

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 2957/2003

In the case between:-

PAULOS DLAMINI

Plaintiff

and

E M KUBUSHI

Defendant

HEARD ON: 18 & 19 OCTOBER 2005

JUDGMENT BY: EBRAHIM J

DELIVERED ON: 3 NOVEMBER 2005

[1] The plaintiff seeks to recover damages from the defendant in the sum of R464 200,00. The plaintiff's cause of action is based on the alleged negligence of the defendant in settling the plaintiff's claim against the Road Accident Fund for an amount less than that to which plaintiff was allegedly entitled in law.

[2] The defendant has resisted the plaintiff's claim on the merits and, in addition, has raised a special plea of prescription as a special defence. This judgment deals exclusively with the adjudication of the special plea. It was agreed by both parties that this issue could not be disposed of without a fair amount of evidence being led which related to the merits.

[3] At the commencement of the trial I was informed by counsel that agreement had been reached between the parties at the pre-trial conference, that

(a) there would be a separation of the issues of merits and quantum and

(b) the defendant carried the onus of proving that the plaintiff's claim had prescribed. Accordingly the trial commenced with the defendant leading its evidence first.

[4] The following matters were common cause:

4.1 The plaintiff was injured in a motor vehicle accident on 9 September 1992 and accordingly was entitled to recover damages in terms of the Multilateral Motor Vehicle Accidents Fund Act 1989 (Act 93/1989).

- 4.2 He consulted the defendant shortly after the accident and mandated her in her capacity as an attorney to lodge such a claim for damages in terms of the said Act.
- 4.3 A claim in the sum of R20 000,00 was lodged on 26 February 1993 by the defendant on plaintiff's behalf which claim was made up of R5 000,00 in special damages and R15 000,00 in general damages for pain and suffering.
- 4.4 No amount was claimed in respect of plaintiff's loss of earnings, future loss of earnings and future medical and hospital expenses.
- 4.5 On 2 March 1994 the insurance company, Santam Insurance, made an offer of R9 500,00 in respect of the capital amount of the claim plus an amount of R900,00 towards legal costs in full and final settlement of all and any claims which plaintiff had or may in the future have

arising from the accident in question.

4.6 The plaintiff signed a special release form known as a discharge form purporting to accept the settlement with all its conditions on 2 March 1994. A cheque for R10 400,00 was received by the defendant's firm from the insurance company on 31 March 1994.

4.7 On 11 April 1994 the plaintiff was given a cheque for R8 000,00 by the defendant in respect of the aforesaid settlement and an amount of R2 400,00 was debited to the plaintiff's account in respect of the defendant's legal costs on the same day.

4.8 At the time the plaintiff consulted the defendant she practised under the name and style of L. Kubushi & Co. with offices at the Finance Building, Phuthaditjhaba in QwaQwa. In January 1994 she entered into partnership with one, T. Mosese. It was intended that her third partner one, Fantisi, should join the

partnership and that the practise should be renamed Fantisi Kubushi & Mosese. This never materialised because the Law Society of the Free State refused Fantisi permission to join, so defendant practised under the name and style Kubushi Mosese from January 1994 to December 1995 at the Consultancy Building, Phuthaditjhaba in QwaQwa. In January 1996 the defendant commenced practising once again for her own account under the name and style Liz Kubushi & Co. This she did until June 1996 when she joined another partnership and moved from Phuthaditjhaba to Bloemfontein in the Free State.

- 4.9 In September 1994 at plaintiff's request defendant obtained a certificate from Santam Insurance Co. in respect of the settlement of plaintiff's Provincial Hospital expenses for medical treatment he had already received as of that date. The plaintiff received the certificate from the defendant.

[5] In its particulars of claim the plaintiff pleaded its cause of action against the defendant thus:

“11. The defendant represented at all material times hereto that she was a professional in respect of such motor vehicle accident cases and claims and undertook to do all things necessary so as to protect the plaintiff’s interests and so as to permit plaintiff’s claim to become lodged timeously with such agent or responsible instance, so as not to permit the plaintiff’s claim to become prescribed.

12. The defendant has expressly or impliedly represented to the plaintiff that she would do all things necessary so as to ensure that plaintiff was to receive fair compensation in respect of such injuries.

13. The defendant also undertook that she would not settle the matter without consulting with the plaintiff first and would obtain the plaintiff’s agreement to any figure which she intends settling the matter for. Defendant undertook that she would ensure that fair and reasonable compensation is paid to the plaintiff.”

