IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 17068/2009

Reportable

In the matter between:

ADVOCATE JAN-HENDRIK ROUX SC N.O
(In his representative capacity as curator *ad litem*
Of **QUINTON HUMAN born** on 14 February 1966) **Plaintiff**

and

THE ROAD ACCIDENT FUND **First Defendant**

A R VAN DER LITH & COMPANY ATTORNEYS
NOTARIES & CONVEYANCERS t/a
VAN DER LITH ATTORNEY **Second Defendant**

JUDGMENT DELIVERED ON 2 MAY 2014

BOQWANA, J

Introduction

[1] This matter concerns a Special Plea of Prescription raised by the first defendant in a claim for damages brought by the plaintiff against the defendants. The issues to be determined are whether the plaintiff's claim prescribed by virtue of his alleged failure to institute legal proceedings within 5 years as from the date the claim arose (after having lodged a claim within 2 years as from date of accident) as contemplated by the provisions of the Multilateral Motor Vehicle Funds Act ('the MMF Act')[1]and Regulations promulgated under that Act, and/or whether the provisions of the Prescription Act[2] do apply to the matter at hand. The parties agreed that the issue be decided on an agreed statement of facts as envisaged in rule 33 of the Uniform Rules.

Agreed facts

[2] The agreed facts are as follows. On 16 July 1994, Quinton Human ('the patient') was injured in a motor vehicle accident on a public road. On 30 November 1995, Advocate Warren Young ('Adv. Young') was appointed by the Court in case number 9935/1995, as *curator ad litem* (with duties and obligations as set out in the Court Order) and the patient's father, Mr John Human, was appointed as his *curator bonis*.

[3] Adv. Young resigned from the Cape Bar in November 1998. On 10 July 1996 the second defendant lodged an MMF1 Claim Form with the first defendant. On 22 November 1999, Adv Young was substituted by a Court Order in the Chamber Book Application 745/1999 as *curator ad litem* by Advoacte Jan-Hendrik Roux, the present *curator ad litem*.

[4] After the death of Mr John Human, Mr Deon Oliver of Village Trustees had been substituted as *curator bonis* of the patient by the Master of the High court on 29 February 2008.

[1] Act 93 of 1989
[2] Act 68 of 1969

[5] On 12 and 14 August 2009, the plaintiff served his summons on the first and second defendants respectively. The patient has been under curatorship (*ad litem en bonis*) since November 1995 to the present.

[6] The aforesaid collision and plaintiff's claim against the first defendant in terms thereof are regulated by the MMF Act. The patient has, as diagnosed by medical experts who evaluated him in support of the curator application, the mental state of: inappropriate behaviour, memory deficit, and concentration deficit.

[7] The parties agreed that, should the first defendant's special plea be dismissed, the action pertaining to the first defendant's liability and the resultant quantum determination shall continue against first defendant only and that the plaintiff's claim against the second defendant stands to be dismissed.

First defendant's special plea

[8] The first defendant avers that the plaintiff's claim against the first defendant is governed by the provisions of the MMF Act and the Regulations promulgated thereunder and by the Road Accident Fund Act[3]

[9] It contends that in terms of the aforesaid Acts and Regulations a claim of compensation arising from the driving of a motor vehicle, where the identity of the owner or driver is not established, should be lodged with the Multi Vehicle Accident Fund ('the MMF') within a period of 2 (two) years from the date of the accident and the same must be enforced by way of legal proceedings within 5 (five) years as from date of accident. The plaintiff alleges that the collision occurred on 16 July 1994, and the plaintiff had to lodge his claim in accordance with the provisions of the MMF Act by 15 July 1996, and serve summons on the first defendant by no later than 15 July 1999.

[10] The first defendant further alleges that the second defendant was requested by Adv Young in his capacity as *curator ad litem* to prepare a claim on Mr

[3] Act 56 of 1996

Human's behalf against the MMF. The second defendant lodged the statutory and requisite MMF1 Form on behalf of the patient together with relevant correspondence on 11 July 1996.

