(Western Cape Division, Cape Town)

(Coram: LE GRANGE, MANTAME, et NUKU, JJJ)

Case No: A119/2019

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA **Appellant**

and

ADVOCATE CHRISTO BISCHOFF N.O. obo
DENZIL REYNERS **Respondent**

JUDGMENT: DELIVERED 12 MAY 2022
(Electronically Delivered)

(MANTAME et NUKU JJ concurring albeit for different reasons, LE GRANGE J dissenting).

MANTAME J

Introduction:

[1] This appeal on all fours turns on prescription. The appellant was granted leave to appeal by the Supreme Court of Appeal on 22 January 2021 to this Court after the trial court refused same on 6 August 2020. The issue on appeal is whether or not the trial court correctly dismissed the appellant's special plea on prescription.

[2] The respondent is the curator *ad litem* to Denzil Reyners ("*Mr Reyners*") who was born on 8 August 1980. An application for the appointment of a curator *ad litem* for Mr Reyners was made on 8 January 2013 and an order granting the curator *ad litem* was granted on 7 February 2013. The summons commencing action against the appellant were filed on 23 August 2013, some twelve (12) years after the incident.

Background Facts:

[3] Mr Reyners fell from the open doors of a moving train on 20 February 2001. He was travelling from home to work and the incident took place between Ysterplaat and Mutual Stations, Cape Town. As a result of this accident, he was taken to Somerset Hospital and later transferred to Groote Schuur Hospital. He sustained injuries in his head, and a right compound depressed temporal skull fracture with underlying acute extradural haematoma was noted in his Groote Schuur medical records. His condition was noted as stable when he arrived at the hospital and his Glasgow Coma Scale ("*GCS*") was noted as 14/15 on 20 February 2001 and 15/15 on 21 February 2001.

[4] Mr Reyners was taken to theatre on the day of his admission for surgery. A craniotomy was performed. The fracture was elevated and the extradural was evacuated and the bone fractures were repositioned. His surgery was reported on the medical records as successful. Mr Reyners was transferred back to Somerset Hospital on 23 February 2001 for full recovery and management after he had fully stabilised and was fully able to manage himself.

[5] It is not clear as to the amount of time he spent recuperating at Somerset Hospital as there are no medical records on record. However, he was later on discharged from hospital after spending a week or two in that institution.

[6] Amongst the reasons that the respondent put forward that motivated for an appointment of a curator *ad litem* was that Mr Reyners did not have a recollection of the accident.

Evidence Led:

[7] During trial the respondent called two lay witnesses, Llewellyn Grove *("Mr Grove")* and Natasha Cupido *("Ms Cupido")* and five (5) expert witnesses, that is, Dr Lawrence Tucker *("neurologist"),* Ms Mignon Coetzee *("neuropsychologist*"), Dr Keir Le Fevre *("psychiatrist"),* Dr Peter Whitehead *("industrial psychologist")* and Ms Elise Burns-Hoffman *("occupational therapist")*.

[8] **Mr Llewellyn Grove** *("Mr Grove")* testified that he met Mr Reyners in 2000, and they worked together at the Independent Newspaper ("*Cape Argus*") in Cape Town. They worked as general workers, and their duties entailed cleaning, and operating machines in the insert and dispatch department. Since they were appointed the same day, they worked on the same shift from 14:00 – 22:00 from Monday to Friday. Both of them stayed in Mitchell's Plain. Mr Reyners stayed in Tafelsig and Mr Grove in Woodlands. A relationship between them developed as they also travelled by train together to work. Mr Reyners would be the first to board the train and once Mr Grove boarded the train at his station he would join him in the carriage.

[9] On the day Mr Reyners fell from the train, they were travelling together to work. When he fell off, he could not follow immediately and find out what happened, he remained in the train until the next stop and got off to look for Mr Reyners. Since Mr Ismail, their co-worker was also with them in the same train, he asked him to proceed to work and report the incident. He then ran back to where Mr Reyners fell. He found him walking towards the N1. He was full of blood and Mr Reyners took his t-shirt off and wrapped it around his head. They both walked towards the N1 freeway to get some assistance. An unknown person, who introduced himself as a doctor stopped his vehicle and put his first aid kit into use and assisted Mr Reyners. He placed a bandage around Mr Reyners head and called an ambulance.

[10] Mr Grove testified that on the next day or two after the incident he visited him at City Park Hospital. He was later on transferred from City Park Hospital to Groote Schuur Hospital. He stated that Mr Reyners was an outgoing person before the accident, but after the accident he was withdrawn and had anger issues. He had two (2) girlfriends in succession and the relationships ended as a result of his anger

issues. It was his opinion that at least he remained in contact with the first girlfriend as they had a boy child together. To date, he has a relationship with his boy as the child visits his home frequently.

[11] As friends, they always reflected and referred their thoughts back to the incident. During cross-examination he confirmed that Mr Reyners knows about what transpired to him as he informed him. He was capable of relating the incident to another person and / or seek assistance with regard to a possible claim. It was his testimony that Mr Reyners did not return back to work after this incident.

[12] **Natasha Jane Cupido** ("*Ms Cupido*") confirmed that she is Mr Reyners older sister and they shared residence at their family home in Tafelsig. Before the accident, they were very close. She even got him a job at the Cape Argus and he performed his job well. She confirmed that he used to be an outgoing person before the accident. The accident changed his personality.

[13] She confirmed further that on the day of the accident, Mr Reyners was taken to Somerset Hospital and later on transferred to Groote Schuur Hospital. After he was discharged his mood changed. He was rude and at times forgetful. He also complained about recurrent headaches.

[14] It was put to Ms Cupido during cross-examination that according to the report of Dr Francis Hemp, Mr Reyners was back to work after a month after the accident. Her response was that she would not have known that as she was not staying at home that particular time. She was still married and stayed with her husband.

[15] In fact, her family did not know that they can file a civil claim after the accident. It was after Trevor Chadwick *("Mr Chadwick")*, a neighbour who was involved in a motor vehicle accident and received compensation that he asked Mr Reynders if he received any form of compensation from his accident, that he took steps. Otherwise, her younger brother knew all the time that he fell from the train and sustained head injuries.

[16] **Dr Lawrence Tucker** ("*Dr Tucker*") testified that he is a neurologist who assessed Mr Reyners and he prepared two (2) reports. Dr Tucker was requested to examine him for the first time on 6 December 2015 and assess him for any potential long term or significant sequelae which might or might not have resulted from a head injury which he sustained. Mr Reyners complained of dizzy spells or blackouts and headaches.

