IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION: MTHATHA)

CASE NO:3118/2016

In the matter between:

NOMABHASO MIRRIAM MJOKOVANA PLAINTIFF

AND

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

DAWOOD, J:

1. The Defendant raised a special plea herein claiming *inter alia*:
   a) That the plaintiff was a passenger in a motor vehicle when a collision occurred on 21 July 2010.
   b) The Plaintiff had lodged a RAF 1 form with the defendant on 21 January 2011.
   c) In terms of section 23 (3) of the Road Accident Fund Act the plaintiff was obliged to serve within 5 years of the date on which the accident occurred.
   d) The plaintiff was accordingly obliged to serve summons on or before the 20 July 2015.
   e) The plaintiff caused the summons to be issued on the 12 September 2016.
   f) The plaintiff accordingly failed to serve summons within the prescribed time.
   g) As a result of the plaintiff's failure to comply with the provisions as prescribed by the RAF Act 56 of 1996 and the regulations, the plaintiff claim has prescribed.
2. The Plaintiff in her Replication stated the following:

   That she personally entered into an agreement with the Defendant, duly represented by its legally qualified employees that she would lodge a claim for compensation with the defendant and the RAF employees.

   (i) To fully investigate the merits of the plaintiff claim and the quantification thereof;

   (ii) To provide the plaintiff with appropriate legal advice as to the reasonableness of any offer made by the Defendant and the damages which she was entitled to and an acceptable settlement of the quantum of the plaintiff claim;

   (iii) It was an implied term of the agreement that the defendant's representative, its employees, would perform the aforesaid services in a proper and professional manner and without negligence; and

(iv) The defendant's employees were aware or ought to have been aware:

a) That the plaintiff was a lay person with no legal expertise;

b) That the plaintiff had no training in the proper quantification of a claim for personal injury in terms of the specific injury suffered by her.

c) The plaintiff would rely entirely on the advices given to her the employees of the defendant as to what experts should be consulted to obtain proper opinions as to the prognosis of her injuries and its effect on her earning capacity in the future;

d) The plaintiff was unaware of the fact that she was entitled to claim for loss of earning or loss of earning capacity in the event that the sequelae of her injuries impacted on those physical faculties; and

e) The defendant owed the plaintiff a duty of care to:

(i) Fully and comprehensively advise the plaintiff of the steps to be taken to quantify her claims;

(ii) Ensure the appropriate opinions from qualified experts were obtained to properly understand the financial implications of the plaintiffs injuries relevant to future loss of earning and earning capacity;

(iii) Quantify the plaintiff claim in accordance with accepted standards and precedents available; and

(iv) Ensure that her claim was not under-quantified and included all headings of claim.

f) On the 11 April 2013 and with the knowledge that the plaintiff had no personal ability to quantify the true value of her claim and would rely on the fact that the defendant employees had assisted her correctly the defendant employees made an offer of settlement as follows:

General damages	R450 000-00
Past hospital expenses	R227419-40
Future medical expenses	section 17 (4) certificate.

g) The plaintiff acted to her detriment by accepting the offer in full and final settlement of her claim.

   In accepting the offer the Plaintiff acted to her prejudice as the offer did not include any amount for future loss of earning capacity.

h) In the premises the defendant is estopped from relying on any claim that the plaintiff's claim has prescribed in that, had the defendant not negligently represented to the plaintiff that her claim had been properly quantified, the plaintiff would have rejected the offer and would have insisted on quantification including future loss of earnings.

i) The defendant's servants further failed to issue any summons on behalf of the plaintiff on or before the 20 July 2015 and failed to advise the Plaintiff that if no summons was issued by that date her claim for future loss of earning would prescribe.

j) By reason of the aforesaid representation that her claim had been properly quantified without the issue of any summons, which was relied upon by the plaintiff to her prejudice, the RAF is estopped from relying on its own ommissions to avoid the claim.

k) Wherefore the plaintiff prayed for the dismissal of the defendant special plea".