[6] It is the plaintiff’s case that the defendant failed to carry out the plaintiff’s mandate to the plaintiff’s satisfaction for the following reasons:

6.1 Defendant claimed nothing on behalf of the plaintiff in respect of future medical expenses and future loss of

earnings. Defendant did not inform the plaintiff that she had received an offer of R9 500,00 in respect of capital and R900,00 in respect of legal costs from the insurance company in full and final settlement of the claim lodged on behalf of the plaintiff.

6.2 She took no steps to negotiate a higher offer with the insurance company on plaintiff's behalf but was satisfied with the initial offer of R10 400,00 altogether.

6.3 The defendant had no authority from the plaintiff to settle the claim at this amount.

6.4 Defendant requested the plaintiff to sign certain documents which he identified as the final discharge form releasing the insurance company from further obligation to compensate him (exhibit 11). On defendant's advice plaintiff signed the form.

6.5 Defendant gave him a cheque for R8 000,00 and

informed him that it was an interim payment in respect of his claim with the insurance company and more money was to follow.

6.6 Had the defendant told the plaintiff that the offer from Santam was in full and final settlement of his claim for damages and that the cheque for R8 000,00 was the only payment he would receive, he would not have signed the discharge forms accepting the offer as it was at all times his intention that defendant elicit a higher offer from the insurance company.

6.7 He attempted to contact the defendant on several occasions after April 1994 when he received the cheque but could not find her. His purpose was to establish whether she had received any more money from him from the insurance company. His evidence was that he was at this stage in financially straitened circumstances having dissipated the R8 000,00 he had received. His investigations eventually led him to the

offices of his present attorneys of record who he consulted for the first time on 3 May 2002 with instructions to trace the defendant. It was only when the defendant contacted his present attorneys that he became aware that the payment of R8 000,00 was a final payment in settlement of his entire claim for damages against the insurance company.

- [7] The defendant was adamant in evidence that she had explained to the plaintiff on 2 March 1994 prior to him signing the discharge that the amount of the settlement was R9 500,00 in respect of capital and R900,00 in respect of her legal costs and that the implications thereof for him was that if he accepted the offer he would have no further recourse to the insurance company for further payment. She was consistent in her denial that she had told the plaintiff that the sum of R8 000,00 was an interim payment and that she had persuaded him to sign the discharge form under false pretences. She said that the plaintiff with the full knowledge that the payment was the only one he would ever receive,

accepted the offer because he desperately was in need of money. She testified that in submitting the plaintiff's claim for R20 000,00 she had deliberately excluded a claim for future medical expenses in view of the fact that the doctor who completed the statutory medical report accompanying the claim, had specifically excluded the necessity of future medical treatment. Indeed, Doctor Schnaid, a witness called by the plaintiff was corroborative of the defendant's version in this regard. He said that immediately after the accident it would not have been clear to a medical doctor what the exact nature and seriousness was of the injury plaintiff had sustained and whether or not there would be a permanent disability necessitating a claim for future medical expenses. Indeed the defendant testified that the doctor who completed the statutory medical report, upon which she relied to formulate the plaintiff's claim, had specifically excluded the necessity for future medical treatment by indicating that future medical treatment was not foreseen on the claim form (exhibit A4). Similarly a claim for future loss of income was omitted because the plaintiff, being a hawker,

was not in possession of a hawker's licence which by regulation of the QwaQwa municipality was a prerequisite for anyone plying the hawking trade in QwaQwa. This was not disputed by the plaintiff. The defendant also readily admitted that the amounts claimed in respect of general damages and special damages, i.e. R20 000,00, was based on her experience in handling third party matters but she was specific in excluding characterising herself as a specialist in third party matters. She did however stress that she had dealt with a number of such matters in her general litigation practice. She agreed that she had not shown the document, exhibit A10, incorporating the offer to settle nor had she gone through it or the discharge form, that is exhibit A11, verbatim with the plaintiff. According to her she was satisfied that she had explained the legal consequences of both the documents to the plaintiff. She also confessed to having failed in her statutory duty as an attorney instructed by the Legal Aid Board, as was the case in this matter, to, firstly, inform the Board of the receipt of the offer to settle and the contents thereof and take instructions thereon from the

Board and second to account to the Board on the settlement of the matter in connection with the costs and fees owing. She also conceded that she had not prepared a full and detailed account to the plaintiff reflecting amounts received from the insurance company and amounts debited to the plaintiff in respect of costs.

- [8] The issue therefore which arises for determination with regard to the special plea, is the following:

Was payment of the R8 000,00 received by plaintiff as a final once off payment in full settlement of his claim for damages against the insurance company or was it received as an interim payment by the plaintiff in the belief that further payments would follow? This is a credibility issue which in the circumstances of this case can only be decided with reference to the underlying wider probabilities.