[17] According to what he was told Mr Reyners had no recollection of the accident. His only recollection was when he saw his mother next to his bed at Groote Schuur Hospital. When he got admitted at Somerset Hospital his GCS was 14/15 meaning that there was a mild depression of consciousness. So, he graded his head injury as mild to moderate-severity based on that Glasgow Coma Scale. Although the doctor did not have access to CT scan images that were taken at the time, his testimony was that the report indicated that he had a depressed skull fracture over the right frontal parietal area and a subdural haematoma, meaning there was a collection of blood beneath that skull fracture. This meant that this was a focal injury. A focal injury is one that involves a discrete area of the brain and does not render one unconscious. Mr Reyners was referred to the neurosurgeons and he was taken to the theatre and the blood was drained, and the depression of the skull was lifted.

[18] Dr Tucker did not want to classify this injury as mild although the clinical records stated so. In his testimony he said: "*it has a diffuse component, which is at least mild, by my "feeling" is more likely best regarded as a moderate diffuse brain injury.*"[1] The doctor confirmed that after the surgical procedure the GCS of Mr Reyners was 15/15. He was prescribed a prophylactic dose of antiepileptic drug called Phenytoin. It was his opinion that maybe the treating doctors were concerned that Mr Reyners might develop a seizure. After three (3) days he was transferred back to Somerset Hospital for recuperation.

[19] At two and / or eight months after the incident, Mr Reyners was back at Groote Schuur Hospital as he complained about headaches and dizziness and he

[1] Record page 187 line 19 - 21

was attended at trauma unit. That in his view was not anything particularly significant.

[20] Dr Tucker appreciated that Mr Reyners returned to his post after the incident at Cape Argus but his contract came to an end and it was not renewed. He then proceeded to work in a Yacht Building Company as a carpenter after being recommended by his brother who worked for the same company, but could not cope. He moved out to do painting work where he took a fall from a ladder. He could not explain how this happened. His mother reported that Mr Reyners was verbally and physically aggressive, had become slower, had trouble concentrating and his memory had been poor. In his opinion, these symptoms are associated with head injury. In Mr Reyners situation, the most significant neurophysical sequence of his head injury is epilepsy. According to Dr Tucker, he 'thinks' he suffers from epilepsy. He also 'thinks' he suffers from focal seizures, but has not spread to give convulsion that all are familiar with. One does not necessarily fall on the ground, shake or bite his tongue. His opinion is based on the odd dizziness that was reported to him by Mr Reyners.

[21] This suspicion by Dr Tucker was based on the report by Mr Reyners being on the ladder and then next he was on the ground. In his words – "*So that is quite suspicious of a focal epileptic attack which hasn't necessarily become generalised.*"[2] In his opinion, the temporal area is the most epileptogenic part of the brain. Further, the EEG that was performed suggested some slowing in the frontal region. Sometimes that indicates focal damage in that region. At times, the little spikes or sharp wave may indicate a short circuit in the brain or epilepsy. However, there are differences of opinion with his colleagues. Dr Lee Pen's opinion was that the spikes were normal. These EEG's were notably taken twelve (12) years after the incident. Based on his opinion, it was Dr Tucker's conclusion that Mr Reyners needs a curator as he is unable to manage his affairs.

[22] Dr Tucker conceded during cross-examination that at the time of examining Mr Reyners, it was not his brief to look at whether he was able to manage his affairs

[2] Record page 195 line 11 - 12

or not. His opinion is based on the information in the neuropsychologist's report. He further confirmed that when he last saw him he was not taking any epilepsy medication. Dr Tucker when asked about a difference between cognitive problems after the incident and ordinary temper problems, he stated that the two are closely related. He agreed with the Counsel's suggestion that Mr Reyners was clearly in a position to cope with his daily tasks at home.

[23] Further, it was put to him that Dr Hemp's report stated that:

> "*Neurological examination was normal and he scored 29/30 on the Folstein Mini Mental State examination.*"

Dr Tucker's explanation was that the Folstein Mini Mental State examination is a rough and rudimentary quick test of mental functioning. A score of 29/30 is a normal score. However, the examination performed on Mr Reyners did not test his behaviour. A neuropsychologist would agree that his cognition is not normal. In his opinion, that score does not exclude cognitive problems. An extensive test has to be performed – which in this situation was not done.

[24] **Ms Mignon Coetzee** ("*Ms Coetzee*") a clinical psychologist who specialises in the neuropsychology testified that she prepared an affidavit in support of an application for an appointment of curator *ad litem*. Her main report is dated 22 September 2015 and a supplementary report is dated 12 September 2017.

[25] Ms Coetzee's first interaction with Mr Reyners was on 6 October 2011. She received instructions to evaluate Mr Reyners on whether he was in need of a curator *ad litem*. In her first report, she was requested to conduct a neuropsychological evaluation in order to determine whether Mr Reyners suffered from any enduring neuropsychological sequelae. She performed her formal testing of Mr Reyners fourteen (14) years after the incident. With the information she received, Mr Reyners had two (2) children from different mothers. One Jade, was in his early teens and resided close by to Mr Reyner's house. The second one was five (5) years old, and he had little or no contact with the child.

[26] Mr Reyners was born at Groote Schuur Hospital after his mother had two (2) miscarriages and this pregnancy was considered high risk. Mr Reyners was a normal

child with normal developmental milestones, but presented with learning difficulties with respect to reading, writing and spelling skills. He repeated Grade One (1) and was taken out of school at Grade Five (5). He was tasked with helping his mother at home and with looking after his young sibling. In his teens, he entered the labour market and was employed at SSB Builders. He performed general work in the construction industry. He later secured employment at Cape Argus through his sister Natasha Cupido. He started this job after turning eighteen (18) years and just over twenty (20) years he was involved in an accident.

[27] When he returned back to his work after the accident he was advised that his work is unsatisfactory and his work terminated. His brother then secured him a job as carpenter at a Yacht builder business. Mr Reyners behaviour, impulsivity and forgetfulness caused difficulties in the workplace.

[28] Mr Reyners had no history of head injuries, seizures or surgeries. He enjoyed good health. However, he smoked cigarettes and marijuana, but discontinued after the accident.

[29] Ms Coetzee confirmed that she prepared a joint report with Dr Francis Hemp. They agreed that the diffuse component of the brain injury was a mild injury. They agreed further that Mr Reyners sustained a compound depressed right frontal parietal skull fracture with an underlying extradural haematoma – which caused local mass effect. However, the CT scan that was performed on the following day confirmed that the blood had been removed – but there was still swelling. After the incident, a number of physical and cognitive difficulties were reported, e.g. dizziness, concentration and memory difficulties. In 2013, Dr Tucker recorded that an abnormality was shown in the right anterior temporal slowing. Dr Lee Pan had a different view on this aspect. Dr Tucker's view was that the abnormal pattern in his brain is consistent with trauma related abnormalities – associated with temporal lobe epilepsy.

[30] Ms Coetzee noted on the investigations that were done at Groote Schuur Hospital in 2015 and based on Mr Reyners complaints of dizziness and / or blackouts, that there was then a suggestion of possible seizure episodes with no

abnormal movements or incontinence. She also evaluated Mr Reyners in 2011 and he complained of forgetfulness and he felt that his mind was slower. That was evident when he returned to his job at Cape Argus and also when he worked with his brother. He also reported that he no longer felt like interacting with people. He preferred to be alone. Ms Coetzee also was advised by Mr Reyners' mother that he has an impulsive aggressive behaviour which would be followed by remorse.

