



**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 34859/2011

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES	NO
(2) OF INTEREST TO OTHERS/JUDGES: YES	NO
(3) REVISED	
24/10/2014	<i>[Signature]</i>
DATE	SIGNATURE

24/10/2014

In the matter between:

ANTHONY PHUMULE NDLALA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MODIBA AJ:

1.

This is a damages claim for loss suffered by the plaintiff as a result of breach of the legal duty of care by the defendant's employees when processing the plaintiff's claim for damages for personal injuries sustained in a motor vehicle collision.

2

2.

The merits of the plaintiff's claim were separated from quantum in terms of section 33 (4) of the Uniform Rules of Court by agreement between the parties. The defendant raised a special plea of prescription.

3.

COMMON CAUSE FACTS

The plaintiff is the only witness who testified at the trial. Therefore his evidence is common cause.

4.

The plaintiff testified that on 16 October 2004, he was a fair paying passenger in a taxi driven on a public road within the province of Gauteng. He sustained injuries when the taxi lost control and overturned. He was admitted to hospital where he was advised by one of the defendant's employees that he may lodge a damages claim with the defendant without being assisted by an attorney, and that the defendant's employees will assist him to ensure that he receives the compensation that he may be entitled to as a result of damages sustained in the motor vehicle collision.

5.

He was given a claim form to complete. He completed the form and submitted it to the defendant's Johannesburg offices on 5 January 2007. His claim was registered under a specified claim number. He was advised to follow up on his claim. From the time he lodged his claim until he consulted an attorney in January 2011, he followed up on his claim telephonically as well as visited the defendant's Johannesburg offices three times. Each time he followed up, he was informed that his claim has not yet been finalised. In January 2011, out of the frustration he was experiencing as a result of the delay in having his claim determined, he decided to consult an attorney. Only then was he advised that in terms of the Road Accident Fund Act, he ought to have issued summons within 5 years of the date of the accident to interrupt prescription. As a result, his claim has prescribed. He further testified that he was never advised by the defendant's employees that his claim would prescribe and that he should seek the services of an attorney to have summons issued against the fund. Until he consulted an attorney, he was under the impression that his claim would be resolved by the defendant's employees.

6.

THE ISSUE TO BE DECIDED

The issue to be decided is whether the defendant has proved on the balance of probabilities that the plaintiff's claim has prescribed. Should I find that the plaintiff's claim has not prescribed, the defendant's special plea stands to be dismissed with costs.

7.

THE APPLICABLE LEGAL PRINCIPLES

Liability for compensation for loss or damages sustained in a motor vehicle collision is determined in terms of the Road Accident Fund Act.¹ The prescription of claims brought in terms of the Road Accident Fund Act is determined by the Regulations issued in terms of section 26 of the Road Accident Fund Act.

Prescription for breach of the legal duty of care is determined in terms of section 12 (1) read with section 12(3) of the Prescription Act 68 of 1969.² In terms of section 12(1), prescription commences to run as soon as the debt is due. However, in terms of section 12(3) a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and 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 case. In *Truter v Deyssel* 2006 (4) 168 (SCA) at para 17 and 19, the court held as follows:

'a debt is due in this sense when a 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.'

'Cause of action for the purpose of prescription means...every piece of fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'³

¹ Road Accident Fund Act 56 of 1996, section 3

² See *Truter v Deyssel* 2006 (4) 168 (SCA) and *Van Zijl v Hoogenhout* 2005 (2) SA 93 (SCA) at 103 B-D),

³ *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23 cited with approval by Corbett JA in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838 D-H.

ANALYSIS

The defendant bears the overall burden to prove its special plea of prescription on a balance of probabilities. The defendant elected to close its case without calling any witnesses to rebut the plaintiff's evidence. Therefore the defendant will stand or fall on its special plea.

The plaintiff's claim is based on tort which comprises of the following elements: (a) a legal duty towards the plaintiff to exercise care, skill or both in the processing of the plaintiff's claim for personal damages, (b) breach of such duty by the defendant and (c) actual loss to the plaintiff as a result of the breach. The claim is not based on the Road Accident Fund Act. For that reason, prescription is reckoned in terms of the Prescription Act 68 of 1969 and not in terms of the Road Accident Fund Act. Therefore the special plea raised by the defendant is irrelevant to the plaintiff's claim. Counsel for the plaintiff submitted that the defendant owes the persons it has invited to directly submit claims to it for compensation for personal injuries suffered as a result of a motor vehicle collision. The duty arises out of the representations the defendant made to the plaintiff that he may submit his claim directly to it without the assistance of an attorney and the defendant's acceptance of the plaintiff's claim.

Counsel for the defendant argued that submitting a claim could never entitle the plaintiff to compensation as he still had the duty to prove his claim. In my view, the legal duty of care owed by the defendant to direct claimants does not give rise to an undertaking to pay their claims because each claimant has a duty to prove his or her claim. The exercise of care and skill in this case entails that the plaintiff does not suffer loss because of inaction or supineness on the part of the defendant's employees. The duty includes ensuring that the claim does not prescribe in the defendant's hands. Where it is foreseeable that the claim will prescribe before it is determined, the defendant has a duty to provide a direct claimant with information on what the claimant ought to do to avoid the claim being rendered obsolete by prescription. Should the defendant find that the plaintiff's claim lacks merit, it must reject it and not deal with the claim *ad infinitum*.

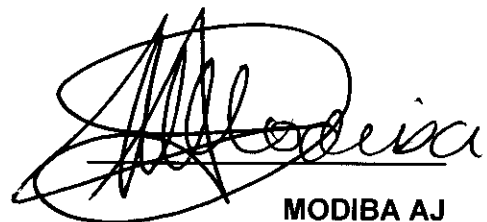
Our courts have repeatedly held that where a person owes another a legal duty of care, prescription only commence to run when the latter person becomes aware of the breach of the duty.⁴ Therefore in terms of section 12 (3) of the Prescription Act, prescription is reckoned from the day the plaintiff becomes aware that the defendant was negligent in not fulfilling the representations it made to him. The plaintiff only became aware of the defendant's negligence when he consulted an attorney in January 2011. Until that date, the plaintiff did not know that his claim had prescribed in the hands of the defendant's employees. The defendant has not adduced facts to prove or even argued that the Plaintiff should have acquired that knowledge by exercise of reasonable care. Therefore prior to that date, the plaintiff cannot be deemed to have had constructive knowledge of the loss that he sustained as a result of negligence on the part of the defendant's employees. Prescription for the plaintiff's claim for breach of the legal duty of care started running in January 2011 when he received advice from his attorneys. He issued summons on 21 June 2011 and served them on the defendant on 30 June 2011, well within the 3 year prescription period applicable in terms of section 12 (3) of the Act.

12.

In the premises, the defendant's special plea stands to be dismissed with costs.

ORDER

1. The defendant's special plea is dismissed with costs.
2. The defendant is 100% vicariously liable for plaintiff's proved damages or damages as agreed to between the parties.



MODIBA AJ

Attorney for the Plaintiff:

K M Röntegen (an Attorney with the Right of
Appearance in the High Court in terms of Article
(4)(2) of Section 62 of 1995)

⁴ See *supra* *Truter and Another v Deyssel* at 173 B-D and 174 C-D, *Van Zijl v Hoogenhout* at 103 B-D.

Of: Röntegen & Röntegen Inc

For the Defendant: Mr U.B. Makuya

Instructed by: Motlhe Jooma Sabdia

Date of hearing: 5 August 2014

Date of judgment: 24 October 2014