

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, MTHATHA**

CASE NO. 2845/13

Reportable

In the matter between:

MKHENKESE NONDABULA

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

ALKEMA J

[1] The crisp issue in this case is whether or not the plaintiff's claim against the defendant has become prescribed in terms of section 23 (1) of the Road Accident Fund Act 56 of 1996 (the Act). More particularly, whether on the facts of this case section 23 (1) applies which provides for a prescription period of three years; or whether section 23 (3) which provides for a prescription period of three years.

[2] The facts of this case are agreed by the parties in a Rule 33 stated case and may be summarised as follows:

- “1. *The collision occurred on 3 May 2010;*
2. *The plaintiff’s claim was lodged with the Fund (the defendant) on 14 May 2013.*
3. *On 4 October 2013 the Defendant made a without prejudice offer of settlement on the merits predicated upon an apportionment of negligence of 70%/30% in favour of the plaintiff. (I will shortly return to the content of the offer).*
4. *On 7 November 2013, Plaintiff within the period open for acceptance accepted Defendant’s offer.*
5. *On 11 January 2016 the defendant gave notice of its intention to amend its plea by the introduction of a special plea of prescription;*
6. *Plaintiff filed a replication to the amended plea pleading:*
 - 6.1 *That the dispute was finally settled by the offer and acceptance dated 7 November 2013;*
 - 6.2 *Defendant has waived its right to prescription; and*
 - 6.3 *Defendant is estopped from raising the defence of prescription.”*

[3] The Special plea referred to in para 5 above and the issues raised in the replication referred to in para 6 above were argued before me on 22 August 2016. The issues are:

- “1. *Whether on the facts of this case the period of prescription is 3 years as provided for in section 23 (1), or 5 years as provided for in section 23 (3) of the Act;*

2. *If three years under section 23 (1), whether the right to raise prescription was compromised by the settlement agreement of 7 November 2013;*
3. *If the right to claim prescription was not compromised by the settlement agreement, whether defendant:*
 - 3.1 *had waived its right to claim prescription; and*
 - 3.2 *is estopped from raising prescription.”*

[4] A recent articulation confirming the fundamental tenet of statutory interpretation is contained in the judgment of the Supreme Court of Appeal in the matter of *Premier Foods (Pty) Ltd v Manoim & Others* 2016 (1) SA 445 at 462-463 Para 42 per Gorven AJA, (referring to the dictum stated in *Cool Ideas 1186 CC v Hubbard & Another* 2014 (4) 474 CC at para 28) namely:

“A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely: (a) that statutory provisions should always be interpreted purposively; (b) the relevant statutory provision must be properly contextualised; and (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible legislative provisions ought to be interpreted to preserve the constitutional validity. This proviso to the general principle is closely related to the ‘purposive approach’ referred to in (para) (a).”

[5] To contextualise section 23 (1), it must not only be read against the Act as a whole, but also against the Regulations promulgated thereunder. I set out hereunder the relevant provisions and quote only those sections which are relevant to the facts of this case.

[6] Section 17 provides for the liability of the Road Accident Fund (the Fund) to claimants who suffered loss and damage arising from the driving of a motor vehicle. It distinguishes between two categories of claimants; to wit those cases where the identity of the driver or owner of a motor vehicle who caused the loss or damage has been established (section 17 (1) (a)); and those cases where the identity of neither the driver nor the owner thereof has been established (section 17 (1) (b)). In this case the identity of the driver was established, and section 17 (1) (a) finds application. Section 17 (4) (a) reads:

“(4 Where a claim for compensation under subsection (1)-

(a) includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him or her, the Fund or an agent shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the Fund or the agent to furnish such undertaking, to compensate-

- (i) the third party in respect of the said costs after the costs have been incurred and on proof thereof: or*
- (ii) the provider of such service or treatment directly, notwithstanding section 19 (c) or (d).*

in accordance with the tariff contemplated in subsection (4) (b).”

[7] I pause to remark that it is common cause that in this case the plaintiff's claim includes a claim for future medical expenses.