[31] The collateral information from his father seemed to be the opposite from what other sources said. His father stated that Mr Reyners was motivated to work, but did not enjoy working with him in the construction industry. He kept looking for some other work. Although he changed in his behaviour after the accident, he had remained stable over the years. He would get piece jobs from his community every now and then.

[32] Having performed various tests Ms Coetzee's opinion was that Mr Reyners lacked the mental capacity to manage his own affairs. She then concluded that he is a candidate for psychotherapy and his family would benefit from psychoeducation. Also that a psychiatrist should be involved in treating his impulse control and aggression. A neurologist should treat the dizziness, headaches, blackouts and epileptogenic activity. For these reasons, it was her conclusion that he needed a curator. A follow up session was done and Ms Coetzee prepared a report dated 12 September 2017. There was no significant change in Mr Reyner's brain functioning. It appears this report was to quantify the amounts that would be needed for the above specialist treatments.

[33] On being asked during cross-examination why Ms Coetzee concluded in her affidavit for an application for curatorship that Mr Reyners was unable to manage his own affairs, after he had instructed an attorney Cohen to lodge a damages claim. Her response was that he consulted an attorney through his mother. It was put to Ms Coetzee that his friend, Mr Grove and his sister Ms Cupido testified that it was his neighbour who asked if he had claimed for the injuries he suffered. That neighbour advised him to approach an attorney. If he approached an attorney after this advice, why had she made a recommendation for an appointment of a curator *ad litem*. Her response was that she took into account his cognitive impairment, executive function

and his frontal lobe damage. Ms Coetzee was reminded that when she supported an application for curatorship, Mr Reyners had already performed what he should have done some years ago. A claim against PRASA (the appellant) had already been identified by his attorney. Ms Coetzee's explanation was that she received instructions to assess Mr Reyners as normal and did not see anything untoward to what she normally deal with. However, she was not familiar with the steps that are normally taken by an attorney in his duties, her opinion was that he needed to be assisted. He needed a curator *ad litem* from a litigation point of view.

[34] Ms Coetzee was asked what difference would a curator *bonis* make after he had lived for ten (10) years without one. Her response was that if he received a large sum of money, he would definitely need a curator. The fact that he had a family who supervised him and has been in a protected environment helped him a great deal. It was further put to Ms Coetzee that Mr Grove testified that he related the information to Mr Reyners about his accident. He could have been able to utilize that information a month or two after the accident that he could have a claim. He would have gone to an attorney and could not have needed a curator *ad litem* either.

[35] Further, it was put to Ms Coetzee that Dr Hemp's opinion was that Mr Reyners had some reduction in his ability to control aggression, but the test results suggest that he has relatively intact executive functions, no evidence of a right hemisphere syndrome and no impairment on the delayed recall and that do not confirm a change in his cognitive results. It is thought that with some active rehabilitation with family counselling, Mr Reyners could cope far better and can be employable at a low level. This was in line with what his father said. Ms Coetzee disagreed with this opinion, and according to her there is an epileptogenic brain activity. There is visible structural damage to the brain. In her view, there is some indication of executive difficulties. According to her as there is organic brain injury, further neurocognitive rehabilitation is impossible.

[36] **Dr Kevr Edwin Le Fevre** ("*Dr Le Fevre*") the psychiatrist testified that he had sights of hospital reports and CT scan that was done on Mr Reyners on 21 February 2001 when he compiled his report. He also consulted with Mr Reyners and his mother. Basically, he was unable to cope as he complained of memory loss. He had

word finding difficulties, much irritable and aggressive. Those difficulties are common in cases of brain damage. His conclusion was therefore that the brain injury resulted in dementia and has permanent loss of cognitive abilities and executive functioning. He is not fit to understand his attorney and to manage his affairs. In his opinion, curator *ad litem* and curator *bonis* should be appointed.

[37] It was put to Dr Le Fevre why he saw it fit to recommend an appointment of curator after Mr Cohen was already handling a case on behalf of Mr Reyners, and having been instructed as such by him. His explanation was that the instructions were given to the attorney by Mr Reyners' family as he understood medico-legal matters are complex in nature and would need an involvement of attorneys. The doctor could not commit himself whether Mr Reyners was or was not in a position to instruct an attorney. He did not ask Mr Reyners either. He did not test his knowledge of money. He could only determine that his cognitive and executive abilities were impaired, based on what he was told and the clinical records and would be likely for him to come across a considerable amount of money. It was not his strong opinion that he would need a curator *bonis*, but stated that some assistance with the other aspects of life would be needed.

[38] Having questioned by the Court on whether Mr Reyners had capacity to consult a lawyer, Dr Le Fevre conceded that Mr Reyners indeed has that capacity but to an extent he needed some assistance to deal with more sophisticated aspects. When asked if Mr Reyners knew that he fell from a moving train. The doctor responded that it is highly unlikely that he would not know that he fell from a moving train. He was not aware of a possible claim. That he came to know after ten (10) years after the accident.

[39] **Ms Elise Margretha Burns-Hoffman** ("*Ms Burns-Hoffman*") the occupational therapist assessed Mr Reyners on 14 June 2016 on his functional capability to work and care for himself. It was reported to her that Mr Reyners left school at Grade (3) three. He then helped his father as a brick layer. Later he joined Cape Argus as a machine operator. He was involved in an accident while still employed at Cape Argus. Following his employment at Cape Argus, was a company called Charter Catch where he did sub-contracting work. She also picked up from another expert

report that he worked for Catch for African. He then failed to hold a job for a long time.

[40] While working for the painting company, it was reported to her that his epilepsy got on the way. He suffered blackouts and fell from the ladder. After the accident he became aggressive for no reason, he went blank at times, his memory fluctuates and dizziness is a problem. In her opinion, any work environment where there is danger, memory fluctuations are a problem.

[41] After conducting some tests with Mr Reyners, he found him to be slow and made a lot of mistakes and at times missed two (2) rows of work that he was supposed to do. His usual short term memory was poor. With regard to physical testing, he became dizzy when he had to jump. He had a lower grip strength and lower level of physical strength as compared to a young man who had previously done physical work. He reported that he does wash and dress and look after himself. However, on that day he dressed up for the purpose of an assessment. He does not do much at home. He spends time watching TV and at times he spent time with his son and girlfriend, and then falls asleep.

[42] Ms Burns-Hoffman contacted Cape Argus and Five Oceans Marine to get some collateral information on what Mr Reyners could have earned if he had stayed in his job. Mr Moodley from Cape Argus stated that he could have earned R7000.00 per month in the same position. From a diagnostic point of view, she performed an MMSE test. The results did not show any severe cognitive dysfunction.