- [9] I am of the view that the probabilities are overwhelmingly in favour of the defendant. I say so essentially in view of the fact that the plaintiff cut a very poor and pathetic figure in the

witness box with frequent and selective loss of memory. By this I refer not to his appearance and demeanour but to the content of his evidence and the manner of his giving it. Throughout his testimony the plaintiff came across as a very confused individual incapable of giving a proper and consistent account of the events to which he was testifying. He constantly chopped and changed his evidence, and the impression I gained was that he did so for the sake of convenience. For example, he was adamant that the offer to settle and its import and legal consequences for him were not explained to him by the defendant but when asked if he had an independent recollection of the particular day's events with reference to his meeting with the defendant and the content of their conversation, he said he could not remember the day at all. He also could not remember signing the discharge form (exhibit A11). In addition he testified that he received the cheque payment of R8 000,00 immediately after he signed the discharge form on the same day. He persisted in this belief despite being shown the different dates on the discharge form viz 2 March 1994 and

on the cheque viz 11 April 2004. He was also shown documents proving that the insurance company had only paid the money on 31 March 1994. This too was to no avail and failed to persuade him that he was mistaken in his evidence. The same criticism is characteristic of his evidence in connection with his procuring of the certificate for payment of past medical expenses from the defendant. He at first said he collected it from the defendant; then he said that she had posted it to him and then later still that he had received it by fax. So too when it came to his reasons for waiting approximately eight years to take constructive steps to find the defendant in the belief that he was entitled to receive further payments from her. His explanation was a weak:

“I could not find her at the Post Office building where her offices had been. She was no longer there.”

When asked why he had not gone to another attorney in QwaQwa after 1994 when he found that his money had dried up and he could not find Miss Kubushi, he answered:

“My trust was with Miss Kubushi. With me once I reach an agreement with a person I do not pin my hopes on anyone else but I finally ran out of patience.”

At no stage did he make any attempt to consult another attorney in QwaQwa. His explanation for this is unsatisfactory when viewed against the length of time which elapsed before he decided to consult his present attorneys of record. His evidence was that he only started looking for the defendant after he had spent the R8 000,00. On his own evidence then he started looking for Miss Kubushi only once he realised that his money had dried up and he needed more money. It follows as a matter of simple logic that if the R8 000,00 payment had been dissipated and he had no means of income whatsoever, which is his undisputed evidence, he would not have waited until all his money had been spent before making attempts to locate the defendant if he knew all along that he was entitled to further payment from the insurance company. A reasonable person in the plaintiff's shoes would have made a determined effort long before his

“interim payment” had dried up to trace the defendant and elicit further moneys if he honestly and truly believed that he was entitled thereto. That the plaintiff did not do so, indicates the improbability and total lack of veracity of his having been told by the defendant that he was to receive further money from the insurers. The submission was made on plaintiff’s behalf that such forward thinking ability was too much to expect of one with the limited educational standard and lack of sophistication of the plaintiff. I cannot agree. A lack of proper education and simplicity do not deprive one of common sense which is all that would have been required of the plaintiff if he is to be believed and if it was indeed the case that he had not been told that his claim for damages had been limited to the sum of R10 400,00 inclusive of costs at the time he signed the discharge form (exhibit A11). A further aspect of the case which detracts from the credibility of the plaintiff, is the fact that not once during the entire period from September 1994 through to June 1996 did he raise the issue of further payments with the defendant, despite the fact that she was still in Phuthaditjhaba in the

QwaQwa area throughout this time. This was never disputed in evidence. And finally, his testimony that he could not read and therefore was unaware of the content of the letter of discharge (exhibit A11) settling his claim at R10 400,00 flies in the face of the two letters (exhibit A5 & A6) which he wrote to his former attorneys of record requesting them to close their file in view of his having instructed the defendant in the meantime to lodge his claim for damages.

- [10] Much was made in argument by plaintiff's counsel of the fact that even on the defendant's own evidence, it was clear that she had not carried out her duty to her client, the plaintiff, and she had not done everything that was possible to get him a better offer. Nor did she explain the offer (exhibit A10), to the plaintiff. She had not identified the actual offer referring to what was capital and what was costs. The defendant conceded this but insisted that on acceptance of the cheque of R8 000,00 the plaintiff was well aware that the matter had been settled in full as she had explained that to him and she had explained that he would not get any further

