



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

CASE NO.:2291/2021

In the matter between:

KWAZIKWENKOSI MTHUNZI NDLELA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

ZONO AJ:

Introduction

[1] It is for parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence) to set out and define the nature of

their dispute; and it is for the court to adjudicate upon those issue¹. The Constitutional Court²affirmed the following statement of law made by the Supreme Court of Appeal³:

“13. Turning then to the nature of civil litigation in our adversarial system it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence,⁴ to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for ‘it is impermissible for a party to rely on a constitutional complaint that was not pleaded’. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone”

[2] The manner in which parties pleaded their cases is central to the determination of this matter. Antecedent to that, there is a need for a brief background and introduction.

[3] On 24th May 2021 the plaintiff Sibabalwe Theophelus Cyprus Siphika instituted the instant proceedings for injuries he sustained on 03rd April 2016 at or near R394 Road next to Mount Ayliff, Eastern Cape as a result of the driving of motor vehicle bearing registration letters and numbers F[...]. It is noteworthy that Mr Siphika instituted the instant proceedings personally and in his own name. On the 3rd May 2022 this court granted an order under Case Number 1521/2022 appointing Kwazikonke Mthunzi Ndlela who is an Advocate of the High Court of South Africa as a curator

¹ *Fischer v Ramahlele* 2014 (4) SA 614 (SCA) at 620C -621C.

² *Public Protector v South African Reserve Bank* 219 (6) SA 253 (CC) Para 234.

³ *Fischer v Ramahlele* 2014 (4) SA 614 (SCA) at 620C-621C as per Theron JA as she then was.

ad litem to Mr Siphika. In the course of time Mr Ndlela, curator *ad litem* apparently substituted Mr Siphika as plaintiff and that is apparent in paragraph 1.1 of the amended particulars and subsequent pleadings and notices.

[4] The matter was defended by the defendant. A special plea dated 07th November 2025 was delivered on 10th November 2025. The special plea raised by the defendant relates to the prescription of the plaintiff's claim. The defendant avers that summons herein was issued on 24th May 2021 and served upon the defendant on 02nd June 2021⁴ after the plaintiff's claim had prescribed on 02nd April 2021. For that proposition the defendant relied on the provisions of section 23(1) of the Road Accident Act 56 of 1996 as amended.

[5] It worths emphasis that it is common cause that the accident occurred on 03rd April 2016; the claim was lodged with defendant on 27th October 2016; the summons was issued on 24th May 2021 and the service thereof was effected on 02nd June 2021. It is also not disputed that a period of five (5) years from the date when the accident occurred to the date of issue and service of summons had expired. On 03rd May 2022 a court order appointing curator *ad litem* was granted.

[6] The plaintiff, realising that the prescribed five (5) year period⁵ referred to in the Act had expired, averred in the amended particulars that the five (5) year period prescribed by section 23(3) of the Act was interrupted; and

⁴ Summons was issued on 24th May 2021.

⁵ Section 23(3) of Road Accident Fund Act 56 of 1996.

the running of prescription was interrupted by the court order dated 03rd May 2022 appointing the curator *ad litem*. Accordingly, so it is averred that the prescription period started *de novo* from the date of the court order.

6.1 The matter came before me by way of a stated case in terms of Rule 33 of the Uniform Rules. The stated case was deficient in material respects. Rule 33(2) provides that:

“(2)(a) Such statement shall set forth the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon. Such statement shall be divided into consecutively numbered paragraphs and there shall be annexed thereto copies of documents necessary to enable the court to decide upon such questions. It shall be signed by an advocate and an attorney on behalf of each party or, where a party sues or defends personally, by such party”. (my underlining)

6.2 Whilst the question of law is set out to be the prescription, but parties contentions are not set out in the statement or stated case. Mr Badli submitted that contentions are not necessary or are not required by the rule. That submission flies in the face of the express wording of rule 33(2) of URC. Mr Gumede was unable to answer the question about his contentions. However, the matter was argued on the basis of the papers serving before me. It is also noted that no replication was filed to deal with pertinent averments on the defendant’s plea about the prescription of the matter.