[43] It was noted by Ms Burns-Hoffman that Mr Reyners has always been dependent in a work environment ever since he started work. Initially he worked with his father in a construction industry, worked with his sister at Cape Argus and his brother helped him with the post-trauma in securing a job. This dependency got even more after the accident. In her view, she did not think that Mr Reyners was employable in the open labour market as he cannot function independently. He can thrive in a sheltered employment environment where he would earn about R350 – R407 per month. The closest for him would be in Bellville.

[44] Family counselling (FAMSA) was also recommended by Ms Burns-Hoffman. There were no costs with regard to seeking sheltered employment. She further recommended an appointment of curator *bonis* and the costs thereof would be factored in the legal costs. Since in her opinion Mr Reyners will be needing care, Cape Care was recommended as his condition would deteriorate with age. Cape Care is a level higher than domestic worker and trained to take care of the well-being of people including those with medical challenges. Their fees are a slightly high – for instance a three (3) hour care would be R429.00.

[45] During cross-examination, it was put to Ms Burns-Hoffman as to how does she reconcile her opinion that Mr Reyners is unemployable having spent one (1) year eight (8) months in the open labour market with different companies. Her response was that the duration is not a relevant factor as he could not cope during that period.

[46] Ms Burns-Hoffman conceded that when Mr Reyners regained consciousness after his surgery and found his mother next to his bed, he was told that he was in a train accident. He knew that fact from that moment. She agreed that if Mr Reyners' claim would fall on the wayside, he would not need a curator *bonis* as there would be nothing to manage (in the form of compensation) and there would not be a need for a carer.

[47] **Dr Peter Whitehead** ("*Dr Whitehead*"), the industrial psychologist was instructed to prepare a report dated 7 December 2016 for Mr Reyners. Further he prepared a joint report with Mr Dawie Malherbe. He was requested to comment on the premorbid career paths, including references to promotions, increases over a lifetime, the effect of injuries and sequelae thereof of Mr Reyners future employability and with reference to post-morbid career path or alternative career opportunities including references to promotions and increases over the lifetime. Further, the comments included his retirement age and loss of income.

[48] It was reported to him that he worked at Cape Argus from the age of eighteen (18) years until his accident in February 2001 on a contractual basis. Dr Whitehead described him as a basic skilled worker since he was at an entry level or lower level

position. To him the word “unskilled” sounds negative. He could not confirm his employment with Cape Argus as they did not keep records dating back that far.

[49] According to the information he received, he returned to work at the Cape Argus, but could not continue any further. He was not employed for about four to five (4 – 5) years (2002 – 2005) and later found employment at a Yacht manufacturing company (Charter Catch) as an unqualified carpenter working with his brother. He later moved on to Cape Charters and was there for a year and he returned to Cape Charter for another nine (9) months. He later moved on to Two Ocean Marine where he remained employed for a year. His last employment was at Andrew Fortuin where he did painting jobs as a sub-contractor for six (6) months. After he fell from the ladder, he did not work. To him, it appeared that he could not sustain the work, although he was able to find it.

[50] The fact that this injury affected his cognitive ability physical component and behavioural issues, in his opinion it impacted his employment options. In fact, his chance of finding employment in an oversaturated environment of basic skilled labour environment is nil.

[51] Dr Whitehead made inquiries at Cape Argus about the salary of Mr Reyners. He was advised that currently he would earn R40 per hour and R7000.00 per month. There would be employer contributions to the provident fund or pension of 9% and an R800.00 contributions to the medical aid. Some of his friends he started with were permanently employed and one of them was a team leader.

[52] In his opinion, if there was no accident, his pre-morbid career path would have progressed in a straight line, and would have worked at Cape Argus until age sixty-five (65). However, Mr Dawie Malherbe was of the view that Mr Reyners has some residual earning capacity. He was not of the view that he is unemployable in the open market. However, according to Dr Whitehead, he would have changed employers to try and build his career and possibly increase his earnings. He would have continued to work until age sixty to sixty-five (60 – 65). Mr Dawie Malberbe in his opinion suggested that he would have earned approximately R72 000.00 per annum with inflationary increases until retirement if regard is had to the general

income of labourers in the market. In Dr Whitehead's view that could be minimum earnings. If one had to take the Cape Argus earning, his total earnings would be R108 000 at the time or more would he have kept that employment.

Grounds of Appeal:

[53] The appellant asserted that the court a *quo* erred in dismissing the appellant's special plea on the following:

[53.1] The court a *quo* erred in not upholding the special plea of prescription based on the factual evidence;

53.1.1 That the respondent's claim arises from an incident on 20 February 2001 when Denzil Reyners was injured falling from a moving train;

53.1.2 That the present claim on Denzil Reyners's behalf was instituted in August 2013;

53.1.3 That Denzil Reyners had knowledge of the identity of his debtor and of the facts from which this claim arises since the incident;

53.1.4 That consequently prescription commenced running against his claim on or about 20 February 2001 in terms of Section 12(1) and 3 of the Prescription Act, 68 of 1969 ("*the Act*"); and

53.1.5 That this claim prescribed in February 2004 in terms of Section 10(1) read with Section 11(d) of the Act.

[53.2] The court a *quo* in paragraph [33] of the judgment, after finding that Denzil Reyners 'was aware that he had fallen from a train', but then erred in contradicting this finding by concluding that 'given his personal circumstances, (Denzil) cannot be deemed to have acquired knowledge of the identity of the debtor and the facts from which the debt arose, and acted, on that information with the appropriate capacity to litigate', when the uncontested evidence given by the respondent's witnesses Grove and Cupido was that:

53.2.1 Denzil Reyners always knew after the incident that he fell out of the open doors of a moving train, when it happened, and how and where it happened;

53.2.2 Denzil Reyners only went to his present attorney in June 2010 after he received the advice of a neighbour, Mr Chadwick for whom the attorney had handled a claim against the Road Accident Funds; and

53.2.3 Denzil Reyners did not know before he spoke to Mr Chadwick that he had a possible claim arising out of the incident and he did not remember the details of the incident or was incapable of instructing an attorney;

[53.3] The court a *quo*, in paragraph [33] of the judgment erred in finding that Denzil Reyners 'did not have the intellectual capacity to pursue a claim against the defendant without delay' because he would not have been aware of 'concepts involving negligence or his legal rights to claim damages' nor of 'what operating procedures applied to institute legal proceedings against the defendant', when the capacity to litigate in the context of prescription does not require knowledge of substantive or procedural legal principles, but merely factual knowledge of the identity of the debtor and the facts from which the debt arises – which knowledge Denzil Reyners had from the outset and throughout;

[53.4] The court a *quo*, in paragraph [34] of the judgment, erred in finding that the appellant 'had failed to prove that Denzil Reyners had knowledge of the debt and the identity of the debtor prior to the appointment of a curator on 7 February 2013 or had the capacity to litigate when the evidence shows the opposite, as set out in paragraph [52.2] above and below;

[53.5] The court a *quo*, in paragraph [35] of the judgment, erred in finding that 'the evidence does not support the defendant's contention that Denzil Reyners had the capacity to instruct an attorney, and institute proceedings without the assistance of a curator' when the evidence shows that Denzil, without the assistance of a curator, lived a normal life for more than ten (10) years after the incident and eventually went to his present attorney and instructed him to institute proceedings – without the assistance of a curator – after having been advised by a neighbour to find out whether he had a claim.