[11] Between the periods of 1996 and 2000 various correspondences ensued between the first and second defendants regarding requests for documents, settlement offers and clarity on further steps, amongst others.

[12] On 2 August 2000, the first defendant advised the second defendant that it had come to their attention that the matter prescribed on 15 July 1999 and their offer of 31 May 1999 was no longer valid as the 30 day period had expired without it being accepted. Upon receiving a letter from the second defendant on 13 September 2000 which enclosed an opinion and requesting that 'further negotiations be entered to settle the matter', the first defendant informed the second defendant that it was not authorised to waive prescription in this matter and that the matter had prescribed on 15 July 1999.

Plaintiff's submissions

[13] The plaintiff argues that prescription of a claim in terms of the MMF Act by a person under curatorship where the claim arises from a motor vehicle accident involving an unidentified motor vehicle is governed by Chapter III of the Prescription Act (subject to the provisions of article 57 of the Agreement in terms of the MMF Act, which extends the prescription from 3 years to 5 years).

[14] According to the plaintiff, completion of prescription is delayed in terms of section 13(1) (a) of the Prescription Act where the claimant is under curatorship. The plaintiff argues that the patient was placed under curatorship on 30 November 1995 and has been under such curatorship ever since that date to the present. His claim was lodged with the first defendant within the 2 year period provided for in the MMF Act and Regulations. The patient had been under curatorship before the expiry of the 5 year period and to this day he remains under curatorship. As a result completion of prescription of his claim remains delayed and his claim did not

become prescribed by the date upon which summons was served on the first defendant. As a result, the plaintiff contends that the first defendant's special plea is without merit and stands to be dismissed with costs.

Second defendant's submissions

[15] The second defendant avers that it makes common cause with the plaintiff's argument on the Special Plea raised by the first defendant. Pertaining to the second defendant's further and alternative special plea of prescriptions *vis a vis* the plaintiff, such would only become relevant if the Court upholds the first defendant's special plea of prescription. By agreement between the parties such alternative special plea is held over pending the finalisation of the Court's determination on the first defendant's special plea.

[16] In his replying argument at the hearing of this matter, counsel for the first defendant, Mr Eia, criticised the fact that, in paragraphs 1.2 and 1.3 of the second defendant's special plea, the second defendant averred that the claim against the first defendant had prescribed. Mr Oosthuizen SC, counsel for the second defendant, filed a supplementary note on 27 March 2014 pointing to the agreement between the parties I have referred to in paragraph 15 above and contending that the correctness of the allegations in the special plea are not an issue to be decided by the Court at this stage and thus are wholly irrelevant to the issues to be decided at this stage. It is further argued by Mr Oosthuizen that in any event, the special pleas raised by the second defendant in paragraphs 1 and 2 of its special pleas are based on an incorrect interpretation of the law and should it become relevant and the plaintiff persist, the second defendant would file an amendment providing deletion of the said paragraphs of the special plea. Any determination made by the Court, it is submitted by Mr Oosthuizen, would undoubtedly be binding on plaintiff and defendants, both now and in the future due to the principles of *res judicata* and the issue of estoppel. Submissions made by Mr Oosthuizen in his supplementary note were not challenged by counsel for both the plaintiff and first defendant.

The legal framework

[17] There are in essence two sets of legislation that have been raised by the parties in this matter, being the MMF Act and the Regulations promulgated under that Act on the one hand and the Prescription Act on the other. What is to be considered is whether the provisions of the two Acts are inconsistent with each other and the extent of that inconsistency, and if there is inconsistency which of the legislation would be applicable in regulating this matter.

[18] The MMF legislation is constituted in three separate parts being: the Act itself, the Agreement establishing the MMF as set out in the schedule to the MMF Act ('the Agreement'), as amended, and Regulations promulgated in terms of Section 6 of the MMF Act. The MMF Act itself contains no provisions directly relevant to prescription at all. Section 2(1) of the Act provides that: 'The Agreement...shall, subject to the provisions of this Act, have the force of law and apply in the Republic of South Africa, as if it were an Act of Parliament of the Republic of South Africa. 'Section 6 (1) empowers the Minister of Transport ('The Minister') to make Regulations to give effect to any provisions of the Agreement. The Regulations made by the Minister are referred to in the definitions section 1 of the MMF Act as follows:

> 'In this Act, unless the context otherwise indicates –
>
> ....
>
> "this Act" includes the regulations made under s 6.'

