



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)**

DATE: 29/05/2009

CASE NO: 30762/2006

UNREPORTABLE

In the matter between:

NENZHELELE JOSEPH TAKALANI

Plaintiff

And

BOOYENS DU PREEZ & BOSHOF INCORPORATED

Defendant

JUDGMENT

LEDWABA, J

- [1] The parties agreed, and it was so ordered in terms of Uniform Rule 33(4), that only the special plea raised by the defendant be adjudicated upon. The parties further agreed that the defendant bore the onus.

- [2] The plaintiff issued summons against the defendant in September 2006 for damages arising out of the defendant's breach of agreement between the parties and the defendant's failure to perform its professional duties properly and/or without negligence. Summons was served on the defendant on 13th October 2006.
- [3] On 31st October 1999 at Giyani an accident occurred between a truck driven by the insured driver and a minibus driven by the plaintiff. The plaintiff instructed defendant to institute a claim for damages against the Road Accident Fund (RAF).
- [4] In October 2001 the defendant served the RAF with the duly completed MMF1 form, together with some annexures, wherein an amount of R309 740 was claimed. In September 2002 the fund offered the plaintiff amounts totalling to R 25 166, see page 31 of exhibit 'A' (the first offer). The offer was increase and past loss of earnings in the amount of R 10 200 was added, see page 31 of exhibit 'B' (the second offer).
- [5] The defendant called two witnesses to testify on its behalf viz, Mr. Stephanus Booyens, a director at defendant's firm of attorneys and Mr. Ndokiseni Netshiunda, an attorney who was duly admitted in April 2000 and was a professional assistant at the defendant's firm of attorneys until 2004. Mr. Booyens's evidence was simply that after summons was

received at the Giyani branch he collected the file and kept it at their Louis Trichardt office. He made copies of the file for their insurance claim. The original file can now not be traced.

- [6] Mr. Netshiunda testified that grew up knowing the plaintiff and he handled the plaintiff's claim. Before the claim was lodged with the RAF, he discussed with the plaintiff how the amount claimed was computed.
- [7] After receiving the first offer from the RAF, the plaintiff instructed him to reject the offer. He then discussed the offer with the claims handler which resulted in the second offer being made by the fund. When he discussed the second offer with plaintiff in about June 2003, the plaintiff said it was too low and he knew of a claimant who received R 80 000 from the RAF but his/her injuries were less serious. His response to the plaintiff was that the fund did not only consider the injuries but also how the accident occurred. The plaintiff told him to wait further instructions regarding the second offer.
- [8] On 26th August 2003 the plaintiff, together with his two relatives, came to his office being furious and accused him of receiving payment from the RAF and demanded the monies paid or the outstanding balance. He was angered by the plaintiff's attitude and false accusations. He phoned the claim handler in the plaintiff's presence and the claims handler

confirmed that no monies were paid by the RAF. He told the plaintiff to instruct another attorney and to leave his office.

- [9] The plaintiff left and returned later to apologise because his relatives and him misunderstood the RAF when they were told about the offer sent to the defendant. The plaintiff further told him that he had serious financial problems and was accepting the second offer. He told the plaintiff that if he accepts the offer he could not later complain that the monies received were insufficient. He anticipated that the plaintiff could later claim that the offer from the RAF was not enough. He then reduced what he said to plaintiff in writing and plaintiff signed the document, see page 38 of exhibit 'A'.
- [10] He then sent a letter to the RAF accepting the second offer.
- [11] The plaintiff kept on phoning to enquire if the discharge form was received from the RAF. After the discharge form was received plaintiff signed it on 6th November 2003 and he was given a covering letter for him, the plaintiff, to deliver the discharge form to the RAF by hand.
- [12] On 17th March 2004 plaintiff signed to acknowledge receipt of an amount of R 28 200 in full and final settlement in respect of monies claimed from the RAF, see page 62 exhibit 'A'.

[13] During cross-examination Mr. Netshiunda further said he, personally, was not satisfied with the monies offered by the RAF, however, he advised the plaintiff to accept the offer because of the allegation in the claim form that the plaintiff was unable to work as a taxi driver could not be sustained. Furthermore, because the RAF had informed him that they have discovered that the plaintiff was employed in Johannesburg. Furthermore, there was a witness who was a passenger in the plaintiff's vehicle when the accident occurred and he alleged that the accident was caused by the sole negligence of the plaintiff. Mr. Netshiunda was of the view that they did not have a good case on the merits that is why he advised the plaintiff to accept the offer.

[14] It was further put to Mr. Netshiunda that the plaintiff's version is that the RAF would pay him more than R 200 000 and that the amount of R 35 000 was the first payment and further monies would be paid by the RAF later. Mr. Netshiunda denied the said version and stuck to his version. The plaintiff, who was at court, did not testify to put his version before the court.

[15] The issue to be decided concerns the time at which prescription started to run in respect of plaintiff's claim for damages against the defendant.

[16] In terms of **section 11(d)** of the **Prescription Act 68 of 1969** (the Act) the plaintiff's claim is subject to a three year extinctive prescription period.

