet Lottering, issued summons on 3 July 2018 against the 2nd defendant, the Road Accident Fund (RAF), for damages incurred as a result of a motor vehicle accident which occurred while the plaintiff was a passenger in the insured vehicle.

2. In the alternative to the above mentioned claim, the plaintiff claimed as against the defendants, the CEO of the RAF and the RAF – in the event that the court finds that the plaintiff's claim

was not validly and/or duly and/or timeously lodged, damages against the 1st defendant and/or the RAF for breach of a duty of care.

3. In response the defendants have raised three special pleas.

3.1 The 1st defendant's special plea refers to s15 (3) of the Road Accident Fund Act 56 of 1996 (the Act) which provides as follows:

"No member of the Board or officer or employee of the Fund, or other person performing work for the Fund, shall be liable for anything done in good faith in the exercise of his for her powers or the performance of his or her functions or duties or in terms of this Act."

They plead accordingly that the 1st defendant cannot be held liable for the conduct of the RAF's employees and that therefore the plaintiff has no claim in law against the 1st defendant.

3.2 The RAF raised two special pleas of prescription in that:

3.2.1 The plaintiff has failed to submit a valid claim to the RAF within 3 years from the date upon which her cause of action arose; and

3.2.2 The plaintiff has failed to issue and serve the summons in respect of the claim within 5 years from the date upon which her cause of action arose.

4. In her replication to the special pleas raised by the defendants, the plaintiffs pleads waiver by the RAF of its right to raise failure to substantially complete the claim form and prescription as defences to the plaintiff's claim. Alternatively she pleads that the RAF is estopped from relying on its said rights. Further alternatively the plaintiff relies on the provisions of s12 (3) of the Prescription Act 68 of 1969 in that the plaintiff only became aware of the full particulars of her claim against the defendants on or about 27 November 2017 and issued summons on 4 July 2018 for damages suffered as a result of the RAF and/or its employees allowing her claim to become prescribed within the 3 year period as prescribed by the Prescription Act. The plaintiff pleads furthermore that her claim against the 1st defendant is in his or her representative capacity.

5. At the hearing of the special plea, the defendants were absent from court, but I was informed by Mr Nortier, plaintiff's counsel, that the defendants maintain the attitude expressed in an e-mail dated 8 September 2020 and addressed to the plaintiff's attorney Ms Denise de Jongh, that the RAF will abide by the ruling of the court in respect of the special pleas.

6. The plaintiff and her attorney Ms de Jongh were called as witnesses.

7. The plaintiff testified that she was 39 years old. On 5 August 2009 she was a passenger in the motor vehicle driven by her

sister when there was an accident which resulted in her being hospitalised in the Kimberley Hospital.

8. Whilst in hospital she was approached by a certain Mr Clive Orto who informed her that he was employed by the RAF and that he was there to assist her in an application for compensation for her injuries sustained in the motor vehicle accident. At Mr Orto's request she also signed the RAF1, Third Party Claim form giving the RAF consent to obtain copies of any records to access any information relating to the claim for compensation and to contact any person or entity for purposes of obtaining or verifying such information and/or documentation.

9. Mr Orto requested the plaintiff to obtain from the police station where the accident was reported, the accident report and the case number, she was also asked to depose to a short affidavit, make a copy of her identity document, obtain her hospital records and provide her banking details. After the plaintiff was discharged from hospital and whilst still on crutches, she obtained the above documents and delivered it to Mr Orto at the RAF offices at the Kimberley Hospital Complex.

10. When the plaintiff started recovering from her injuries she called the offices of the RAF on numerous occasions, where she spoke to either Mr Orto or a receptionist, and enquired about the progress on her claim. She was told that everything was in order and that they would revert to her. This situation continued for some years.

11. She testified that at some stage she spoke to a neighbour who had also been involved in a motor vehicle accident and enquired from her as to the status of her claim. The neighbour told her that she had instructed private attorneys, P Joubert Inc. to handle her claim. The plaintiff thereafter met with one of P Joubert Inc's investigators and decided to instruct the attorneys to pursue her claim.

12. Ms De Jongh of Joubert Inc investigated the plaintiff's claim and informed her that the medical certificate had not been signed by the medical practitioner and that the RAF maintained that the plaintiff's claim had prescribed.

13. The plaintiff testified that she only saw Mr Orto while she was in hospital and thereafter communicated with him telephonically. Her evidence was that she was never informed by Mr Orto or any other employee of the RAF that her claim was about to prescribe and that she could instruct an attorney. She was also not informed that the RAF was experiencing difficulties in obtaining the signed medical certificate.