[19] In so far as the Agreement is concerned Chapter XVIII which deals with the prescription of claims contains three provisions relevant to this case which are Articles 55, 56 and 57. Articles 55 and 56 deal with motor vehicle accidents caused by identified motor vehicles. Article 55 provides as follows:

> 'Notwithstanding the provisions of any other law relating to prescription, but subject to the provisions of Articles 56 and 57, the right to claim compensation under Chapter XII from the MMF or an appointed agent in respect of claims arising from the driving of a motor vehicle in the case where the identity of either the owner or driver thereof

has been established, shall become prescribed upon the expiry of a period of 3 years from the date upon which the claim arose.'

[20] Article 56 of the Agreement provides that:

'Article 56

Prescription of a claim for compensation referred to in Article 55 shall not run against

(a) a minor;

(b) any person detained as a patient in terms of the provisions of mental health legislation applicable within the area of jurisdiction of a Member; or

(c) a person under curatorship'

[21] The abovementioned Articles therefore do not apply in the present matter. Article 57 however is not limited to identified motor vehicles. It also applies to unidentified motor vehicles. Article 57 reads as follows:

'Notwithstanding the provisions of Article 55, no claim which has been lodged under Article 62 shall prescribe before the expiry of a period of 5 years from the date on which the claim arose.'

[22] The first defendant's Special Plea is primarily based on Regulation 3 of the Regulations promulgated in terms of section 6 of the MMF Act and the subsequent Road Accident Fund Act, 56 of 1996 which deals specifically with the liability of the MMF in respect of the claims arising from the driving of a motor vehicle in cases where the identity of neither the owner nor the driver could be identified.

[23] Regulation 3(1) c(i) and (ii) of the aforesaid Regulations provide as follows:

' 3.(1) The liability of the MMF in terms of the Agreement in respect of claims for bodily injury or death arising from the driving of a motor vehicle of which the identity of neither the owner nor the driver can be established (hereinafter referred to as the unidentified motor vehicle) shall be subject to the following conditions:

(a) The MMF shall not incur any liability unless –

.....'

[24] Regulation 3(2) provides as follows:

' (2) The liability of the MMF in respect of claims which arise in terms of this regulation shall be subject to the following further conditions:

(a) (i) A claim for compensation for loss or damage suffered by the claimant shall be delivered to the MMF within two years from the date upon which the claim arose mutatis mutandis in accordance with the provisions of Article 62 of the Agreement.

(ii) The provisions of subparagraph (i) shall also apply to all third parties and claimants, irrespective of whether they are subject to any legal disability.

(b) No such claim shall be enforceable by legal proceedings commenced by a summons served on the MMF before the expiration of a period of 90 days as from the date on which the claim was sent or delivered by hand, as the case may be, to the MMF as provided for in paragraph (a) (i):

Provided that if the MMF repudiates in writing liability for the claim before the expiration of the said period, the claimant may at any time after such repudiation serve summons on the MMF.

(c)(i) The MMF shall not incur any liability unless the summons arising from the provisions of paragraph (b) above has been properly served on the MMF within five years from the date on which the claim arose as provided for in paragraph (a) (i): Provided that the court shall not hear the action before the third party has lodged with the court a certificate *probabilis causa litigandi* prepared by an independent advocate or attorney of not less than 10 years' standing who has considered all the evidence concerning causation and liabilityto each of the litigants.

(ii) The provisions of subparagraph (i) shall also be applicable to all third parties and claimants, irrespective of whether they are subject to any legal disability.'

[25] Regulation 3(2) is the relevant provision for the purposes of the stated case. The first defendant accepts that a valid claim as required by regulation 3(2) (a) (i)

was lodged by the plaintiff on 11 July 1996. The requirements of that provision were accordingly satisfied. The issue raised by the first defendant is that summons was not served within five years from the date on which the claim arose as required by regulation 3(2) (c) (i), which would have been on or before 15 July 1999. Instead it was served 15 years later on 12 August 2009.