3. The matter came before me as a stated case in order to determine the special pela of prescription:
    a) The defendant case is that the plaintiff's claim has prescribed having regard to the 5 year period provided for in the Act
    b) The further defence is that the plaintiff claim is based on the Defendant's Statutory obligations in terms of section 17 of the RAF Act and not as it ought to be on a breach of contract.
    c) The plaintiff in her replication sought to introduce a new cause of action based on breach of contract estoppel and the Prescription Act. The Plaintiff's cause of action however in her particulars of claim is based on section 17 of the RAF Act which has statutory prescribed periods which the defendant alleges supersedes the Prescription Act.
    d) I accept that the replication to a large extent relies on the obligations of the employees of the fund and seems to be based on an agreement and their failure to comply with their obligations in terms of the agreement which is not what the plaintiff claim is based on the plaintiff's cause of action in its particulars of claim clearly is based on section 17 of the Road Accident Fund Act.
4. The plaintiff has accordingly not sued the fund on the basis of breach of contract but rather has elected to pursue her claim in terms of section 17 for future loss of earning or earning capacity.
5. The Defendant's argument does have merit that the plaintiff cause of action in the particulars is not based on a breach of contract and accordingly the concepts of misrepresentation and estoppel are not applicable, despite it being raised in her replication.
6. The plaintiff however clearly was unaware of what her actual entitlement was in respect of the separate heads.

7. She would not be aware of the consequences of the responses made or that she needed to give further information on some of the responses unless she was specifically questioned in respect thereof.
8. This is not a case where the plaintiff was unhappy with the amount offered yet settled for it but she seems to have believed that it was a proper offer at the time.
9. However since the plaintiff's cause of action in her particulars of claim is not based on breach of contract but on the Act the question of misrepresentation or estoppel cannot be raised at replication stage but that ought to have been the cause of action instituted against the defendant if reliance was to be placed on it.
10. I now turn to the argument of whether or not the Prescription Act is applicable or not.

"a) Section 14 of the Prescription Act 69 of 1969 reads as follows:-

14 Interruption of prescription by acknowledgment of liability.

(i) The running of prescription shall be interrupted by an express or tacit acknowledgment of liability by the debtor.

(ii) If the running of prescription is interrupted as contemplated in ss (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or any time thereafter the parties postpone the due date of the debt, from the date upon which the debt again became due."

b) In **Road Accident Fund v Mothupi**[1] Nienaber JA stated as follows:

"In the first place an acknowledgment of liability for the purposes of section 14 of the Prescription Act is a matter of fact. Thus it was stated in Agnew v Union and South West Africa Insurance Co. Ltd 1977 (1) SA 617 (A) at 623 A – B.

[1] 2000 (4) SA 38 at paragraph 37

“Of daar in ’n bepaalde geval ’n erkenning van aanspreeklikheid was, is ’n feitlike vraag wat betrekking het op die bedoeling van die persoon wat as skuldenaar aangespreek is. In die verband het Broome RP die volgende gese in Petzer v Radford (Pty) Ltd 1953 (4) SA 314 (N) op 317 en 318:
“to interrupt prescription an acknowledgement by the debtor must amount to an admission that the debt is in existence and that he is liable therefore.”

c) In **Road Accident Fund v Smith NO**[2] it was held that the relevant provisions of the Prescription Act to the extent that they are not otherwise incompatible with the Act, apply to claims processed under it.

d) In this case there has factually been an acknowledgment of liability, and an actual payment made, unlike **Mothupi’s** case where the court did not hold that the Prescription Act was not applicable but that the factual basis for its applicability had not been established.

e) Section 14 (1) of the Prescription Act is accordingly applicable and applies to the RAF Act as well.

f) The 5 year prescription was accordingly as argued by the Plaintiff interrupted on the 11 April 2013 and the claim accordingly has not prescribed.

g) The argument by the defendant that the plaintiff cannot rely upon the Prescription Act is accordingly ill-conceived having regard to the authorities referred to by the plaintiff in its heads of argument nor did they furnish any authorities in support of this contention.

h) The plaintiff has accordingly established that in this case prescription has indeed been interrupted by the offer that was made and accepted.

[2] 1999 (1) SA 92 SCA at 98 F – G

i) The issue of whether or not it was in full and final settlement and whether or not she is entitled to still claim are separate issues that were not part of the defence raised.

j) The Defendant had accepted liability and such factual acknowledgment interrupted prescription.

11. The point *in limine* in respect of prescription, accordingly falls to be dismissed for the reason set out above.

12. I accordingly make the following order:

a) The Special Plea of Prescription is dismissed with costs.

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DAWOOD J

JUDGE OF THE HIGH COURT

DATE HEARD:	23 FEBRUARY 2018
JUDGMENT DELIVERED:	28 MARCH 2018
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