14. Ms de Jongh testified that she is an attorney and an associate at P Joubert Inc, Cape Town. She had started working there during 2016 and was given the plaintiff's file. She compiled a time line with regard to the steps taken by P Joubert Inc. on behalf of the plaintiff as follows:

14.1 The plaintiff had signed a mandate instructing P Joubert Inc. on 31 July 2014;

14.2 Ms de Jongh requested the relevant documentation from P Joubert's Kimberley office during August 2016;

14.3 On 12 September 2017 she inquired from the RAF whether a claim was lodged and what the status thereof was;

14.4 On 13 September 2017 she received an e-mail from the RAF that they could not divulge any information for security reason;

14.5 On 12 October 2017 Ms de Jongh commenced with an application in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA), to obtain the contents of the RAF file;

14.6 On 23 October 2017 she received the file;

14.7 On 27 November 2017 she consulted with the plaintiff regarding the contents of the file;

14.8 After informing the plaintiff that the claim had prescribed, she subsequently received instructions to proceed with issuing summons; and

14.9 Counsel was instructed and summons was issued during July 2018.

15. Ms de Jongh also compiled a bundle of documents which she received from the RAF after the PAIA application. The information gleaned from the RAF file relating to this matter is as follows:

15.1 The plaintiffs short affidavit dated 11 February 2010 referred to in her evidence, her bank details with ABSA Bank, dated 11 February 2010, her hospital records, accident report and a copy of the plaintiff's identity report were included in the RAF's file.

15.2 The RAF third party claim form signed by the plaintiff was in the file. Significantly, the portion of this form relating to the medical report was only signed by the medical practitioner Dr Walid Bonaicha on 9 January 2014.

15.3 A merits assessment form, undated, with the plaintiff's details, date of accident, date of prescription entered as 4 August 2012 and a note that the claim was lodged on 20 January 2014 with the word *"PRESCRIBED"* entered. The merits assessment forms contains boxes to be ticked marked *"yes"* and *"no"*. In response to the question *"Repudiate claim?"* the *"no"* box is ticked. In response to the question *"could you assess merits"*, the *"yes"* box is ticked. Next to *"amount claimed"* R1 is entered and next to *"1st estimate amount"* the amount of R75 000 (GD) – presumably for general damages - is entered.

15.4 On 15 January 2014 Ms Claudia Griffiths of the Kimberley Hospital Complex office of the RAF dispatched a memorandum to Ms Lydia Malandzi, team leader of the Origination Department of the RAF (the Direct Claims Department) in Johannesburg stating that:

> *"1. **Claimant** (plaintiff) **ID copy, Claimant affidavit and BIF is within prescription.***
>
> ***2. The delay was the completion of the SMR** (Statutory Medical Report) **which was only done 09/01/2014."***
>
> (explanations in brackets are own insertions)

16. That concluded the evidence led in this matter. Mr Nortier undertook to provide me with written heads of argument which I received in due course.

17. I deal first with the special pleas raised by the RAF. Since the identity of the driver is known, the special pleas are based on the provisions of sections 23 (1) and 23 (4) of the Act. For the sake of convenience, I quote the relevant and related sections of the Act as follows.

> *"17. Liability of Fund and agents*
>
> *(1) The Fund or an agent shall-*
>
> ***(a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle***

where the identity of the owner or the driver thereof has been established;

(b) . . . .

19. Liability excluded in certain cases

The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage-

(a) . . . .

(b) . . . .

(c) . . . .

(d) . . . .

(e) . . . .

(f) if the third party refuses or fails-

(i) to submit to the Fund or such agent, together with his or her claim form as prescribed or within a reasonable period thereafter and if he or she is in a position to do so, an affidavit in which particulars of the accident that gave rise to the claim concerned are fully set out; or

(ii) to furnish the Fund or such agent with copies of all statements and documents relating to the accident that gave rise to the claim concerned, within a reasonable period after having come into possession thereof.

23. Prescription of claim

(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) . . . .

(3) Notwithstanding subsection (1), no claim which has been lodged in terms of section 24 shall prescribe before the expiry of a period of five years from the date on which the cause of action arose.

(4) . . . .

(5) . . . .