[8] For the sake of completion I also refer to sections 17 (5) and (6) which read as follows:

*“(5) Where a third party is entitled to compensation in terms of this section and has incurred costs in respect of accommodation of himself or herself or any other person in a hospital or nursing home or the treatment of or any service rendered or goods supplied to himself or herself or any other person, the person who provided the accommodation or treatment or rendered the service or supplied the goods (the supplier) may, notwithstanding section 19 (c) or (d), claim an amount in accordance with the tariff contemplated in subsection (4B) direct from the Fund or an agent on a prescribed form, and such claim shall be subject, **mutatis mutandis**, to the provisions applicable to the claim of the third party concerned, and may not exceed the amount which the third party could, but for this subsection, have recovered.*

(6) The Fund, or an agent with the approval of the Fund, may make an interim payment to the third party out of the amount to be awarded in terms of subsection (1) to the third party in respect of medical costs, in accordance with the tariff contemplated in subsection (4B), loss of income and loss of support: Provided that the Fund or such an agent shall, notwithstanding anything to the contrary in any law contained, only be liable to make an interim payment in so far as such costs have already been incurred and any such losses have already been suffered.”

[9] Section 23 of the Act deals with the prescription of claims, and only sections 23 (1) and (3) are relevant to this case. These sections provide as follows:

“23. (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) (Not relevant for the purposes of this case).

(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.”

[10] Section 17 (4) (a) is quoted above, and section 24 deals with the prescribed procedure to be followed when claims are lodged with the Fund.

[11] Section 24 (1) prescribes that a claim for compensation and accompanying medical report under section 17 (1) “... *shall be set out in the prescribed form, which shall be completed in all its particulars.*” Subsection 1 (b) prescribes the manner of delivery of the claim to the Fund. The “*prescribed form*” contemplated by section 24 (1) (a) is described in Regulation 7 as “*form RAF1 attached as Annexure A to these Regulations.*”

[12] In respect of claim for hospital and medical expenses as contemplated by section 17 (4) and (5), section 24 (3) provides that “... *a claim by a supplier for the payment of expenses in terms of section 17 (5) shall be in the prescribed form, and the provisions of this section shall apply **mutatis mutandis** in respect of the completion of such form.*”

[13] Save for saying that section 24 makes elaborate provision for the manner in which the “*prescribed form*” must be completed and delivered to the fund, and states that (in s24 (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,*” it is unnecessary to quote the section in full.

[14] Before dealing with the application of the facts in this case to the above provisions, it is necessary to first determine the meaning of the above legislative provisions.

[15] The point of departure is section 39 (2) of the Constitution which obliges courts to interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights. The Bill of Rights applies to all law and is pivotal to the interpretation of all legislation. In *Tshwane City v Link Africa* 2015 (6) SA 440 at 475 (para 115) the majority judgment of the Constitutional Court held:

“It is by now commonplace in our constitutional jurisprudence that all statutes must be interpreted through the prism of the Bill of

Rights Approached on this footing, the general rule is that a statute must be given its ordinary grammatical meaning, unless to do so would result in absurdity or create discord with the Constitution. And, most importantly, in following these interpretive prescripts, where it is reasonably possible, legislation must be given a meaning that preserves its constitutional validity. These principles were clearly set out in *Cool Ideas*:

“There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).” (Footnotes omitted.)

[16] It has been recognized in a long line of cases that the Act and its predecessors represent “... social legislation aimed at the widest possible protection and compensation against loss and damages for the negligent driving of a motor vehicle.” See: *Road Accident Fund v M obo M* [2005] 3 All SA 340 (SCA) at para 12; *Aetna Insurance Co v Minister of Justice* 1960 (3) SA 273 (A) at 285 E-F; *Multilateral Motor Vehicle Accidents Fund v Radebe* 1996 (2) SA 145

(A) at 152 E-I; *Bezuidenhout v Road Accident Fund* 2003 (6) SA 61 (SCA) at para 7.

[17] I am thus called upon to give the above provisions its ordinary grammatical meaning, unless to do so would result in absurdity or create discord with the Constitution. In this regard I am urged by Mr *Kincaid* who, together with Mr *Bester*, appeared for the plaintiff, to find that on a proper, purposive and contextualised approach the period of prescription under section 23 (3) on the facts of this case is five years.

[18] This argument is premised on the common cause fact that plaintiff's claim includes a claim for hospital and medical expenses as contemplated by section 17 (4) (a), and since the word "or" is indicative of an alternative mechanism to section 24 as opposed to a conjunctive stipulation, I can and should find on the ordinary grammatical meaning of the words in section 24 (3) that the legislature intended that a claim for future medical expenses compensable by way of an undertaking from the Fund constitutes an independent mechanism for the initiation of a five year prescriptive period.