[53.6] The court a *quo*, in paragraph [31] of the judgment, erred in finding out that Denzil Reyners 'has never lived an independent life and is extremely dependent on his mother'. Whereas the evidence showed that Denzil was employed at the time of the accident, went back to work after the accident and found other employment on several occasions. When he became unemployed; there was no evidence that Denzil Reyners could not interact and socialise with other people and did not live an 'independent life'; there was no evidence that Denzil Reyners could not work with money; could not care for himself or could not cope with the normal activities of daily living and there was no evidence that Denzil Reyners needed any special attention or assistance from his mother or anyone to manage his own affairs.

[53.7] The court a *quo* in paragraph [35] of the judgment erred in finding that Denzil Reyners was 'rendered insane within the meaning of Sec 13(1) (a) of the Prescription Act' in the light of, *inter alia*, the evidence quoted in paragraphs [52.2] and 52.5] above, and the fact that the onus in this regard rested on the plaintiff.

[53.8] The court a *quo* erred in ignoring or failing to give proper weight to the fact that neither Denzil Reyners nor his mother gave evidence, with the result that there was no direct, credible evidence of his purported inability to manage his daily affairs and total dependence on others; the plaintiff's attorneys did not testify to support the suggestion that Denzil Reyners was incapable of instructing his attorney to investigate and / or institute a claim based on the incident in June 2010, not a single expert who opined that Denzil Reyners needs or needed a curator to manage his affairs complied with the stringent requirements in this regard as set out in Uniform Rule 57 and explained by the Constitutional Court in *RAF v Mdeyide 2008 (1) SA 535 (CC)* in paragraphs [32] – [41] – rendering their opinions meaningless in the context of the prescription enquiry; and not a single expert focussed in formulating his or her opinion on Denzil Reyners's mental (and hence legal) capacity to conduct his own affairs at the crucial time, i.e. the years immediately after the incident, as set out and explained in *Du Toit NO obo Ntsikelelo Mafanya v RAF WCHC Case No A582/2015* (Delivered 21 September 2016) in paragraph [47], in which the Mdeyide judgment was followed and applied.

Issues for determination:

[54] This Court is called upon to decide whether or not the court a *quo* was justified in dismissing the appellant's special plea of prescription.

Analysis and Discussion of the applicable legislation:

[55] It is common cause that the appellant does not take issue with the existence of a debt. The appellant's contention is that whatever claim the respondent might have had against it has become prescribed. This is the special plea that the court a *quo* is said to have failed to uphold, the appellants having relied on Section 11(d) and 12(1) of the Prescription Act.

[56] The Constitutional Court in *Road Accident Fund and Another v Mdeyide*[3] had an opportunity to interpret certain sections of the Prescription Act *vis-à-vis* the Road Accident Fund Act. For purposes of this judgment, the Court will focus on the pronouncements by that Court on the relevant sections of the Prescription Act. The Constitutional Court asked this question:

> "*13. When does prescription begin to run? This question is central to the present inquiry. Section 12(1) of the Prescription Act stipulates that it begins as soon as the debt is due. A debt is due when it is "immediately claimable and recoverable." In practice this will often coincide with the date upon which the debt arose, although this is not necessarily always so. In terms of Section 12(3) of the same Act,* ***a debt is deemed to be due when a creditor has knowledge of the identity of the debtor and of the facts from which the debt arises*****" (Emphasis added).**

[57] Mr Reyners at the time of his injury was still a minor who was contractually employed at Cape Argus. The evidence of Mr Grove was that, shortly after the train stopped in the next station, he ran towards the area where Mr Reyners was dislodged by the moving train. He met him walking towards N1 with his t-shirt wrapped around his head as he was bleeding. When they arrived at the N1 Highway, they indeed received assistance from a person who said he was a doctor and called

[3] (CCT 10/10) [2010] ZA CC18; 2011 (1) BCLR 1 (CC); 2011 (2) SA 26 (CC) (30 September 2010)

an ambulance for them. At that moment already, Mr Reyners knew that he had an injury in his head and must wrap his t-shirt around his head and was on his way towards the N1 where at least he would receive assistance. His reaction immediately after the accident does not resonate with a person who did not know what happened to him.

[58] Though this Court and the court a *quo* did not have a benefit of Somerset Hospital records, the Groote Schuur records demonstrated that when he arrived on the same day of the accident in that hospital, his condition was stable and his GCS was noted at 14/15. However, after the surgery, his GCS was 15/15. Even though he did not have a recollection of what happened after the surgery, that was expected as he had anaesthetics and undergone a surgical procedure. However, the uncontroverted evidence before this Court was that Mr Grove relayed the circumstances to him on where, when and how the accident happened. This was confirmed by Ms Cupido, that her brother knew what happened to him shortly after the accident.

[59] Surely, when he returned to work after the accident at Cape Argus, there was no intimation that his mother returned to Cape Argus with him to explain to his employers why he could not attend work by the time he was still recuperating from the accident, as this Court was led to believe that his mother always assisted him. There was no evidence presented that he was mentally compromised at that stage and lacked mental capacity to manage his own affairs. Even when his employment ended having been on contract, there is no evidence that it was due to mental illness.

[60] Mr Reyners was attended by specialist doctors at Groote Schuur Hospital when he received medical care and surgery from the accident, including neurologists. According to the medical records, he was discharged by his specialist from his review visits at Groote Schuur Hospital having been satisfied about his well-being. If there was an issue with his mental faculties that would have been picked up by the specialist doctors (neurologists) from those reviews. It would not have escaped them that this was a patient in need of care. What appears to have been an ongoing concern was his complaints about headaches and dizziness. He was

prescribed an Epilim for that purpose, which at the time of consultation with Dr Tucker he had long stopped taking. There is no history in those 10 years of Mr Reyners taking any drugs or medication for mental illness.

[61] It is neither Dr Tucker nor Dr Le Fevre's opinion that Mr Reyners be prescribed medication to that effect. Dr Le Fevre in his letter that he sent to Mr Reyners' attorneys for a curatorship application stated that Mr Reyners suffered from dementia. This diagnosis was not motivated exactly where it was based on. It was only during trial that he stated that he gathered the history from the medical records and what was said to him. Contrary to what he wrote in the letter supporting an application for curatorship, in his testimony during trial there was no mention of dementia. Dr Le Fevre's testimony was characterised by vague responses which were non-committal. His testimony as a specialist psychiatrist who concluded that Mr Reyners needed an assistance of a curator was not at all convincing during trial.