24 Procedure

24. (1) A claim for compensation and accompanying medical report under section 17 (1) shall-

(a) be set out in the prescribed form, which shall be completed in all its particulars;

(b) be sent by registered post or delivered by hand to the Fund at its principal, branch or regional office, or to the agent who in terms of section 8 must handle the claim, at the agent's registered office or local branch office, and the Fund or such agent shall at the time of delivery by hand acknowledge receipt thereof and the date of such receipt in writing.

(2) (a) The medical report shall be completed on the prescribed form by the medical practitioner who treated the deceased or injured person for the bodily injuries sustained in the accident from which the claim arises, or by the superintendent (or his or her representative) of the hospital where the deceased or injured person was treated for such bodily injuries: Provided that, if the medical practitioner or superintendent (or his or her representative) concerned fails to complete the medical report on request within a reasonable time and it appears that as a result of the passage of time the claim concerned may become prescribed, the medical report may be completed by another medical practitioner who has fully satisfied himself or herself regarding the cause of the death or the nature and treatment of the bodily injuries in respect of which the claim is made.

(b) . . . .

(3) . . . .

(4) (a) Any form referred to in this section which is not completed in all its particulars shall not be acceptable as a claim under this Act.

(b) A clear reply shall be given to each question contained in the form referred to in subsection (1), and if a question is not applicable, the words "not applicable" shall be inserted.

(c) A form on which ticks, dashes, deletions and alterations have been made that are not confirmed by a signature shall not be regarded as properly completed.

(d) Precise details shall be given in respect of each item under the heading "Compensation claimed" and shall, where applicable, be accompanied by supporting vouchers.

(5) 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.

(6) No claim shall be enforceable by legal proceedings commenced by a summons served on the Fund or an agent-

(a) before the expiry of a period of 120 days from the date on which the claim was sent or delivered by hand to the Fund or the agent as contemplated in subsection (1); and

(b) before all requirements contemplated in section 19(f) have been complied with:

Provided that if the Fund or the agent repudiates in writing liability for the claim before the expiry of the said period, the third party may at any time after such repudiation serve summons on the Fund or the agent, as the case may be."

The RAF's first special plea

18. It stands undisputed that the plaintiff had delivered by hand to the RAF offices at the Kimberley Hospital, the claim form and all the accompanying documents as requested by the RAF's Mr Orto within a few months of the accident. It is also undisputed that the plaintiff had on several occasions over the years telephonically followed up on the progress of her claim and was not informed that the statutory medical report, which is a peremptory requirement in terms of s 24 had not been completed by the medical practitioner.

19. In Pithey v RAF 2014(4) SA 112 (SCA) the SCA reiterated at paragraph 19 thereof that:

> ***"It has been held in a long line of cases that the requirement relating to the submission of the claim form is peremptory and that the prescribed requirements, concerning the completeness of the form are directory, meaning that substantial compliance with such requirements suffices. As to the latter requirement this court in SA Eagle Insurance Co Ltd v Pretorius reiterated that the test for substantial compliance is an objective one"***

20. See also *Busuku v Road Accident Fund* 2017 (1) SA 71 (ECM) where a similar situation to the one *in casu* arose. The RAF had raised a special plea claiming that the plaintiff had failed to send or deliver to it a medical report as contemplated by s 24 (1) read with s 24 (2)(a) of the Act, resulting in the claim becoming prescribed.

The court held that at paragraph 23 thereof that:

> ***"(23) As stated at the outset of this judgment, the medical report attached to the Third Party Claim Form served on the Fund on 30 April 2014, was left in blank and no particularity was supplied at all. It lacks any or all compliance with any or all of***

the provisions under the Act or regulations. Due to its total lack of compliance, the issue of 'substantial compliance' with the Act or Regulations does not arise. In my view it cannot even be termed as partial compliance; it can best be described as non-compliance with the Act and Regulations."

The special plea of prescription was upheld.

21. In *Busuku*, unlike the matter at hand, the plaintiff was represented by an attorney who personally delivered the completed claim form and incomplete medical report to the offices of the RAF. The issue *in casu* is whether, in the case where the RAF's Direct Claims Department had taken it upon itself to approach the plaintiff and invite her to rely on its assistance in the proper investigation and lodgement of her claim, it can be allowed to rely on the invalidity of the claim and its subsequent prescription. I turn to the case law in this regard.