[26] Sections 13(1)(a) and 16 of the Prescription Act which the plaintiff rely on provide as follows:

'**13. Completion of prescription delayed in certain circumstances. –**

(1) If –

(a) The creditor is a minor or is insane or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1); or

(b) The debtor is outside the Republic; or...

(c) .....

.....

(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after , the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist,

the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)'('Own emphasis)

...'

[27] Section 16 of the Prescription Act provides as follows:

'16. Application of this Chapter. – (1) Subject to the provisions of subsection (2) (b), the provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes

conditions on the institution of an action for the recovery of debt, apply to any debt arising after the commencement of this Act.

[28] It is submitted by Mr Duminy SC on behalf of the plaintiff that the regulations that the first defendant relies on are in conflict with section 13(1)(a) of the Prescription Act (in respect of the period prescribed for prescription of the claim). According to the plaintiff where there is conflict between the Prescription Act and another statute, the Prescription Act must yield to the third party legislation as prescribed in section 16 of the Prescription Act. Regulations 3(2) c(i) and (ii) of the MMF Act, that the first defendant rely on, are, however, not an Act of Parliament as envisaged in section 16 of the Prescription Act and accordingly do not take precedence over the provisions of the Prescription Act. Section 13 (1) (a) therefore applies in these circumstances, delaying the completion of prescription of the patient's claim.

Analysis

[29] To determine whether or not the Prescription Act or the regulations regulate the special plea of prescription raised by the first defendant, section 16 of the Prescription Act should be the starting point. In **Moloi & Others v Road Accident Fund**[4], the Court held that:

'[13] It is convenient to deal with this latter point first. Although section 16 of the Prescription Act is not drafted as clearly as it might be it is reasonably plain that what is intended is that the provisions of Chapter III will apply to all debts save where they are ousted by the provisions of an Act of Parliament which is inconsistent and then only to the extent of the inconsistency. The inconsistent provisions which have to be included in an Act of Parliament and which will oust some or all of the provisions of Chapter III are provisions which (a) prescribe a specified period within which a claim is to be made; (b) prescribe a specified period within which an action is to be instituted in respect of a debt or (c) impose conditions on the institution of an action for the recovery of a debt. Regulation 3(2) (a) is a provision falling under (c) above because it purports to impose conditions on the institution

[4] 2001 (3) SA 546 (SCA) at 552 in paragraph 13

of an action. It follows from the plain terms of section 16 that unless such provision has the status of an Act of Parliament it is invalid.

[14] I do not agree that the provisions of the Prescription Actare ousted because of the fact that in section 1 of Act 93 of 1989 the words "this Act" are defined so as to include the regulations made under section 6. It is clear from the introductory words to section 1 that the statutory definition of "this Act" applies in the interpretation of Act 93 of 1989 itself. There is no substantive elevation of the regulations to the status of an Act of Parliament. It is instructive in this regard to compare how the regulations are dealt with in section 1 with what is said in section 2(1) about the Agreement, *viz*: "The Agreement . . . shall, subject to the provisions of this Act, have the force of law and apply in the Republic of South Africa, *as if it were an Act of Parliament of the Republic of South Africa*." (The emphasis is mine.)

[15] In other words it is clear that the Agreement has been expressly given the status of an Act of Parliament and it was accordingly accepted by this Court in *Road Accident Fund v Smith N O*[1998] ZASCA 86; 1999 (1) SA 92 (SCA) that provisions in the Agreement dealing with prescription oust inconsistent provisions of the Prescription Act in terms of section16thereof.

[16] If Parliament had intended the regulations made under section 6 of Act 93 of 1989 also to have that status so as to oust inconsistent provisions of the Prescription Act, I would have expected a similar provision to that contained in section 2 to have been included as regards theregulations.