Discussion and Analysis

[7] The starting point should be the relevant provisions of section 23 of the Act. Section 23 of the Act provides:

“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. *Prescription of a claim for compensation referred to in subsection (1) shall not run against—*
 - (a) a minor;*
 - (b) any person detained as a patient in terms of any mental health legislation; or*
 - (c) a person under curatorship.*
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”.*

[8] In *Cools Ideas*⁶ the Constitutional Court made the following expression:

“28. *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 their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)”.*

[9] Section 23(1) and 23(3) provides for two-staged prescription. It provides for two prescription periods, *to wit*, three year and five-year prescription periods. Firstly, it is important to note that section 23(1) and (2) relate only to the three-year period within which to lodge a claim. That is, the right to claim compensation prescribes upon expiration of three years of the cause of action. That right prescribes if no claim has been lodged within a

⁶ *Cool Ideas 1186 CC v Hubbard and another* 2014 (4) SA 474 (CC);2014 (8) BCLR 869 (CC) Para 28.

period of three years. That is the first prescription. However, such prescription can be suspended or delayed in terms of section 23(2) of the Act by three factors. Prescription does not run against the following category of persons (i) minor (ii) a detained patient and (iii) a person under curatorship. Minority, detention of a patient in terms of mental health legislation and curatorship over a person are the only factors legislatively prescribed to suspend or delay the prescription of a right to claim compensation.

- [10] Section 23(3) of the Act provides for a right to enforce a claim by legal proceedings as contemplated in and subject to provisions of section 24(6) of the Act. This is a right to litigate. This right is subject to the fact that there is a claim duly lodged within three years of the cause of action. It goes without saying that, once the first prescription hits there is no right to litigate. The right to enforce a claim (right to litigate) should be enforced after the expiry of a period of 120 days from the date on which the claim was delivered to the defendant⁷ and after the documents referred to in section 19(f) of the Act have been furnished to the fund⁸. However, it must obviously be before the expiry of five years from the date when the cause of action arose. Simply put after the proper lodgement of claim, the claimant still has a further two-year period within which to issue and serve summons, save for and subject to the period referred to in section 24(6) of the Act.

⁷ Section 24(6) of Road Accident Fund Act 56 of 1996.

⁸ An affidavit in which particulars of the accident that gave rise to the claim concerned are fully set out; or copies of all statements and documents relating to the accident that gave rise to the claim concerned.

[11] In *Casu*, there is no dispute about the first prescription, which is a right to claim compensation within three years. The claim for compensation was duly lodged within the prescribed period. The dispute herein relates to the second prescription, which is the right to enforce a claim by legal proceedings. A continuous period of five (5) years expired on 02nd April 2021 without summons having been issued and served upon the defendant. It is on this basis that the defendant contends that the plaintiff's claim has prescribed. On the other hand, the plaintiff contends that such prescription period was interrupted by the court order dated 03rd May 2022 appointing curator *ad litem*. Therefore, the sole issue for determination is whether or not the court order aforesaid or the appointment of curator *ad litem* interrupted the prescription period prescribed in section 23(3) of the Act.

[12] It is trite that parties stand or fall by the papers⁹. A party is bound by his or her pleading¹⁰. The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies¹¹. It is impermissible for a party to plead a particular case and seek to establish a different case at the trial¹². Plaintiff's pleaded case is that the court order dated 03rd May 2022 or the appointment of the curator *ad litem* on 03rd May 2022 interrupted prescription. It is plain that 03rd May 2022 falls after the 02nd April 2021, which date was the date on which five (5) years prescribed by section 23(3) of the Act expired. The plaintiff's claim would have ordinarily prescribed on 02nd April 2021.

⁹ *Nkume v Transunion Credit Bureau Pty Ltd and another* 2014 (1) SA 134 (ECM) Para 7.

¹⁰ *Imprefed (Pty) Ltd v The National Transport Commission* 1993 (3) SA 94 A.

¹¹ Rule 18(4) of Uniform Rules of Court.