[62] In fact, none of the expert witnesses ventured an opinion on how Mr Reyners was able to hold an employment in some instances for one (1) year having been a person who needed assistance after the accident. The experts were cautious in their testimonies and did not want to state that Mr Reyners suffered from mental illness. As stated above the only resulted sickness that was worth of medical treatment after the accident was the epilepsy which an Epilim was prescribed, for which Mr Reyners did not bother taking such medication.

[63] Further, Dr Tucker tried hard to describe Mr Reyners' injury in his own peculiar way without accepting that the Groote Schuur medical record described the primary injury as a depressed skull fracture over the right frontal parietal area and a subdural haematoma. This injury was graded as a "mild depression of consciousness." In his opinion he had a "**feeling"** that the injuries were "moderate-severe as compared to mild". His opinion was based on the examination he conducted some ten (10) years after the accident.

[64] Be that as it may, the two (2) lay witnesses, Mr Grove and Ms Cupido who conversed with Mr Reyners confirmed that he knew about the details of the accident and he was even conscious about the scar that was in his head as he always wore a

peak cap. Mr Reyners' level of consciousness and the manner he conducted his daily activities, the fact that he moved from one relationship to another and fathered children, and raised concerns on who would take care of his children should he die do not support Dr Tucker nor Ms Coetzee's theory that Mr Reyners was brain damaged and such resulted in loss of cognitive abilities and executive functioning. This was not the opinion that was shared by the appellant's like experts. The manner in which Mr Reyners conducted his life after the accident was the opposite. There was no indication that he was a person suffering from mental disability or impediment. His father stated that although his mood changed, he led a stable life.

[65] It was the appellant's contention that any opinion, whether from a layperson or expert, which is expressed on an issue the Court can decide without receiving such opinion is in principle inadmissible because of its irrelevance. Only when an opinion has probative value can it be considered admissible. In *Helen Suzman Foundation v President of the RSA and Others*[4] it was stated:

> "*It has frequently been pointed out that direct and credible evidence of events usually carries greater weight than the opinion of an expert seeking to reconstruct those events afterwards, especially where the material on which that is based is scant.*"

This is exactly what the respondents' expert witnesses attempted to achieve in this matter.

[66] It would appear that the starting point in determining the point that was raised in the special plea is whether or not in terms of the Prescription Act extinctive prescription begins to run as soon as the debt is due, and the creditor knows the identity of the debtor and the facts giving rise to the debt.

[67] In my considered view, this point should not be answered with the evidence of an expert opinion as the enquiry is factual in nature. Mr Grove confirmed that *"he knew what transpired with him, because we informed him.*"[5] In addition, he stated, *"he was capable of telling an attorney that he had fallen out of the open doors of a*

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[4] 2015 (2) SA 1 (CC) para [30] fn 30
[5] Record page 143 line 4

moving train and able to ask whether he had a claim based on that."[6] Mr Grove further confirmed that, had Mr Reyners knew that he had a claim, he was capable of pursuing it.[7] Moreover, Ms Cupido testified that in June 2010, a neighbour Trevor Chadwick asked Mr Reyners whether *"he got anything for his accident and he said no"* and Mr Chadwick then advised him to go to his attorney which he did.[8] Mr Reyners had explained to Mr Chadwick *"that he didn't know he can claim for anything."* Mr Chadwick then suggested that Mr Reyners go to attorney Cohen, who had handled his claim against RAF, to *"find out"* whether he had a claim.[9] Ms Cupido confirmed that if Mr Chadwick had spoken to Mr Reyners earlier, he would have gone to the attorney earlier.[10] This was not a conversation between Mr Chadwick and Mr Reyners's mother, as the experts suggest that this is the information that was given to the attorney by his mother. That is totally incorrect.

[68] Judging from Mr Reyners responses from the conversation he had with Mr Chadwick, he does not appear to be a person who is in need of assistance by the curator. There is no indication that Mr Chadwick had a conversation with Mr Reyners' mother, as there was a communication breakdown between the two. Mr Reyners gave sound answers and later took it upon himself to share the information with his parents. The information was not distorted when his mother and father received it. In fact, the parents were able to decide amongst themselves that Mr Reyners' mother should accompany him to the lawyer. In my view, the fact that Mr Reyners arrived at Mr Cohen's office with his mother, does not immediately render him a person who needs assistance of a curator.

[69] In fact, the brief that came from the attorney to Dr Le Fevre and Ms Coetzee was to examine him if he is a candidate for an appointment of curatorship on his behalf. At that time, the attorney had consulted with Mr Reyners who was sent to him by Mr Chadwick and knew that the claim was way beyond the three (3) year prescription period. If the experts could come up with a report recommending an appointment of a curator, prescription could be suspended. This was borne out by

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[6] Record page 149 line 1; Record page 150 line 24
[7] Record page 150 line 25; Record page 151 line 4
[8] Record page 169 line 20 - 24
[9] Record page 174 line 4 - 15
[10] Record page 174 line 19; Record page 175 line 18

the fact that Mr Cohen did not institute the claim immediately after receiving instructions from Mr Reyners.

[70] It is not for this Court to downplay the injuries sustained by Mr Reyners. At the same time, the evidence at our disposal does not support the conclusion reached by the respondent's experts that Mr Reyners suffered the loss of his cognitive abilities and executive functioning. The conversation between Mr Reyners and Mr Chadwick proved that Mr Reyners' mental abilities are stable as he knew that he got injured and did not receive compensation for it and he should utilise the services of Mr Chadwick's attorney. Mr Reyners possessed that knowledge that he was injured from a train accident from at least in February 2001, shortly after the accident. The fact that he did not know that he can lodge a claim is a separate inquiry altogether and in any event is not a valid defence. What remains clear is that he did not know that he could be compensated up until June 2010. However, his knowledge about the incident remained unaltered in that ten (10) years.

[71] Dr Le Fevre and Ms Mignon Coetzee expressed an opinion that Mr Reyners is unable to manage his affairs, however, they conceded that they did not comply with Rule 57 of Uniform Rules of Court before expressing such an opinion. They could not explain what affairs Mr Reyners could not manage and why a curator was necessary, so said the appellant. Moreover, despite the appellant having direct interest in the appointment of a curator on behalf of Mr Reyners, such application was not served on them. It only transpired after the issue of summons that this Court appointed a curator *ad litem* for Mr Reyners.

[72] The curatorship orders possess a great legal burden on patients and / or claimants as it removes their rights and responsibility to make choices about the proceeds of the claim. It does not end there; these orders take away their rights that are enjoyed in the ordinary course by natural persons. The attorneys should be cautious and not protect only their financial interests, but the rights and financial interests of the claimants should take priority, as these claims are not a money making scheme.