[17] In the absence of such a provision it cannot be held in my view that the regulations are to be regarded as included in Act 93 of 1989 for any purpose other than interpreting the expression "this Act" therein and they do not have the status of an Act of Parliament for any other purpose. The result is that they cannot oust the provisions of Chapter III of the Prescription Act in the case of a minor's claim in terms of the Agreement where such claim arises out of the driving of a motor vehicle of which the identity of neither the owner nor the driver can be ascertained. It follows that the plaintiffs' contention as set out in paragraph 8 of the stated case should in my view have been upheld.

[30] Section 16 of the Prescription Act plainly provides that provisions of Chapter III dealing with prescription of debts and which include section 13 shall apply to any debt arising after the commencement of that Act, save as in so far as they are inconsistent with the provisions of any Act of Parliament prescribing a

specific prescription period, in which case such Act of Parliament will override such Prescription Act provision.

[31] The **Moloi** decision found that there is no substantive elevation of the Regulations to the status of an Act of Parliament. Although the **Moloi** matter dealt with Regulation 3(2) (a) (i) and (ii), the decision dealt with a principle that a Regulation (it being not an act of Parliament) could not override the provisions of the Prescription Act. The Court held as follows:

> 'The result is that they cannot oust the provisions of Chapter III of the Prescription Act in the case of a minor's claim in terms of the Agreement where such claim arises out of the driving of a motor vehicle of which the identity of neither the owner nor the driver can be ascertained. It follows that the Plaintiff's contention as set out in paragraph 8 of the stated case should, in my view, have been upheld.[5]

[32] Paragraph 8 of the stated case in that matter was to the effect that sections 13 and 16 of the Prescription Act were applicable in that case and their effect was that prescription did not run against minors.[6]

[33] I am therefore not persuaded by the argument made by Mr Eia that **Moloi** is distinguishable simply because it dealt with Regulation 3(2)(a)(i) and (ii) and not with Regulations 3(2)(c)(i) and (ii). That decision clearly found on principle. As can be seen from the **Moloi** decision above section 2(1) of the MMF Act provides that: 'The Agreement . . . shall, subject to the provisions of this Act, have the force of law and apply in the Republic of South Africa, as if it were an Act of Parliament of the Republic of South Africa.'(Own emphasis) but no such is mentioned when pertaining to the Regulations.

[34] The only provision in the ambit of the MMF Act that can be said to be inconsistent with the Prescription Act is Article 57 in the Agreement. Undoubtedly if the Legislature intended the Regulations to have the same status as the Act of Parliament it would have said so as Farlam AJA (as he then was) observed in the

[5] See Moloi & Others v Road Accident Fund supra at paragraph 17
[6] See Moloi & Others v Road Accident Fund supra at paragraph 6 E

Moloi judgment. **Article 57** (in the Agreement) specifically states that the term of prescription is five years (and not three years as provided for in the Prescription Act).

[35] There are however no provisions in the MMF Act or Agreement, dealing with the certain circumstances in which the completion of prescription is delayed; such are dealt with in section 13 of the Prescription Act. Section 13 of the Prescription Act would therefore regulate the delay in completion of prescription as the MMF Act is silent on this. The calculation of five years in **Article 57** must therefore be read subject to the provisions of Section 13(1) (a) of the Prescription Act.

[36] Section 13(1)(a) delays prescription for as long as the person is under curatorship. The claim will become prescribed one year after the impediment of curatorship has been lifted. That section neither defines curatorship nor provides any examples of what the term could be referring to. The first defendant has raised an alternative argument relying on the decision of **ABP 4 X4 Motor Dealers (Pty) (Ltd) v IGI Insurance Co Limited**[7]. It is argued on behalf of the first defendant that 'a person under curatorship' referred to in section 13 of the Prescription Act does not include a person such as the patient in the present matter because the appointment of the *curator ad litem* enabled the curator to institute legal proceedings on behalf of the patient. Mr Eia argued that once a *curator ad litem* was appointed the impediment under section 13 falls away (as the patient was not disabled from suing).

