



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable/Not reportable

Case no: 2211/2023

In the matter between

ZANDILE EDWIN TAAIBOS

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

Heard: 19 March 2024

Delivered: 20 June 2024

Summary: Prescription in terms of Section 23(3) of Road Accident Fund Act 56 of 1996
- whether claim has become prescribed

ORDER

1. The Defendant's special plea of prescription in terms of Section 23(3) of the Road Accident Fund Act 56 of 1996 is upheld.

2. The Plaintiff's claim is dismissed costs, including the costs of counsel on scale A.

JUDGMENT

LOUBSER PJ

[1] On 7 September 2012 the Plaintiff sustained bodily injuries when the vehicle in which he was a passenger, was involved in an accident with another vehicle at Verkeerdevlei in the Free State Province. The Plaintiff then proceeded to lodge a claim for the damages he suffered as a result of his injuries, with the Defendant on 7 September 2015.

[2] Following receipt of the claim, the Defendant conceded the negligence alleged, and on 19 March 2018 the parties signed an agreement in terms of which the Defendant undertook to pay the Plaintiff's future hospital and medical treatment and related services and goods, as envisaged by Section 17(4)(a) of the Road Accident Fund Act.¹ In its offer that accompanied this agreement, the Defendant stated that 'if this offer was made after prescription of the claim, it will be deemed to be a bona fide error, and acceptance thereof will not be enforceable'.

[3] The Plaintiff thereafter issued summons against the Defendant, claiming his past medical and hospital expenses, his past and future loss of income and general damages to the total sum of R3 400 000. The summons was served on the Defendant on 10 May 2023. Section 23(3) of the RAF Act, however, provides that 'no claim which has been lodged ... shall prescribe before the expiry of a period of five years from the date on which the cause of the action arose'. It speaks for itself that the Plaintiff's summons should have been served on the Defendant before 7 September 2017 to avoid prescription of his claim. It further speaks for itself that the Plaintiff's claim had already become prescribed when the agreement in terms of Section 17(4)(a) was signed by the parties.

[4] It was therefore not unexpected when the Defendant included a special plea of prescription in its plea filed in response to the Plaintiff's summons. The parties have agreed that this special plea must be decided first by the Court, and separate from the other issues arising from the pleadings. The Court is, in the premises, only called upon to decide whether the Plaintiff's claim had become prescribed by the late filing of the summons.

¹ Act 56 of 1996

[5] Mr Pela, appearing for the Plaintiff, submitted that the special plea should be dismissed with costs by reason of the fact that the Defendant had failed its duty of care towards the Plaintiff. He contended that the Defendant had waived its right to rely on prescription when it decided to continue engaging with the Plaintiff even after the matter has become prescribed. Here Mr Pela referred to the Section 17(4)(a) undertaking that was provided by the Defendant. The Defendant should have warned the Plaintiff at the time that his claim had already become prescribed. The Defendant should not be allowed to hide behind its own negligence, he submitted.

[6] In this respect Mr Pela relied on the judgement by Williams, J in *Lottering v Chief Executive Officer of the Road Accident Fund N.O. and Another*². In that matter it was found that the RAF had breached its legal duty of care towards the plaintiff by, *inter alia*, failing to advise her over a period of years that her claim would prescribe and that she should consult an attorney. The Court found that the RAF, who featured as the Second Defendant, should not be allowed to hide behind its own negligence. By its conduct, the Second Defendant has waived its right to rely on prescription, it was found.

[7] Now a proper reading of the *Lottering*-judgment will show that the facts and circumstances of that matter differs materially from the facts and circumstances of the present case. Firstly, in *Lottering* the Plaintiff pleaded in the alternative as against both the Defendants a breach of a duty of care. Such a cause of action was never pleaded in the present case. Secondly, the Plaintiff in *Lottering* filed a replication to the plea of prescription, whereby it pleaded waiver by the RAF of its right to raise prescription as a defence to the Plaintiff's claim. In the present case, the Plaintiff filed no replication at all. Thirdly, the Plaintiff in *Lottering* presented evidence in Court to substantiate her replication and her plea of breach of a duty to care. In the present hearing, no evidence was presented by the Plaintiff.

[8] It follows that in *Lottering* a proper foundation was laid in the Plaintiff's pleadings for the findings that were eventually made by the Court. In the present case, no such foundation existed for the contentions made on behalf of the Plaintiff. It is trite that a party has a duty to allege in the pleadings the material facts upon which it relies. A plaintiff is not allowed to plead a particular case and then seek to establish a different case at the trial. It is also not permissible for a Court to have recourse to issues falling outside the pleadings

² [2021] ZANCHC 36

when deciding a case³.

[9] In my view, all that remains is that Section 23(3) of the Act clearly provides that a claim against the RAF shall prescribe at the expiry of a period of five years from the date on which the cause of action arose. The cause of action arises on the date of the accident.

[10] I find support in this respect in the judgement of Matshaya, AJ in this Division in the case of *Mochekoane v Road Accident Fund*⁴. In that case the plaintiff also failed to plead a lack of duty of care on the part of the RAF, and no evidence was presented by the plaintiff. The plaintiff also did not file any replication to the plea of prescription in that case. The learned Acting Judge came to the conclusion that there is no room for condonation of a claim that has been lodged out of time in terms of Section 23(3) of the Act, and that the RAF therefore does not have the powers to waive prescription of a claim.

[11] In concluding as such, the learned Acting Judge relied on what was stated by the Constitutional Court in *Road Accident Fund and Another v Mdeyide*⁵, namely that the RAF Act 'makes no provision for condonation of a late claim, either based on the ignorance of the claimant, or for any other reason'.

[12] In the premises, the Defendant's plea of prescription has to succeed. As for costs, I can find no reason why the general rule that costs follow the result, should not apply.

[13] The following orders are made:

1. The Defendant's special plea of prescription in terms of Section 23(3) of the Road Accident Fund Act 56 of 1996 is upheld.
2. The Plaintiff's claim is dismissed costs, including the costs of counsel on scale A.



PJ LOUBSER, J

³ Minister of Safety and Security v Slabbert [2010] 2 All SA 474 (SCA) at para 11

⁴ [2021] ZAFSHC 261

⁵ 2011(2) SA 26 (CC) at para 20

Appearances

For the Plaintiff:

Adv. T. Pela

Instructed by:

Mzila Nhlapho Attorneys
Bloemfontein

For the Defendant:

Ms J. Gouws

Instructed by:

The State Attorney
Bloemfontein