

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 8215/19

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

13 September 2021

Date


Signature

In the matter between:

MOGOTSI MATTHEWS LAMOLA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

(RAF REFERENCE: 546/12417767/24/0

LINK NO: 3933783)

Heard: 20 January 2021

Judgment: 13 September 2021

JUDGMENT

MOVSHOVICH AJ:

Introduction and background

1. In February 2019, the plaintiff ("**Mr Lamola**") instituted proceedings against the defendant ("**RAF**"), claiming payment in an amount of R800,000 plus interest and costs as loss arising from a motor vehicle accident.
2. Mr Lamola was a passenger in a vehicle driven by Mr SC Ncake. On or about 17 November 2013, Mr Ncake lost control of and rolled the vehicle. As a result of this accident, Mr Lamola claims he sustained various injuries, incurred medical expenses and suffered loss of earnings and psychological shock, trauma and loss of amenities of life.
3. Mr Lamola claims damages in respect of the loss he alleges to have suffered on one of three bases:
 - 3.1 a claim in terms of section 17 of the Road Accident Fund Act, 1996 ("**the RAF Act**") ("**claim 1**");
 - 3.2 a claim on the basis of a "duty of care" which Mr Lamola alleges was imposed on the RAF as a result of it providing assistance to Mr Lamola by way of a "Direct Claim" in terms of the RAF Act ("**claim 2**");
 - 3.3 a claim based on an oral contract alleged to have been concluded between the RAF and Mr Lamola during or about August 2016 whereby the RAF undertook to assist Mr Lamola to lodge and prosecute his claim against the RAF, to render such assistance diligently, timeously and competently, and to take all required steps to ensure that Mr Lamola's claim against the RAF (being a claim in terms of section 17 of the RAF Act) would not prescribe ("**claim 3**").

4. In respect of claim 2, Mr Lamola alleges that the "duty of care" was breached by the RAF resulting in the loss pleaded in the particulars of claim. In relation to claim 3, Mr Lamola alleges a breach of contractual obligations, resulting in the same loss.
5. The RAF delivered two special pleas and a plea on the merits. The first special plea is that of prescription and is framed in the tersest terms: "*the Plaintiff [sic] claim has become prescribed in lodgment, the matter should have been lodged on or before 16 November 2018*". The second is an alleged failure by Mr Lamola to comply with section "17 of the Road Accident Fund Amendment Act 19 of 2005".

Procedural history

6. After the pleadings closed, the parties had a pre-trial conference before the Honourable Deputy Judge President Ledwaba ("DJP") on 12 September 2019. At that meeting, it was agreed that the issue of prescription would be adjudicated upfront. The RAF also agreed at the meeting that the issues could be decided without recourse to oral evidence. Although the minute does not reflect Mr Lamola's views on the topic, it must be accepted that he likewise agreed to such an approach.
7. The parties consequently filed heads of argument and the matter came before me as a special motion on 20 January 2021. On the date of the hearing, however, there was no appearance for the RAF. Despite notification to RAF's attorneys, no legal representatives of the RAF turned up to argue the matter. The matter thus proceeded with due regard to all the documents (including RAF's heads of argument) and written and oral submissions by Mr Lamola's counsel, Mr Beaton SC.
8. In argument, Mr Beaton suggested that both special pleas were properly before me for adjudication. I do not agree. The minutes of the 12 September 2019 meeting are clear as to what was referred, and it is confined to the first special plea. The RAF also

proceeded on this basis, and its heads of argument are confined to the issue of prescription. I thus do not propose to express any view on the second special plea. In any event, I fail to see how the second special plea, which is fact-sensitive, may be decided without recourse to (any) factual evidence.

Analysis

9. It is difficult to understand what was envisaged by the parties when they agreed that the first special plea could be adjudicated "without oral evidence". It appears that what must have been meant is that I could proceed to deliver a judgment on the assumption that all the facts pleaded by the parties are correct. The state of the pleadings, the lack of specificity in the first special plea and the absence of a replication make such an approach difficult to implement in practice. As has also recently been reiterated by the Supreme Court of Appeal,¹ few, if any, prescription defences will ever succeed in an exception-type process. While this is not an exception, the failure by the RAF to adduce any oral (or documentary) evidence in support of the special plea render some of the considerations underlying Supreme Court of Appeal's misgivings relevant to the current proceedings. But given the parties' agreement on the applicable facts, I shall do my best, insofar as this is practicably possible, to do justice to the matter with the information at my disposal. In this regard, I note that while no replication has been delivered, the plaintiff did anticipate certain prescription issues and thus included in the particulars of claim contentions which are normally left for replication.
10. I should also note from the onset that the focus of this judgment is the plea of prescription. I express no view on the sustainability, in law or fact, of the claims advanced by the plaintiff. That is a matter for the trial court.

¹ *Jugwanth v MTN* [2021] ZASCA 114 (9 September 2021).