22. In *Madzunye and Another v Road Accident Fund* 2007(1) SA 165 (SCA), Maya JA, had the following to say with reference to the responsibilities of the RAF, at paragraph 17 thereof:

> *"17. In an unreported judgment of this court, Road Accident Fund v Roman Klisiewicz, Case No. 192/2001, handed down on 29 May 2002, Howie JA set out the extent of the respondent's responsibilities saying at para 42:*
>
> *'The [Road Accident Fund] exists to administer, in the interests of road accident victims, the funds it collects from the public. It has the duty to effect that administration with integrity and efficiency. This entails the thorough investigation of claims and, where litigation is responsibly contestable, the adoption of reasonable and timeous steps in advancing its defence. These are not exacting requirements. They must be observed."*

23. The RAF's responsibility to investigate claims with efficiency and integrity was restated in *Pithey, supra* where the RAF raised a special plea of invalidly of the claim where there was some confusion as to whether the claim was one in terms of s17 (1) (a) (where the driver is known) or s 17(1) (b) of the Act (where the driver is unknown). Petse JA at paragraph 25 stated that the RAF ought *"not to benefit from its own failure to clarify, with minimal time, effort and expense, whatever confusion the claim form and attached documentation revealed."*

The special plea was dismissed with costs on appeal.

24. In an unreported judgment of the Gauteng Local Division, Johannesburg, the matter of *Johannesen Ralph v The Road Accident Fund,* case no 2014/03112, delivered on 5 May 2016, which Mr Nortier referred me to after delivering his heads of argument, a similar scenario to the one *in casu* arose. The plaintiff was also assisted by an employee of the RAF's Direct Claims Department in lodging his claim after being injured in a motor vehicle accident. The claim was timeously lodged but thereafter the plaintiff received no responses from the RAF regarding the progress of his claim despite several telephone calls and attendances at the RAF's offices. Some years later the plaintiff consulted with attorneys and was advised that his claim had lapsed. A new set of attorneys were however willing to assist. At that stage so much time had passed that his summons was served on the RAF five years after the prescribed period envisaged in s 23 (3) of the Act. The RAF

raised a special plea of prescription which was dismissed by Siwendu AJ.

25. The court held in *Johannesen* that where the RAF represents to a claimant that it will assist in settling a claim without external legal advice, a greater duty of care rests on the RAF to take all reasonable steps to prevent claims prescribing in its hands – which steps would include responding to the claimant's enquiries, bringing the matter to finality, and informing the claimant about the rejection or prescription of the claim. In the absence of evidence by the RAF of the reasonable steps taken to contact the plaintiff or to properly process the claim, it would be unjust for the RAF to benefit from inaction on its part.

26. I agree with the responsibilities and duties of the RAF expressed in the above-mentioned matters. In addition Mr Nortier has referred to s 24(5) of the Act as being the nail in the coffin for the RAF. S 24 (5) provides the RAF with 60 days in which to object to the validity of a claim, failing which it shall be deemed to be valid in law in all respects. The position is set out in *Thugwana v Padongelukfonds* 2005(2) SA 217 (TPA) at paragraph 7, where Els J held the following:

> ***"7.) Indien daar wesenlike gebreke in die eisvorm en/of die mediese verslag voorkom welke gebreke sodanig was dat die eis onregsgeldig was sou die verweerder in afwesigheid van die bepalings van art 24(5) bloot kon stilsit, wag dat die eiser dagvaar en dan die punt neem dat die voltooiing van sodanige vorm en/of verslag so wesenlik gebrekkig is dat die eis ongeldig is. Dit sou duidelik onbillik wees teenoor die eiser. Artikel 24 (5) is derhalwe in die Wet ingevoeg om die onbillikheid teen te werk. Waar daar gebreke in die eisvorm of mediese verslag voorkom wat so wesenlik van aard is dat dit***

> ***nie regsgeldig is nie, plaas art 24 (5) nou 'n regsverpligting op verweerder om binne 60 dae beswaar teen die regsgeldigheid daarvan te maak wat die eiser die geleentheid gee om die gebreke reg te stel. Sou verweerder nie binne 60 dae beswaar teen die regsgeldigheid daarvan maak nie, kan hy ingevolge art 24 (5) nie meer op die gebreke in die eisvorm of mediese verslag steun nie. Sou hy wel beswaar maak en eiser stel nie die gebreke reg nie, bly die eisvorm en/of mediese verslag onregsgeldig.***
> ***Artikel 24 het nie ten doel om met enige ander prosedurele aangeleenthede behalwe die daarin uiteengesit, of dit nou artikels van die Wet en/of regulasies is wat prosesregtelik van aard is, te handel nie."***

This position was confirmed on appeal in *Thugwana v Road Accident Fund* 2006(2) SA 616 (SCA).