[19] I now turn to the interpretation of the above sections bearing the above interpretational principles in mind.

[20] On the ordinary grammatical meaning of section 23 (1), the period of prescription is three years from the date of the collision:

1. subject to the operation of subsection (3); and

2. provided the identity of either the driver or owner of the insured vehicle has been established.

[21] It is common cause that the identity of the driver has been established and that this is a claim under section 17 (1) (a). It follows that subject to subsection (3), the prescription period is three years.

[22] Subsection (3) provides that, notwithstanding subsection (1), no claim “*which has been lodged ...*” in terms of either section 17 (4) (a) or section 24 shall prescribe before the expiry of a period of five years from the date of the collision. Put differently, if a claim has been lodged in terms of either section 17 (4) (a) or 24, such claim will prescribe upon the expiry of five years. This is the ordinary grammatical meaning of subsection (3). It follows that to determine whether the period of prescription is three years as provided for in subsection (1), it must first be determined if a claim has been lodged in terms of either section 17 (4) (a) or section 24 within the three year period. If not, the claim became prescribed after the expiry of the three year period; if so, the period of prescription is extended to five years.

[23] If the claim is only in respect of hospital and medical expenses under section 17 (4), such claim is lodged by making a claim under section 17 (5) quoted above. If the claim includes, for instance, general damages, then it is lodged as provided for in section 24 read with Regulation 7 referred to above. If such lodgement occurs within the three year period provided for by section 23 (1), then the period of prescription is extended to five years by virtue of the operation of section 23 (3); if not, the claim prescribes after three years. In my

respectful view, on the wording used in the Act, this is the only interpretation that can be attributed to section 23 (1) read with 23 (3).

[24] The above interpretation also meets the requirement of purposiveness. The purpose of distinguishing between three and five years, in my respectful view, is this.

[25] It has repeatedly been recognised that the content of the claim form and accompanying medical reports allow for an early investigation in, and an assessment of, both the merits of the claim and the quantum of damages. The Fund relies entirely on the fiscus for its funding and it has a duty to the public to protect itself against illegitimate or fraudulent claims. The particularity required by section 24 and Regulations 2, 3, 4, 5 and 6 is designed to place the Fund in the position to properly and timeously investigate and assess any claim and its quantum. See: *Multilateral Motor Vehicle Accident Fund v Radebe* 1996 (2) SA 145 (A) at 152E-Z; and *Guardian National Insurance v Van der Westhuizen* [1990] All SA 357 (C). If a claim is not timeously lodged as required by Regulation 2, then the opportunity to properly investigate the claim may be lost because witnesses forget, die or disappear, and reports and other evidence may no longer be available.

[26] Once the claim has been lodged as required by section 23 (3), the evidence may be secured, witnesses are identified and statements are taken from them. In these circumstances the period of prescription may safely be extended to five years without prejudice to any of the parties. However, if the claim is not lodged within three years as required by section 23 (1), then it prescribes due to

the prejudice suffered by the Fund caused by its inability to timeously and properly investigate the claim and secure the evidence.

[27] I do not believe this interpretation offends the Bill of Rights or unduly narrows the protection afforded to the third parties under the Act.

[28] The three year period contemplated by section 23 (1) of the Act expired on midnight on 2 May 2013. It is common cause that the plaintiff lodged his claim on 14 May 2013, outside the three year period. Since the claim was not lodged within the three year period as required by section 23 (3), and for the reasons advanced, I find that the plaintiff's claim had become prescribed.

[29] The flaw in the argument advanced by Mr *Kincaid* is, with respect, that it is not enough that part of plaintiff's claim is for future medical expenses. To bring section 23 (3) into operation a claimant is in addition required to lodge his or her claim under section 17 (4) (a) (for future medical expenses) within the three year period as required by section 23 (1); or alternatively, to lodge any other claim under section 24 within the said three year period. If this happens, the period of prescription is extended to five years under section 23 (3); if not, it remains three years under section 23 (1).

[30] The argument advanced by Mr *Kincaid* completely ignores the wording "... which has been lodged ..." in section 23 (3). This is impermissible in the law of interpretation, and meaning and effect must be given thereto.