¹² *Minister of Safety and security v Slabbert* 2010 (2) SA 474 (SCA) Para 11.

[13] It is axiomatic that the legal basis for the grant of the order appointing curator ad litem is that the victim or a patient must be of unsound mind and consequently incapable of managing his her own affairs.¹³ It may reasonably be assumed in favour of the plaintiff that the court hearing the matter on 03rd May 2022 was satisfied by the papers and a case was made out for an order appointing a curator *ad litem*. Even if it is accepted that on 03rd May 2022 the victim or patient was of unsound mind, consequently was unable to manage her own affairs, that cannot save the plaintiff's case.

[14] Firstly, there is nothing in the whole tenor of the pleadings that demonstrates that at the time when the claim was still extant Mr Siphika was of unsound mind and consequently was unable to manage his own affairs. Even the expert reports¹⁴ which clearly alludes to Mr Siphika's cognitive decline, do not shed light on when that may have begun. Infact they do not express a view that the victim or patient is of unsound mind and consequently unable to manage his own affairs. Mr Badli, Counsel for the defendant, strongly argued that Mr Siphika was at all material times of sound mind and was able to manage his own affairs. He persuasively argued that Mr Siphika personally lodged his claim with the defendant on 15th November 2016. He meaningfully communicated with the defendant at all stages including the stages of offers which were made by the defendant to him respectively on 24th January 2017 and 17 February 2020. When the instant proceedings were instituted on 24th May 2021, Mr Siphika was the plaintiff in his own personal capacity, *albeit* that the claim had allegedly prescribed. That is a testament that from 03rd April 2016 when accident occurred to 24th May 2021 when summons was issue, he

¹³ Rule 57 (1) of the Uniform Rules of Court.

¹⁴ Neurosurgeon, Clinical Psychologist and Industrial Psychologist.

was of sound mind and was able to manage his own affairs and consequently he was of full legal capacity. That is the essence of Mr Badli's submission.

[15] Judging by the case number in the court order (1521/2022), it is clear that an application for the appointment of curator *ad litem* was made or brought in 2022, hence the court order appointing curator *ad litem* was granted more than a year after the institution of the instant proceedings in the name of Mr Siphika. From these facts it is easy to conclude that from 03rd April 2016 to 02nd April 2021, which is a period of five (5) years, Mr Siphika was of full legal capacity and was of sound mind and was able to manage his own affairs. In that period Mr Siphika was not under curatorship.

[16] In any event, section 23(2) (c) of the Act provides that Prescription of a claim for compensation referred to in section 23 (1) of the Act “*shall not run against a person under curatorship.*” It grammatically means that a three-year prescription period is suspended or delayed if the injured person is under curatorship¹⁵. An injured person must be under curatorship during the period contemplated in section 23(1) of the Act which is three years. There is significant synergy between section 23(1) and 23(3) of the Act. For Context it is proper to read them together. Three years referred to in section 23(1) of the Act is an integral part of the five-year prescription period referred to in section 23(3) of the Act. Section 23(1) of the Act is subject to subsection 2 and 3. The words in section 23(1) of the Act “*subject to*” means that the subsection is dependant and conditional upon section 23(2) and (3) of the Act. Section 23(1) is subservient to section 23(2) and

¹⁵ *SATAWU and another v Garvas and others* 2013 (!) SA 83 (CC);2012 (8) BCLR 840 (CC) Para 37.

(3) of the Act. In all, the period of three years referred to in section 23(1) is subsumed in the period of five years referred to in section 23(3) of the Act.

[17] In conclusion in this regard, a period of curatorship of an injured person must be within the period of three years referred to in section 23(1) and five years referred to in section 23(3) of the Act. The curatorship must occur within the legislated prescription period. It cannot apply when the prescription period has run to the fullest. Purposive interpretation requires that the purpose of the provision must be taken into account¹⁶. Sight must not be lost of the fact that section 23(1), (2) and (3) of the Act seek to prevent or stop the running of prescription. The prevention can only happen when something has not happened. Stopping can happen when something is in progress. It is unequivocal that prevention and stopping cannot take place after the fact. I agree with Mr Badli's submission that the horse now is bolted. An *ex post facto* curatorship over the injured person cannot save the claim from prescription. I therefore come to conclusion that the court order dated 03rd May 2022 or the appointment of the current plaintiff as curator *ad litem* can and did not interrupt the prescription period referred to in section 23(3) of the Act. I also find that the prescription period referred to in section 23(3) of the Act had ran to the fullest without interruption.