27. *In casu,* it is not just that the RAF did not object to the validity of the claim due to the medical report being incomplete, it clearly undertook to obtain such medical report on behalf of the plaintiff. I say this, since it was the RAF, and not the plaintiff, who eventually during 2014 attended to the completion of the medical report. In such an instance it is in my view even more egregious of the RAF to seek to benefit from their own tardiness.

28. In my view the RAF's first special plea should be dismissed.

The RAF's second special plea

29. The above remarks with regard to the duties and obligations of the RAF and its employees (with the exception of s 24 (5)) apply equally to the second special plea of the RAF.

30. The plaintiff's evidence stands uncontested that she was never informed by any employee of the RAF over the course of a period of years of making telephonic enquiries regarding her claims, that her claim would be rejected and/or that she would not be compensated or that the claim would prescribe and that she would be best advised to consult an attorney. There can be no doubt that the RAF has breached it legal duty of care towards the plaintiff in this regard. As Mr Nortier has correctly contended the RAF should not be allowed to hide behind its own negligence.

31. In her replication to the special pleas of the RAF the claimant has pleaded that the RAF has waived the right to take defences such as the invalidity of the claim and/or prescription. It is by now settled that a statutory provision enacted for the special benefit of any individual or body may be waived by that individual or body, provided that no public interests are involved (See *SA Eagle Insurance Co Ltd v Bavama* 1985(3) SA 42 (A) at 49 G-H; *Road Accident Fund v Mothupi*: 2004 (4) SA 38 SCA 49 F-G; *Road Accident Fund v Ngubane* 2008 (1) SA 432 (SCA) paragraph 11).

32. There is a presumption against waiver and the onus to prove it rests upon the party asserting it. It has been held that clear proof is required, especially in the case of a tacit waiver, as is alleged *in casu*.

33. The uncontroverted evidence of the plaintiff is that until she had instructed her attorneys of record during 2014 to attend to her claim, she had received reassurances from the RAF's employees that her claim was in order and that they will revert to her. She was never informed that the claim was about to or has prescribed. It is significant in this respect that the RAF 1 Claim Form does not indicate at all the date of prescription of the claim. The only time the date of prescription appears in the file of the RAF is in the RAF's internal correspondence after the plaintiff's attorneys were instructed to pursue the claim.

34. This conduct of the RAF is in my view unequivocal and consistent with no other hypothesis that that it has waived its right to raise or rely on prescription (See *Mothupi supra* at paragraph 19).

35. Having found that the RAF has waived its right to rely on prescription, I do not intend to deal with the issue of estoppel.

36. The RAF's second special plea relates only to prescription in terms of s 23 (1) and s 23 (4) of the Act. It does not deal with prescription of the plaintiff's alternative delictual claim against the RAF based on vicarious liability. I therefore do not deal with Mr Nortier's submissions relating to the Prescription Act 68 of 1969.

37. The RAF's second special plea also stands to be dismissed.

1st Defendant's special plea

38. This special plea is based on s (15) 3 of the Act which in effect exempts *inter alia* a Board member or officer of the RAF from liability from *"anything done in good faith in the exercise of his or her powers or the performance of his or her functions or duties under or in terms of this Act"*.

39. The claim is however not brought against the CEO of the RAF in his or her personal capacity, but is based on the vicarious liability of a state organ for the negligence of its employees. Therefore, it was argued by counsel, it was necessary to sue or join the nominal head of the RAF in the plaintiff's action, in his or her *nomino officio* capacity, as the person ultimately responsible for the conduct of the employees of the RAF.

40. I agree with the contention of Mr Nortier and in my view the 1st defendants' special plea also stands to be dismissed.

41. There is no reason why costs in this matter should not follow the result. Mr Nortier has however also asked that the plaintiff and Ms de Jongh be declared necessary witnesses and that the defendants pay the wasted costs of the postponement of the trial on 27 May 2020. I however have no information regarding the circumstances of that postponement except for a note on the court file that the matter was postponed *in absentia*. The costs of 27 May 2020 should therefore best stand over for later determination

In the circumstances the following order is made:

a) The 1st and 2nd defendants' special pleas are dismissed with costs, the one paying, the other to be absolved;

b) Ms Denise de Jong and Ms Katrina Lottering are declared to have been necessary witnesses and their reasonable expenses should be allowed;

c) The costs of 27 May 2020 are to stand over for later determination.

CC WILLIAMS

JUDGE

For Plaintiff:	Adv. L Nortier P Joubert Inc.
For Defendants:	No appearance