[73] Reverting back to the point of prescription, Section 12(3) of the Prescription Act requires the creditor to have a knowledge of the identity of the debtor and the facts from which the debt arises. The defences raised by the respondents that by virtue of mental defect suffered by Mr Reyners he did not have the necessary capacity to litigate and therefore prescription would not have started to run is unsustainable given the set of circumstances leading to Mr Reyners attending at Mr Cohen's offices. Further, in the circumstances where no specialist psychiatrist doctor prescribed him any medication for an alleged mental defect for the past ten (10) or twenty (20) years in today's terms, the defence of insanity as contemplated in Sec 13(1) (a) of the Prescription Act does not find application in this matter. The fact that he was able to survive for that long with his family and the members of his community is a true reflection of his mental state that he is stable and capable of acquitting himself well in his daily life.

[74] The conversation between Mr Reyners and his neighbour Mr Chadwick is sufficient proof that Mr Reyners had relevant mental capacity to institute a claim long before their conversation. According to *Merriam-Webster com - Medical Dictionary*; mental capacity is defined as sufficient understanding and memory to comprehend in a general way the situation in which one finds oneself and the nature, purpose, and consequence of any act or transaction in which one proposes to enter, and / or the degree of understanding and memory the law requires to uphold the validity of or to charge one with responsibility for a particular act or transaction. Put simply, Mr Reyners knew that for him to receive some form of compensation for the injury he suffered from the train accident, he needed to approach a lawyer. As to who accompanied him to the lawyer is immaterial as he went there as the primary source of information from Mr Chadwick. In fact, he knew the cause of the accident and the identity of the debtor from the day he was discharged from hospital according to the lay witnesses. There was no need in my view to distort that information with unconvincing suggestions from experts that Mr Reyners is insane or had no mental capacity. The basis of these insinuations was not laid anywhere by the experts and is not borne out by the facts on the life he lived in that 10 years.

[75] In *Mdeyide (supra)*[11] the Constitutional Court explained the term "insane person" in Sec 13(1) (a) as 'not restricted to someone who is detained as a patient in terms of mental health legislation … and includes persons of unsound mind, who are incapable of managing their own affairs and who have no capacity to institute action' and who lacks the capacity to litigate,' (Emphasis added). Mr Reyners does not fall under this definition.

[76] In circumstances where the curator *ad litem* was appointed without the full inquiry in terms of Rule 57 of the Uniform Rules of Court, and having Mr Reyners being the primary source of information when he consulted an attorney, in the circumstances the respondent's defences to prescription have to fail. The Constitutional Court in Mdeyide *(supra)* was not convinced that Mr Mdeyide who was totally dependent on other people for assistance who was blind, illiterate and innumerate, had never been employed did not have capacity to litigate and ordered an inquiry in terms of Rule 57 of the Uniform Rules of Court. The Court indicated that such inquiry may determine 'conclusively that the plaintiff was incapacitated as contemplated by Section 13(1) (a) of the Act or may establish 'that at material times the plaintiff was of sound mind.' The primary reason of extinctive prescription is to protect the interest of the debtor, not the creditor. It enhances efficiency of the courts, because parties are obliged to bring their disputes to the court without delay so that they can effectively be resolved – See *Mtokonya v Minister of Police;*[12] *Myathaza v Johannesburg Metropolitan Bus Services and Others.*[13]

[77] This Court in *Du Toit obo Ntsikelelo Mafanya v RAF*[14] confirmed the principle in *Mdeyide (supra). The court a quo* and the full bench refused to set aside a settlement agreement concluded five (5) years previously based on the *ex post facto* opinions of three (3) medical experts (Ms Mignon Coetzee, neuro-clinical psychologist, Dr Johan Reid, neurologist and Prof T Zabow, psychiatrist) that the plaintiff had lacked legal capacity at the time of the conclusion of the settlement agreement.

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[11] At para 32, 36 and 38
[12] [2017] ZACC 3 para [84]
[13] [2016] ZACC 49 para [28]-[30]
[14] Case No A582/2015 (Delivered 21 September 2016)

[78] Similarly, this Court cannot endorse *ex post facto* unsubstantiated expert opinions that have been concluded after Mr Reyners had well instructed his attorneys in his damages claim. It is this Court's view that the purpose of the expert was procured for purposes of suspending prescription.

[79] The respondent, in pursuing further the submissions that Mr Reyners had unsound mind as a result of the injuries suffered, which rendered the prosecution of claim impossible, made reference to *Susan van Zyl NO vs RAF*[15]. In this case a claim for damages was lodged on behalf of the claimant by his mother some seven (7) years after the accident and a curatrix *ad litem* was appointed to pursue the claim.

[80] At the trial, the RAF admitted the contents of the medico-legal reports which expressed the view that the claimant was mentally incapacitated as a result of the injuries he sustained during the collision. The special plea was upheld by the High Court. The matter was taken on appeal to the SCA where the SCA held that the Prescription Act did not apply to claims for compensation under the RAF Act. It was found that the Prescription Act was excluded because its provisions were inconsistent with those of the RAF Act in relation to prescription. It was concluded that the High Court was correct in upholding the special plea of prescription and dismissed the appeal. It found further that the claimant's situation should have been managed by detaining him timeously in terms of the mental health legislation or by appointing a curator *ad litem* to institute his claims with the prescribed period.

[81] The matter proceeded to the Constitutional Court and that Court considered the impossibility principle in the context of this claim, and it found that it was direct authority supporting the application of this principle which prevented time limits from running against litigants where, due to no fault of their own, it was impossible for them to comply with time limits set by a statute for the prosecution of the claim.

[82] The respondents submitted that the Prescription Act applied in the case of Mr Reyners. Given his mental state pursuant to the fall, Section 13(1) (a) of the

[15] Case No CCT114/20; [2021] ZACC 44

Prescription Act protected his claim from prescription. He was of unsound mind and did not have capacity to pursue his claim without the assistance of a curator.

[83] In *Van Zyl (supra)* the RAF admitted the medico-legal reports with regard to Mr Jacobs' condition of unsound mind that was filed by the psychiatrist and neurosurgeon. In Mr Reyners case, the state of mind remained in dispute. That was borne out by the joint minutes of the similar experts. Judging from the evidence of the respondents' lay-witnesses, the appellants in this case have discharged, the onus that Mr Reyners at all times after the incident, he had the capacity to instruct an attorney and to litigate as he had knowledge of the debtor and the facts from which the debt arose. I agree with the appellant that the Van Zyl judgment does not find application in this case. In any event, even if the medico-legal reports were admitted by both parties, the impossibility principle was not pleaded and / or argued by the respondent in this matter.

[84] The fact that Mr Reyners did not know after leaving hospital that he had a claim against the respondent is not a defence to the running of extinctive prescription. The special plea in our view should succeed.