11. It seems to me that claims 2 and 3 have clearly not prescribed. Both of those claims are subject to a three year prescription period in terms of section 11 of the Prescription Act, 1969, calculated from the time that the debt becomes due, provided that the creditor was or ought reasonably to have been aware of the identity of the debtor and the relevant facts,² and the plaintiff had not been wilfully prevented from acquiring the relevant knowledge.³
12. The combined summons in this matter was served in February 2019.
13. Claim 3 is based on an oral agreement allegedly concluded in August 2016. A claim under that alleged contract could not have prescribed prior to August 2019.
14. Claim 2 is premised on an alleged duty of care by the RAF to assist Mr Lamola's claim under section 23(3) of the RAF Act. In this regard, in its special plea, the RAF avers that the claim should have been lodged by 16 November 2018 (ie, five years after the accident).
15. The above dates are of some import in the determination of this matter. The pleaded duty of care (if it ever existed) arose on a date which is difficult to ascertain with precision, but would logically have to antedate 16 November 2018, and could conceivably be prior even to February 2016. In relation to breach, this could likewise have first occurred at any point between the accident (or Mr Lamola having approached the RAF for assistance) and 17 November 2018.
16. It seems to me, however, that RAF's prescription defence in relation to claim 2 is untenable as that claim is based on a continuous and ongoing breach and which must have endured to at least 16 November 2018. Also, and importantly, no loss would

² Prescription Act: section 12(3)

³ Section 12(2)

have been suffered by Mr Lamola until 17 November 2018, and thus an important element of the cause of action / debt will have been absent before 17 November 2018.

17. For all those reasons, a plea of prescription in respect of claims 2 and 3 must fail.
18. Claim 1 presents different considerations. On the face of it, claim 1 was lodged more than five years after the cause of action, being the accident in question and consequent loss, arose. On the pleadings, however, the plaintiff avers that the RAF accepted or condoned any non-compliance with section 23(3) of the RAF Act or waived its right to rely thereon. It is unclear precisely what grounds such acceptance, condonation or waiver, but it seems to be related to the RAF's alleged duty to ensure timeous lodging of Mr Lamola's claim, as adumbrated under claim 2.
19. This (pre-emptive) defence to any plea of prescription gives rise to complex legal (including potentially public policy) and factual issues and cannot properly be finally decided on the basis of the approach to evidence as articulated by the RAF in the minutes of the meeting with the DJP. In my view, only the trial court can, in an informed fashion, finally adjudicate this aspect of the prescription special plea. Relevant factors in this regard may include whether the alleged duty of care existed and its precise scope; in what circumstances it arose and when; whether the RAF or any of its officials are empowered or may in law be taken to have waived, condoned or accepted non-compliance with statutory prescripts; and any public policy implications of the defence raised.
20. I thus propose to direct that the adjudication of the prescription plea in respect of claim 1 stand over for determination by the trial court in this matter. As such a direction / order was not directly contemplated in the parties' submissions, I propose to make a provisional order in the above terms, and to afford the parties fifteen court days to

make written submissions to me as to why such an order should not become final. In the absence of the timeous receipt of any submissions, the above order will become final. If either of the parties does make submissions, I shall, after consideration thereof, make an appropriate order in respect of the prescription special plea relating to claim 1.

Costs

21. In relation to the prescription plea in respect of claims 2 and 3, I see no reason why costs should not follow the event. In relation to the prescription plea in respect of claim 1, if the order I proposed above is made, it seems fair and sensible for those costs to be reserved for determination by the trial court.

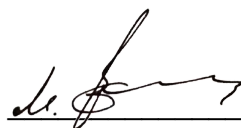
Order

22. I thus make the following order:

- 22.1 The special plea of prescription in relation to claims 2 and 3 is dismissed with costs.
- 22.2 The special plea of prescription in relation to claim 1 shall stand over for determination by the trial court.
- 22.3 All costs in respect of the special plea of prescription in relation to claim 1 are reserved.
- 22.4 The orders in 22.2 and 22.3 are made on a provisional basis and the parties are afforded the opportunity to make written submissions in relation to those orders within 15 days of 13 September 2021. Should no submissions be made within this period, the orders in 22.2 and 22.3 shall become final.

Hand-down and date of judgment

23. This judgment is handed down electronically by circulation to the parties' legal representatives by email and by uploading the judgment onto Caselines. The date and time for hand down of the judgment are deemed to be 12:45 on 13 September 2021.



VM MOVSHOVICH
ACTING JUDGE OF THE HIGH COURT

Plaintiff's Counsel: RG Beaton SC

Plaintiff's Attorneys: Erasmus-Scheepers Attorneys

Defendant's Counsel: L Roos (only heads of argument)

Defendant's Attorneys: Brian Ramaboa Incorporated (it is unclear whether any attorneys remain on brief for the RAF, but there was no formal notice of withdrawal)

Date of Hearing: 20 January 2021

Date of Judgment: 13 September 2021