



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

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
 (2) OF INTEREST TO OTHER JUDGES: YES/NO
 (3) REVISED.

DATE: 8 July 2024

SIGNATURE:

CASE NO: A16/2023

In the matter between:

MASHABA, ADVOCATE MG NO
(obo MARIO FRANCISCO MUCHANGA)

APPELLANT

AND

ROAD ACCIDENT FUND

RESPONDENT

Coram:

Ceylon AJ, Millar J et Ntuli AJ

Heard on: 22 May 2024

Delivered: 8 July 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 8 July 2024.

ORDER

It is Ordered:

- [1] The appeal is upheld.
- [2] The Respondent is ordered to pay the costs of the appeal.
- [3] The order of the Court *a quo* is set aside and replaced with the following order:
"The special plea is dismissed with costs."

JUDGMENT

CEYLON AJ, (MILLAR J et NTULI AJ CONCURRING)

INTRODUCTION:

- [1] This is an appeal against the whole of the judgment and order handed down in this Court on 7 November 2014 in which a special plea of prescription was

upheld and the claim dismissed. Leave to appeal to this court was granted by the Court *a quo*. The appeal is unopposed.

- [2] The Appellant was appointed as the *curator ad litem* of Mr. Mario Fransisco Muchanga (Mr. Muchanga) on 29 August 2013. Mr. Muchanga is alleged to have suffered severe bodily as well as head and brain injuries in a motor vehicle collision which occurred on 2 November 2007. He was a passenger in a motor vehicle involved in a multiple vehicle collision and in respect of which the party/ies said to be negligent were identified. Some 5,5 years after the collision, a claim was lodged with the Respondent and the following year, some 6 years after the collision, a summons was served.
- [3] It was not in issue that both in respect of the filing of the claim as well as the issue of summons, that these occurred outside the prescribed time periods set out in section 23 of the Road Accident Fund Act.¹ In order for the claim to have been submitted timeously, it ought to have been lodged within 3 years ie by 1 November 2010 and summons ought to have been issued within 5 years ie by 1 November 2012. This is the basis upon which the Respondent raised its special plea.
- [4] The only issue for determination before the Court *a quo* was the special plea. It was not in issue that Mr. Muchanga had been severely injured to the degree that the appointment of the Appellant was necessary in order for him to prosecute an action for damages against the Respondent.
- [5] In the judgment granting leave to appeal to this Court, the Court *a quo* summarised the reason for the upholding of the special plea as follows:

"In a nutshell the Court's stance was that the appointment of a curator could not post facto suspend the running of prescription that has expired. Neither could his

¹ 56 of 1996.

claim be saved by the application of section 13 of the Prescription Act 68 of 1969. . . or the common law."

- [6] Judgment of the special plea was handed down on 7 November 2014. The application for leave to appeal was subsequently heard and judgment granting leave to this Court handed down on 12 December 2022.
- [7] In the interregnum between the dismissal of the special plea and the hearing of the application for leave to appeal, the question of whether or not prescription was interrupted in respect of a person placed under curatorship (where his disability predated the expiry of the initial prescriptive period), after the initial prescriptive period had already elapsed was decided by the apex Court.
- [8] The Constitutional Court in the matter of *Van Zyl NO v RAF*² while finding that the provisions of section 13(1)(a) read together with section 13(1)(i) of the Prescription Act³ did not override the provisions of section 23 of the RAF Act, found nevertheless that in terms of the common law:

"[85] In addition to providing support to enable people with disabilities to exercise legal capacity, the [Convention on the Rights of Persons with Disabilities] CRPD⁴ provide that State Parties must ensure access to justice for persons with disabilities on an equal basis with others.

[86] The application of the impossibility principle and section 39(2) of the Constitution to interpret section 23(1) and 23(2)(b) and (c) of the RAF Act achieves consistency with the CRPD. It affords the affected persons access to courts. This interpretation enables the affected persons to exercise legal capacity, preserve their dignity and access counts under

² 2022 (3) SA 45 (CC).

³ 68 of 1969. Section 13(1)(a) read together with section 13(1)(i) provides that prescription does not run in respect of a person under curatorship and would only start running again a year after the person had been released from curatorship. In the present matter since Mr. Muchanga's condition is alleged to be permanent and irreversible, he would never be released from curatorship.

⁴ Convention of the Rights of Persons with Disabilities adopted by the United Nations and ratified by the Republic of South Africa on 30 November 2007.

section 34 of the Constitution. Ultimately, it protects the affected persons against losing their claims for compensation to prescription. Importantly, it also saved the State, as a party to the CRPD, from claims of discrimination and abuse. Insofar as there are categories of persons with disabilities unprotected under the RAF Act, I agree with Jafta J that it would raise questions about State liability for breach of the CRPD. However, as stated above, that enquiry falls beyond the scope of this judgment so does the validity of the RAF Act.

[87] In conclusion, this Court recognises that the Prescription Act does not apply to suspend the running of prescription under the RAF Act. However, the common law impossibility and incapacity principles apply to rescue Mr Jacobs' claim from prescribing in this instance. They also save the State from exposure to claims of violating its international obligations. To fortify protection against prescription, this Court interprets sections 23(1) and 23(2)(b) and (c) of the RAF Act consistently with the CRPD.

[88] This approach simultaneously recognises the validity of the RAF Act and the rights of the affected persons to human dignity and access to courts, without over burdening the RAF. As the RAF pointed out, people with mental incapacities who are assisted by caregivers are usually able to lodge claims before they expire. Therefore, the affected who are unassisted would be few and far between. Nevertheless, they would also be the most marginalised. While it may not be easy to gain access to the records of persons with mental incapacities, this is a small inconvenience for the RAF to bear comparatively to the huge burden on the affected persons if their claim prescribe this is required of the RAF, as a social institution, to accommodate the affected persons- After all, this is what it means to be a caring society". [my addition].

[9] In consequence of the finding of the Constitutional Court in the *Van Zyl NO* case, since Mr. Muchanga was rendered disabled on the day of the collision in question, it is from that day that he is to be regarded as disabled and incapable

of acting, without the assistance of the Appellant to enforce his rights against the Respondent.

[10] For this reason, the appeal should succeed. Costs will follow the result.

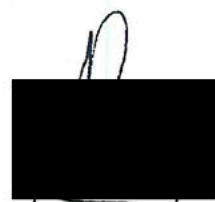
[11] In the circumstances, I propose the following order:

[11.1] The appeal is upheld.

[11.2] The Respondent is ordered to pay the costs of the appeal.

[11.3] The order of the Court *a quo* is set aside and replaced with the following order:

"The special plea is dismissed with costs."



B. CEYLON
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree, and it is so ordered



A. MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree



M.O. NTULI
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON: 22 MAY 2024

JUDGMENT DATE: 8 JULY 2024

COUNSEL FOR THE APPELLANT: ADV UB MAKUYA

ADV BJ NODADA

INSTRUCTED BY: MBHELE ATTORNEYS PRETORIA

REF: RAF/0663/RMBHELA

NO APPEARANCE FOR THE RESPONDENT