[18] One aspect that deserves a short shrift is the one of the offers made by the defendant and not accepted by Mr Siphika. Firstly, in law context is

¹⁶ *Cool Ideas 1186 CC v Hubbard and another* 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) Para 28.

everything¹⁷. The averments dealing with the orders are contained in paragraph 6.1.2 and 6.1.3 of the amended particulars of claim as follows:

“Compliance

6.1.2 On the 24th January 2017 an offer on merits (negligence) was issued but RAF but the injured person did not sign the acceptance offer hereof, **see annexure “A”**.

6.1.3. Further on or about February 2020 the injured person was called by Nomthandazo Ntuli who works for RAF in Durban to come to RAF Durban offices and sign an offer of R350 000.00 which the injured person does not know whether it was interim or final. On the same month (February 2020) the injured person went to RAF Durban offices as requested by Ms Ntuli but refused to accept an offer of R350 000.00 and as a result injured person upon seeing no progress thereafter decided to approach his present attorneys to pursue the matter further on 06th November 2020” (sic).

[19] The issue about the offer was raised only to give historical background about the matter, not in the context of pleading interruption of prescription. It was averred in the context of demonstrating to this court that the plaintiff has complied with the statutory requirements, and all that was necessary to be complied with, hence it appears under the heading compliance, not interruption of the running of prescription. It was an afterthought to argue it out of its proper context to support a cause about the interruption of prescription. The stated case referred to above introduced the question of the offers as a menu for this court to consider when determining this matter. I also find solace for that in the oral submission by plaintiff’s Counsel, Mr Gumede. That approach was incorrect.

[20] In any event, the offer attached to the papers as annexure A was made on an “*without prejudice*” basis. Mr Gumede was unable to advance argument as to why a document that was a communication made on a “*without*

¹⁷ *Minister of Home affairs and others v Scalabrini Centre, Cape Town and others* 2013 (6) SA 421 (SCA); 2013 (4) ALL SA 571 (SCA) Para 89.

prejudice” basis should be used in court as evidence. It is trite that the concession made for settlement purposes does not waive any rights of the party making such concession. It cannot be held against that party. In a nutshell the defendant made those offers without detriment to any of its existing rights. The defendant did not intend to prejudice its right to have its dispute resolve by the court of law¹⁸. The intention was only to settle the matter out of court amicably, which settlement did not eventuate. In any event Mr Siphika did not align himself and did not agree with the contents of the offer as he did not accept it. He therefore cannot rely on the same contents he effectively rejected to support his cause. Our law does not permit a party to take two inconsistent positions; to blow hot and cold; approbate and reprobate¹⁹. I accordingly find that reliance on the offers referred to above is without merit and the defendant’s special succeeds.

Costs

[21] It is a general rule that costs must follow the result. It was accepted by the defendant’s Counsel that the plaintiff was pursuing her constitutional right, *inter alia*, to bodily integrity²⁰. He further conceded that in these circumstances the principle enunciated in *Biowatch*²¹ should be applied. He therefore did not insist on the issue of costs.

Order

[22] In the result following order shall issue:

- 1. The defendant’s special plea of prescription is upheld.**

¹⁸ Section 34 of the Constitution.

¹⁹ *Hlathswayo v Mare and Deas* 1912 AD 242.

²⁰ Section 12(2) of the Constitution.

²¹ *Beowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) Para 54-60.

2. **Plaintiff's claim is hereby dismissed.**
3. **There shall be no order as to costs.**

A.S ZONO

JUDGE OF THE HIGH COURT (ACTING)

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Matter heard on : 11 November 2025

Delivered on : 20 November 2025