[31] Claims are lodged in terms of section 24, and, in the case of future medical expenses, in terms of section 17 (5) read with section 24 (3). It is the timeous lodgement of these claims which triggers section 23 (3) and extends the prescription period to five years. This has not happened on the facts of this case.

[32] Surprisingly, there are not many reported judgments where the above provisions have been judicially interpreted. I have been referred to only *Van Zyl vs Road Accident Fund* 2012 SA (GSJ) Case No. 3499/2009 (unreported).

[33] In *Van Zyl (supra)* the RAF4 form containing the “*serious injury assessment*” was served after the expiry date of the three year period. The issue which arose was whether such report forms part of the “*claim*” which had to be lodged within the three year period under section 23 (11). It was common cause that the claim and accompanying medical report (form RAF1) was timeously lodged under section 24. *Satchwell J* found that in para 76 “... where form RAF 1 is completed with particularity in compliance with the Act and then submitted the ‘claim’ as intended and specified by the Act and has been lodged.” In regard to the RAF 4 form containing the “*serious injury assessment*” she found (at para 77) *the prescription periods provided for in the Act, namely the initial three years and the extension of two years, are both periods during which form RAF 4 may be submitted to the RAF ...*”

[34] The above issue does not arise in this case. It is common cause that the claim and accompanying medical report RAF 1 in this case were lodged outside the three year period. I nevertheless find some support in the *Van Zyl (supra)*

judgment for the proposition that if the claim and RAF 1 form are lodged within the three year period, then the period of prescription is extended to five years under section 23 (3).

[35] The next issue is whether the settlement agreement of 7 November 2013 compromised defendant's right to claim prescription. It is necessary to refer to the relevant terms of the settlement. They read as follows:

“This offer is limited to the aspect of negligence as to the manner in which the collision occurred and the apportionment of such negligence. This offer may not be interpreted or construed in a manner that would have the RAF concede any other aspect of the claim. To avoid doubt, the RAF reserve the right all its rights in law with regards to all other procedural and substantive aspects of the claim.

If this offer was made after prescription of the claim, it will not be deemed to be a waiver of prescription and any purported acceptance will not be enforceable.”

The last sentence reads:

“In full and final settlement of the issue of negligence, as more fully set out in the offer, I hereby accept the above offer of settlement.” (The emphasis is mine).

[36] It is clear from the above terms that only the issue of negligence was settled — i.e. the manner in which the collision occurred. The right to claim prescription is expressly reserved and by the very terms of the settlement

agreement the right to claim prescription was not compromised. And neither was the issue of *quantum* of damage.

[37] I therefor have no hesitation in coming to the conclusion that the right to rely on prescription was not compromised by the settlement agreement.

[38] The issues of waiver and estoppel are so closely inter-related that I intend to deal with them simultaneously.

[39] The defendant's right to invoke the claim of prescription arose on 3 May 2013 when the 3 year period mentioned in section 23 (1) lapsed. The plaintiff instituted action on 20 November 2013 and defendant filed its plea on 27 January 2014 without raising a plea of prescription. On the basis that the issue of negligence was settled on 7 November 2013, the remaining issues which remained alive were those concerning the *quantum* of damages and prescription. As I said, the plea filed by the defendant on 27 January 2014 did not raise the issue of prescription, and the litigation continued essentially on the issue of *quantum* of damages only. It was only on 11 January 2016, two years after the filing of the plea, that the issue of prescription was invoked by the defendant.

[40] During the aforesaid period of two years, and having regard to the issues on the (then) pleadings, the parties held Rule 37 conferences, exchanged numerous notices under the Rules of Court, complied with Case Flow Management Orders, and the plaintiff procured reports from a neurosurgeon and a neuropsychologist.

[41] The amendment of the plea raising prescription on 11 January 2016 resulted in the proceedings before this Court on 22 August 2016.

[42] Essentially, the contentions of the plaintiff are that the defendant waived its right to, and/or is estopped from raising the defence of prescription as it did in its plea of 27 January 2014. Mr *Kincaid* submitted that such right was open to the defendant from 3 January 2013 (on the supposition that I find the period of prescription is three years and not five years). Instead of invoking such right, which was specifically reserved under the settlement agreement of 7 November 2013, the defendant actively participated in the litigation on the issue of *quantum* of damages thereby conveying to the plaintiff that it had waived its right to prescription; alternatively, it presented to plaintiff that it had waived such right and it is therefore now estopped from denying it had waived such right.