moneys from her in respect of his claim. I cannot fault Miss Kubushi's approach. In view of her evidence that she explained the offer which was recorded on the discharge form which was in similar terms to the terms of the offer to settle (exhibit A10), I am satisfied that she complied with the requirement of identifying to the plaintiff the essentials of the offer. For all of the above reasons, I find that the probabilities are overwhelmingly in favour of the defendant's version that the plaintiff was fully aware that he had accepted the sum of R8 000,00 in full settlement of his claim for damages and that no further moneys would be coming to him. The fact that defendant failed in her statutory duties in the manner already alluded to in this judgment, does not in my view, detract from her credibility on the gravamen of this case namely that she acted in the best interests of her client, the plaintiff, and that in doing so she had informed the plaintiff of the terms of the settlement and that the settlement was a final discharge of the plaintiff's claim against the insurance company. Conversely, I am unable to accept the explanation given by the plaintiff as to why he allowed a

lapse of time of approximately eight years before consulting a firm of attorneys in order to establish whether or not any further moneys were owing to him. I find his explanation to be just not credible, because of the inherent improbabilities to which I have referred.

[11] I turn now to the question of whether or not the plaintiff's claim has prescribed by the effluxion of time. For the purposes of the adjudication of the special plea, I find that the explanation given by the plaintiff as to why he waited so long to institute his claim for damages against the defendant, to be incapable of honest belief.

11.1 Summons in this matter was issued on the defendant on 20 July 2004. The claim was lodged on 26 February 1993 and settled on 2 March 1994.

Section 12(1) of the Prescription Act 68 of 1969 provides:

“Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.”

The Prescription Act of 1969 contains no definition of the term “due date”. It is accepted that in the interpretation of statutes words must be given their ordinary grammatical meaning and it is a primary rule in the construction of statutes that the language of legislation should be read in its ordinary sense. See **UNION GOVERNMENT (MINISTER OF FINANCE) v MACK** 1917 AD 731 at 739; **S v COCKLIN EN 'N ANDER** 1971 (3) SA 776 A at 781.

The usual meaning of the word due is “owing and already payable” **LAGERWEY v RICH AND OTHERS** 1973 (4) SA 340 (T) at 345.

11.2 In order for the question of prescription to rise, two things are prerequisite – the debt must have arisen and the debt must be due. For purposes of the adjudication

of the special plea, I have assumed that a debt has arisen. The only question is, is it due?

Section 10 of the Prescription Act of 1969 provides for the extinction of a debt after the lapse of certain periods stipulated in section 11 of the Act. A debt which arises from a breach of contract does not become recoverable until loss or damage has been suffered. See **ELECTRICITY SUPPLY COMMISSION**

v STEWARTS AND LLOYDS OF SA (PTY) LTD 1981

(3) SA 340 (A) at 344 F – G and **OERTEL EN**

ANDERE NNO v DIREKTEUR VAN PLAASLIKE

BESTUUR EN ANDERE 1983 (1) 354 (A) at 370 B.

Both Mr. Röntgen, who appeared for the plaintiff and Mr. Cronje, who appeared for the defendant, agreed that a claim for damages is a debt as envisaged in section 10(1) of the Prescription Act of 1969 and that in terms of section 11(d) of the Act the period of prescription applicable to such a debt is three years.

11.3 As it stands it is the case for the defendant that the plaintiff's claim for damages against the defendant has become prescribed by the effluxion of time and that any summons instituting action ought to have been served on the defendant on or before either 25 February 1996 being three years from the date of the plaintiff's signature of the claim for compensation under the Motor Vehicle Accidents Act 1989, that is 26 February 1993, alternatively on or before 1 March 1997 being three years from the date on which the plaintiff signed the discharge (exhibit A11) accepting the settlement from the insurance company, that is 2 March 1994.

12.1 The plaintiff's case is that the running of prescription was interrupted in view of the disputed settlement agreement and that prescription can only run from the date on which the plaintiff instructed his present attorneys of record to trace defendant, i.e. 3 May 2002.

Therefore the plaintiff pleads that his claim has not become prescribed.

12.2 In view of the credibility findings I have made and more specifically in view of the fact that I have rejected outright the explanation given by the plaintiff for the inordinate length of time which he took in instituting the action for damages against the defendant as being non credible, it is my finding that as of the date of the service of the summons on the defendant, that is 20 July 2004, the plaintiff's claim had become prescribed, he having had three years only from the date of either of the lodging of his claim for damages under the Motor Vehicle Accidents Act 1989, alternatively three years from the date on which he accepted the settlement by signing the discharge form, to sue the defendant for damages for breach of contract.

[13] Accordingly judgment is awarded as follows:

1. The special plea of prescription is upheld.
2. The plaintiff's claim against the defendant is dismissed.
3. The plaintiff is ordered to pay the defendant's costs.

S. EBRAHIM, J

On behalf of plaintiff : Mr. K.M. Röntgen (Snr)
Instructed by:
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BRAKPAN

On behalf of defendant: Adv. P.R. Cronje
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