[37] In the **ABP 4x4 Motor Dealers**[8] decision the Court held that:

> '[29] The legislature has not defined or explained in the Act what the words 'a person under curatorship' are intended to comprehend. Nor are any examples given in the Act from which it might be possible to deduce it. One is thrown back upon the

[7] 1999 (3) SA 924 (SCA)

[8] ABP 4x4 Motor Dealers supra at paragraph 29

ordinary meaning of the words used with due regard to the context, the apparent purpose of the provision in which they are found and, of course, to their setting in, and the object of, the statute as a whole. In the process one has to bear in mind that the concept of curatorship in the present day South African law is no longer limited to its well known manifestations in the common law but extends to a number of statutorily created curatorships, each with its own raison d'être. The spectrum is wide indeed. Such curatorships sometimes apply to both natural persons and juristic persons and sometimes to only one or other of those classes of persons. Their reach and effect is sometimes all-embracing and disabling and sometimes narrowly confined with very little accompanying disablement. Their raison d'être is sometimes the same as that in another statute; sometimes it is unique to the statute in which it is found. Herein lies the rub.'

[30] The Legislature must be taken to have been aware of its creations when it employed the expression 'a person under curatorship' in the Act. The question then is which (if any) of them is to be included and which (if any) to be excluded and, more specifically, of course, whether the particular curatorship which exists in this case is to be included. If all are to be included some absurd results will ensue as I shall attempt to demonstrate in due course. If some are to be excluded the question of what criteria determine exclusion arises'

[38] **ABP 4x4 Motor Dealers** decision does not in my view support the first defendant's proposition that when a *curator ad litem* has been appointed the impediment in section 13 falls away as the curator will be able to institute legal action. The Court in the **ABP 4x4** case was faced with a different legal question which was whether reference to 'a person under curatorship' in section 13(1)(a) of the Prescription Act was to a natural person and not a juristic conception to which legal personality had been artificially attributed by law, and whether 'the relevant impediment referred to in paragraph (a)'showed that curatorships which did not disable the subject of the curatorships or curators from commencing legal proceedings to enforce claims was not the kind of curatorship envisaged in section 13(1)(a).

[39] The Court held that a company under curatorship could be covered by section 13 (1) (a) of the Prescription Act. The Court saw no reason why the insurance company could not be under curatorship within the meaning of section 13 (1) (a). It held that:

> '..if assumption of total control by a curator is an (even if not only) underlying rationale for the inclusion of persons under curatorship in s13 (1) (a), as I think is the case, I see no good reason for concluding that respondent is not a person under curatorship within the meaning of the provision. It is as much a person under curatorship as a company which has been placed under curatorship *eo nomine*'[9]

[40] The **ABP 4x4** judgment endorsed a view that the word 'impediment' covered a wide spectrum of situations ranging from 'those in which it would not be possible in law for the creditor to sue to those in which it might be difficult or awkward, but not impossible, to sue. In short, the impediments range from the absolute to the relative.'[10]

[41] It is further clear from the **ABP 4x4** judgment that the phrase 'person under curatorship' has a wide interpretation. That judgment, in my view, is no authority for the proposition that once a curator is appointed, then the impediment in s13 finds no application. Furthermore, a person under curatorship has been held in **Van Ryhn N.O v AA Ondering Assuransie-Assosiasie Beperk**[11] to include a person in respect of whom a *curator ad litem* has been appointed in terms of section 24(1) (b) (iii) of the Compulsory Motor Vehicle Act 56 of 1972 and therefore enjoying protection of that section. The running of the prescription period was held to be suspended by the appointment of the *curator ad litem* where a person has a claim against the insurer in terms of that Act in **Van Ryhn** decision.[12] The principle enunciated in that decision must also be upheld in this case, albeit referring to a different statute.

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[9] ABP 4x4 Motor Dealers supra at paragraph 40

[10] ABP 4x4 Motor Dealers supra at paragraph 11

[11] 1986 (3) SA 460 (O)

[12] Van Ryhn N.O v AA Ondering Assuransie-Assosiasie Beperk supra at 462 to 463

[42] I am in agreement with counsel for both the plaintiff and second defendant that there can be no room to 'develop' the ordinary meaning of the words 'person under curatorship' in section 13(1)(a) in the manner contended for the first defendant.