[43] With respect, I do not believe that there is any merit in the arguments based on waiver and estoppel. The point of departure is that the parties expressly and unambiguously in the settlement agreement of 7 November 2013 settled only the issue of negligence; i.e. the manner in which the insured vehicle was being driven. The other issues remained alive. In particular, defendant specifically reserved the right to invoke the defence of prescription.

[44] The defendant, to the knowledge of the plaintiff, had the right to engage the plaintiff in litigation on the issue of *quantum* of damages with the reservation of the right to invoke the defence of prescription at any time in the future. From

20 November 2013 when plaintiff instituted the action the defendant acted within its rights to engage plaintiff in litigation on the issue of *quantum*, and when it raised the issue of prescription on 11 January 2016 it did so by exercising its right specifically reserved on 7 November 2013.

[45] The plaintiff's defences of waiver and estoppel are not based on an express term or misrepresentation, but on a tacit term or misrepresentation based on the defendant's conduct. It is trite that it is a requisite of waiver that the contracting party must have the intention to waive its contractual right. Having gone to the trouble of specifically reserving the right to claim prescription, the conduct of the defendant must exhibit an intention to abandon or waive the right so specifically reserved.

[46] In *Hepner v Roodepord-Maraaisburg Town Council* 1962 (4) SA 772 (A) at 778 D-F Steyn CJ stated:

"There is authority for the view that in the case of waiver by conduct, the conduct must leave no reasonable doubt as to the intention for surrendering the right in issue (Smith v Momberg 1895}SC 295 at page 304; Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Ltd 1915 AD 1 at p 62) but in Martin v de Kock 1948 (2) SA 719 (AD) at p 733 this Court indicated that that view may possibly require reconsideration. It sets, I think, a higher standard than that adopted in Laws v Rutherford 1924 AD 261 at p263, where Innes CJ says:

'The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it,

whether expressly or by conduct plainly inconsistent with an intention to enforce it.'

This accords with the test applied in City of Cape Town v Kenny 1934 AD 543 and was followed in Collen v Rietfontein Engineering Works 1948 (1) SA 413 (AD) at p 436 and Linton v Corser 1952 (3) SA 685 (AD) at p 695. Cf. Ellis and others v Laubcher 1956 (4) SA 692 (AD) at p 702). In my opinion the test is more correctly stated in these cases."

[47] Our case law shows that clear proof is required, especially of a tacit as opposed to an express waiver, indicating an intention to waive. It is true, as submitted by Mr *Kincaid*, that the defendant's failure to raise prescription in its plea of 27 January 2014 is consistent with an intention not to enforce it, but it is equally consistent with a host of other reasons not to enforce prescription. Plaintiff, to this day, contends that the period of prescription is five years as provided for in section 23 (3). The defendant could equally have suffered from the same misconception, or the failure to plead prescription may have been a failure to properly investigate and research the applicable period of prescription, or sheer incompetence, or negligence, or lethargy, or based on a decision to first investigate the *quantum* in the spirit of the social legislation to provide the widest possible protection to the plaintiff before deciding whether or not to plead prescription.

[48] In my view, there is no clear proof of intention to waive prescription by not pleading such defence on 27 January 2014.

[49] The same principles apply to estoppel. Estoppel is the false representation by a contracting party to another contracting party that a certain state of affairs exist, well knowing that it is not the truth. If the other contracting party, induced by the misrepresentation, and acting on such misrepresentation, acts to his or her prejudice, then the first contracting party is estopped from relying on the true state of affairs.

[50] There is no proof, for the reasons advanced above, that the defendant intended by its failure to plead prescription on 27 January 2014 to falsely misrepresent to plaintiff that it had waived its right to invoke prescription. By invoking the defence of prescription it acted within its rights and its failure to do so on 27 January 2014 was equally consistent with other, innocent, reasons mentioned earlier.