[17] Defendant's counsel submitted that on the evidence before the court the prescription period started running on 28th August 2003 when the RAF received the acceptance of the offer.

[18] The crucial question is when did the plaintiff know that defendant acted improperly, unprofessional and or negligent in breaching of its professional duties.

[19] **Section 12** of the Act reads as follows:

"When prescription begins to run

- (1) *Subject to the provisions of ss (2) and (3), prescription shall commence to run as soon as the debt is due.*
- (2) *If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.*
- (3) *A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."*

- [20] There is no evidence to suggest that defendant prevented plaintiff from knowing the existence of the debt. There is no doubt that plaintiff knows the identity of the plaintiff.
- [21] The crisp issue is whether the plaintiff had actual or deemed knowledge of the facts from which the debt arises as required by **section 12 (3) of the Act** prior to 13th October 2003. If the plaintiff had the factual knowledge after 13th October 2003 the special plea should fail.
- [22] The plaintiff in the particulars of claim does not allege when the defendant breached the alleged agreement. In paragraph 13.6 and 13.7 of the particulars of claim the made the following allegation:
- “13.6 advising the plaintiff on 6 November 2003 to accept an offer of settlement from the road Accident Fund in respect of Plaintiff’s claim in terms whereof a sum of R35 366,00 and an undertaking in terms of section 17 of the RAF Act and costs was paid (“the settlement”); and*
- 13.7 on 6 November 2003, to the detriment of the Plaintiff, caused the Plaintiff, in particular due to the foregoing and under circumstances where the plaintiff was relying solely on the advice of the Defendant through its representatives, to accept the settlement with the*

Road Accident Fund in respect of Plaintiff's claim for a sum which did not amount to adequate compensation for the Plaintiff's injuries and related sequelae."

[23] On the evidence of Mr. Netshiunda supported by the contents of page 38 of exhibit 'A', contrary to what plaintiff alleged in the particulars of claim, the plaintiff informed his attorney and signed on 26th August 2003 that he accepts the second offer from the RAF.

[24] Plaintiff's counsel argued that the amount in the second offer and the amount in the discharge form signed on 6th November 2003 differed, the plaintiff has therefore accepted the offer of the 6 November 2003. I interpose to state that the difference is in an amount of R300 which in my view is clear that it is caused by a calculation error in the second offer.

[25] The defendant's counsel submitted, correctly in my view, that the discharge form was just an administrative process.

[26] It is trite that a party who raises prescription must allege and prove the date of the inception of the period of prescription, see **Gericke v Sack 1978 (1) SA 821 (A)**.

[27] The defendant should prove that between 28th August 2003 and 13th October 2006 the plaintiff knew or had deemed

knowledge of the facts from which the debt arises that the defendant breached the agreement or acted negligently.

[28] On the available evidence where the plaintiff signed to accept the offer did he know that the defendant breached the agreement and was acting improperly and unprofessional?

[29] Based on the evidence, the plaintiff accepted the offer because he was in dire need of money, he knew that he is accepting the money in the second offer. However, does such conduct impute knowledge of unprofessionalism and improper conduct on the part of the plaintiff?

[30] In **Truter and another v Deyssel 2006 (4) SA 168**, van Heerden JA in paragraph 16 and 17 on page 174 states the following:

“[16]...’debt due’ means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.

[17] In a delictual claim, the requirements of fault and unlawfulness do not constitute factual ingredients of the

cause of action, but are legal conclusions to be drawn from the facts:

‘A cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed with his action. Such facts must enable a court to arrive at certain legal conclusions regarding unlawfulness and fault, the constituent elements of a delictual cause of action being a combination of factual and legal conclusions, namely a causative act, harm, unlawfulness and culpability or fault.’”

[31] On the available evidence supported by documents an amount of about R309 740 was claimed, the RAF made two offers, after about two months the plaintiff accepted the second offer. Mr. Netshiuandi on the information available to him advised him to accept the offer. He further explained to the plaintiff about his options to consult with an attorney of his choice in June 2003 when it was clear that the plaintiff is not satisfied with the offer.

[32] According to the evidence of Mr. Netshiuandi it was as early as in June 2003 he informed the plaintiff about the offer and advised him to accept the offer. If Mr. Netshiuandi was advising the plaintiff was contrary to their alleged agreement, the plaintiff knew or should have known that in at least June 2003. Significantly, he also knew that he could consult with an attorney of his choice.

[33] The plaintiff chose not to testify and put his version before court as to why was the summons only served on 13th October 2006 and as to when did he become aware for the first time about the facts from which the debt arose.

[34] **I therefore make the following order:**

- (i) The special plea of prescription is upheld.**
- (ii) Plaintiff's action is dismissed with costs which costs include the costs of the 19th May 2005.**

A. P. LEDWABA

JUDGE OF THE HIGH COURT

Date of hearing: 20 May 2009

Counsel for Plaintiff: Advocate B. Joseph

Instructed by: De Meyer & De Vries Attorneys

‰: Röntgen & Röntgen Inc.

Counsel for Defendant: Advocate A. Combrink

Instructed by: Bennett Francis & Maitin Incorporated Attorneys

‰: Ledwaba Mazwai Attorneys