[43] In support of the plaintiff's argument, Mr Oosthuizen argued on behalf of the second defendant that the interpretation that the first defendant seeks to attach to section 13 of the Prescription Act would be profoundly unjust. To support his view he referred to the decision of **Road Accident Fund v Smith N.O**.[13] where the court held at 102C to 102E:

> 'If Parliament in enacting the 1989 Act, with the Agreement as a schedule, which was to have the force of law as if it were an Act of Parliament (see s2(1) of the 1989 Act), or before that in enacting the 1978 Act, had intended to deprive persons who had been protected from the running of prescription under the common law and later were protected under s13(1)(a) of the Prescription Act of any protection at all from prescription, I would have expected much clearer language than the language which was used. Put bluntly the intention attributed to Parliament by the appellant is that an insane person who has not been detained, will, otherwise than at common law and under the Prescription Act, be exposed to the full rigorous prescription. This notwithstanding that Parliament must be taken to have been aware of the fact that a result of the change of policy regarding mentally ill persons which it approved when it passed the 1973 Act was that a large number of persons previously described as insane would not be detained under the mental health legislation. Such an interpretation as the appellant proposes would in my view be profoundly unjust.'

[44] A further submission was made by Mr Eia that it is not so much that the plaintiff's claim has prescribed against the first defendant, in that the second defendant and/or the *curator ad litem* failed to comply with the applicable and still valid statutory regulations, but no liability has arisen against first defendant due to the failure to issue summons before the expiry of five years from the date of occurrence of the motor vehicle accident. In effect, the first defendant argues that

[13] 1999 (1) SA 92 (SCA)

the Prescription Act, 68 of 1969 ('Prescription Act') is of no application as not only did the patient have a *curator a litem* appointed but a valid claim was properly and timeously lodged and filed with the first defendant.

[45] Apart from the fact that this proposition differs from what has been pleaded and from the issues contained in the stated case a valid claim was submitted within the two year period imposed in terms of Article 62. The condition imposed on the institution of the action was fulfilled. That being done, liability was established. Once Summons is not served in accordance with Regulation 3(2)(c)(i) within the five year period, that becomes a prescription issue as pleaded by the first defendant. In **Moloi**[14] the Court, approving of the view expressed in the decision of **Mbatha v Multilateral Motor Vehicle Accidents Fund**[15] held that Regulation 3(2) (a) (i) imposed a condition not in a proper sense of the word but a prescriptive period.

[46] Given the fact that the claim was submitted within the two year period with the first defendant the next issue to be determined was whether the claim had prescribed given the plaintiff's failure to institute summons within a year five year period from the date on which the claim arose. Section 13(1) (a) of the Prescription Act which I have found applies in this case provides that the plaintiff's claim will only become prescribed one year after the impediment of curatorship had been lifted. That impediment can only be removed by a Court Order.

[47] The issue of how sections 13 and 16 of the Prescription Act should be interpreted and their application *vis a vis* other Acts of Parliament and in particular regulations promulgated under the MMF Act has been dealt with and decided by the cases that I have referred to and in particular the **Moloi** decision, which I find is binding on this Court.

[14] Moloi & Others v Road Accident Fund supra at paragraphs 20 and 21
[15] 1997 (3) SA 713 (SCA) at 716C

[48] In the result, I find no merit in the first defendant's special plea and as such the matter is to proceed as agreed by the parties in their stated case. Costs shall follow the result.

[49] I therefore make the following order:

1. The first defendant's Special Plea is dismissed and the first defendant is directed to pay costs of the plaintiff including costs of two counsel and costs of the second defendant.

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N P BOQWANA

Judge of the High Court

APPEARANCES

FOR THE PLAINTIFF: Advocate W R E Duminy SC and Advocate T J Nel

INSTRUCTED BY: Harold Gie Attorneys, Cape Town

FOR THE FIRST DEFENDANT: Advocate P C Eia

INSTRUCTED BY: Cliffe Dekker Hofmeyr Inc., Cape Town

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