[51] It is true that the defendant's failure to plead prescription on 27 January 2014 and to engage the plaintiff in litigation on issues of quantum in circumstances where it ought to have known that the claim had become prescribed, had resulted in the plaintiff incurring unnecessary legal costs including the expenses of obtaining expensive medical-legal reports. To this extent the defendant may have caused the plaintiff to suffer unnecessary expenses and costs. But this may be remedied by an appropriate costs order. I believe the plaintiff may argue convincingly that the defendant should be liable for the costs and expenses from 27 January 2014. But this consequence, prejudicial as it may be to the plaintiff, is no proof for intention for purposes of waiver or estoppel.

[52] Mr *Clark*, who appeared on behalf of the defendant, referred me on the issues of waiver and estoppel to *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at 51 *et seq.* On the issue of waiver *Nienaber* JA said at p 51 *et seq* (para 23):

“The argument, even in its amplified form, remains unconvincing. Conclusion (d) simply does not follow from premise (a). By not disputing negligence the Fund did not concede liability in toto. MNM never intimated in advance that the plaintiff would accept whatever quantification the Fund proposed. The possibility of litigation could therefore not be excluded, even if the merits, so called, were no longer in dispute. Neither side ever mentioned a concrete figure to the other. The quantification of the claim therefore remained wide open. A waiver of prescription would mean that the Fund, as debtor, bound itself in advance never to raise prescription against the plaintiff even if the quantum was not settled. By not actively disputing the merits Van Schalkwyk at most conveyed the impression that the defendant was not going to rely on the defence that the insured driver was not negligent; non constat that it could reasonably be understood to have conveyed the notion that the Fund abandoned any other defences that may have been open to it should the parties not have reached a satisfactory settlement. Nothing Van Schalkwyk did could reasonably have led MNM (or the plaintiff or someone in her shoes), to believe that prescription was present to the mind of Van Schalkwyk at the time. The correspondence makes it clear that neither side gave prescription a thought. Nothing Van Schalkwyk did could therefore have led the plaintiff (or her notional alter ego) to believe that the statutory right which was given to the Fund for that very eventuality would not be relied upon by it should the occasion

for doing so arise. Absent a ‘sorgplig’, as Van Schalkwyk testified, an assertion not challenged on behalf of the plaintiff, no duty rested upon him or the Fund to alert MNM to the perils of prescription. Moreover, the plaintiff failed, indeed, did not even begin to prove that ‘information sought by the Defendant could not be obtained prior to 2nd August 1996’, which was one of the principal allegations pleaded by her in support of her reliance on waiver. And finally, any doubt as to how Van Schalkwyk’s actions were to be interpreted must be resolved against the plaintiff who bears the onus to prove waiver.”

[53] On the issue of estoppel, the learned Judge of Appeal said at 53 (para 29):

“The test for inferred waiver, as stated earlier in par [16], is the impression created by the conduct of the Fund on the mind of the plaintiff’s notional alter ego; that, as it happens, is also, in the context of estoppel, the test for a representation (Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd, supra, (292E-F); Rabie. The Law of Estoppel in South Africa, 37). Having earlier found that the conduct of Van Schalkwyk was not capable of creating the reasonable impression that the Fund meant to waive prescription in perpetuity, it seems to me that by the same token and for substantially the same reasons it is not capable of creating the reasonable impression that prescription will not be invoked pending finalisation of the quantum by negotiation. In itself that is a sufficient reason for refusing the amendment. But as stated earlier there is a second equally potent reason for doing so”

[54] Although, as submitted by Mr *Kincaid*, the facts in *Mothupi (supra)* differ from the facts in this case, the principles enunciated in paras 23 and 29 apply equally to the facts of this case.

[55] In all the above circumstances I believe the defendant's special plea of prescription must be upheld. However, for the reasons mentioned, and in the absence of argument before me on the issue of costs, I decline at this stage to make any costs order. If the parties are unable to agree on an appropriate costs order, they may set the matter down again for an appropriate costs order.

[56] I make the following order:

1. The plaintiff's special plea is upheld and it is declared that the plaintiff's claims have become prescribed, and the claims are accordingly dismissed.
2. The issue of costs are adjourned sine die with leave to set the matter down on the issue of costs only in the absence of agreement between the parties.

ALKEMA J

Delivered on 27 September 2016

Counsel for Applicant : Mr Kincaid

Instructed by : S Z Jojo Attorneys
Counsel for Respondent : Mr Clark
Instructed by : Messrs Smith Tabata Attorneys