[85] In the circumstances, I grant the following order:

85.1 The appeal is upheld with costs.

85.2 The court a quo's order is set aside and substituted with the following:

"The Defendant's special plea succeeds with costs."

MANTAME, J

LE GRANGE J

[86] I had the benefit of reading both judgments of my Learned Colleagues. I agree the central question in this instance turns on prescription. Where we part ways, is on the issue whether Reyners has the requisite knowledge of the identity of the debtor and the facts from which the claim arose to institute action as contemplated in s 12(1) of the Prescription Act no. 68 of 1968.

[87] In both judgments it was reasoned and concluded that Reyners possessed the requisite knowledge to institute action since the date of the incident for prescription to have commenced. In the first judgment, Mantame J for her conclusion relied on the lay evidence presented by the Plaintiff in the court a quo. According to Mantame J, the lay evidence should be preferred above the Plaintiff's expert witnesses, in determining whether Reyners was a person suffering from mental disability or impediment. In the third judgment Nuku J relied on the expert evidence but only in so far as it relates from the date of their appointment. According to Nuku J, the Plaintiff failed to discharge the evidential burden in proving that Reyners did not have the capacity to litigate in the years following the incident.

[88] For the reasons that follow, I disagree with the reasoning and conclusion of either judgment.

[89] The Defendant in its Special Plea pleaded that the Plaintiff's claim had prescribed as prescription had commenced from the date of the incident in accordance with s 12(1) of the Prescription Act no. 68 of 1968.

[90] The Plaintiff in its replication raised the defence that the patient, ("Reyners"), by virtue of a mental defect, did not have knowledge of the debtor and the facts from which the claim arose as required by s 12 (3) of the Prescription Act. Accordingly, the completion of prescription was therefore delayed until he was no longer mentally afflicted.

[91] The Plaintiff's defence to the special plea is essentially one of a denial. According to the Plaintiff Reyners never had the requisite knowledge for prescription to commence running, as he lacked the capacity to litigate since the date of the incident and could not himself instruct an attorney to institute proceedings without the assistance of a curator, which means that prescription was delayed until the appointment of such a curator on 7 February 2013.

[92] At pre-trial conference held on 29 October 2019, the following was recorded at para 9.8

"That the fall caused plaintiff a traumatic brain injury which resulted in, inter alia permanent loss of cognitive abilities and executive functions, dementia problems, epilepsy, memory problems, word finding difficulties, irritability, aggression, apathy and change of personality.

Defendant admits that the sequelae of the Plaintiff's injuries are as agreed to in the joint minutes by the occupational therapists and the neuro-psychologists."

[93] Mignon Coetzee, an occupational therapists, was engaged on behalf of the Plaintiff and Dr Frances Hemp, a neuro-psychologist, on behalf of the Defendant. In their joint minute dated 9 May 2016 (page 752-754) both were in agreement that a curator *ad litem* and *curator bonis* should be appointed to assist Reyners. At the same pre-trial conference at para 9.10 the following was recorded:

"In respect of Mignon Coetzee, Ms Bums-Hoffman and Dr Whitehead there are joint minutes with Defendant's experts in the same field and Defendant admits the reports of Plaintiff's experts to the extent that the joint minutes reflect agreement between the experts.

In respect of the other reports Defendant admits that the various reports reflect the investigations and opinions of the various experts, without admitting that the opinions are correct.

The rest is not admitted."

[94] The Defendant did not call any witnesses and solely relied on the evidence of the Plaintiff and in particular the testimony of the two lay witnesses Grove and Cupido for the proposition that the Plaintiff's claim has prescribed.

[95] According to the primary submission by Mr. Potgieter, SC, (counsel for the Defendant), the lay evidence of Grove and Cupido was sufficient to establish that Reyners did *'have knowledge of the identity of the debtor and the facts from which the claim arose'* and did *'have the capacity to litigate'*.

[96] The witnesses' evidence was succinctly summarized in the first judgment. It is evident that Grove and Reyners talked about the incident after he was discharged from the hospital. According to Grove, Reyners personality changed from an out-

going person to an introvert, he became angry easily and very aggressive and very forgetful. In cross-examination Mr. Potgieter, at page 149 line 11, put the following to him.

> "Mr Potgieter: [A]nd if he wanted to, he could have gone to a lawyer and tell him the story and ask him whether he had a claim or not, correct?
>
> Mr Grove: M'Lady, I'm not too sure about that, as that - in that time I was still young. M'Lady, I wasn't aware that-and that time my level of education was only matric, as I only matriculated in 1999, so I, myself couldn't advise him. So I can't confirm if he was aware that he could go for a claim, my Worship-M'Lady.

At record page 150 line 19:

> Mr Potgieter: At that time, Mr Grove, Denzil Reyners was capable of telling someone else, listen I was in a train, the doors were open, the train was moving, I fell out and I got injured, do you think I have a claim. He was capable of doing that.
>
> Mr Grove: He was capable. M'Lady
>
> Mr. Potgieter: And, yes, if the person said yes and the person was an attorney, I'm sure he would have pursued that claim. If he could claim something from injuries, he would have put in a claim.
>
> Mr. Grove: That's correct, M'Lady"

[97] The evidence of Natasha Cupido, the sister of Reyners, was also crisply summarized in the first judgment. She confirmed that her brother was very outgoing. However, after the incident he became very withdrawn, forgetful and no longer has as many friends as he did previously. She also described his memory lapses. According to her, Reyners on a particular day locked the door of the bedroom forgetting her son was still asleep inside; other times he would put his plate in the microwave instead of the sink; and he avoids shopping as he cannot recall what he was supposed to buy. She further testified how a neighbour, Trevor Chadwick, ("Chadwick") advised him in June 2010 that he should go to his present attorneys.

[98] In cross-examination the following was put to Cupido at page 174 line 19 of the record.

Mr Potgieter: “Yes. Can you think of any reason if that had happened six months after Denzil’s accident, that he would not have gone to Mr Cohen?
Ms Cupido: We didn’t actually knew (sic) that we can claim for any money. I think if my parents knew or even if we knew that he could claim any claims, then he would have gone for it, but he didn’t knew (sic) until he spoke to Trevor.
At page 175 of the record line 11, the cross -examination continued.
Mr Potgieter: So am I correct in saying that what you’re really saying is that if he had known earlier that because he had this train accident that he could claim from someone?
Ms Cupido: If he knew, yes.
It continued on page 175 line 19.
Mr Potgieter: But he knew at all times that he was injured when he fell out of a train and the train was moving and the doors were open?
Ms Cupido: He knew he fell out of the train, yes”

[99] The question now is whether the evidence of Grove and Cupido, as relied upon by the Defendant, is sufficient to show that Reyners did have knowledge of the debtor and the facts from which the claim arose as contemplated by s 12 (3) of the Prescription Act.

[100] Our Higher Courts have repeatedly stated that a Defendant bears the full evidentiary burden to prove a plea of prescription, including the date on which a plaintiff obtained actual or constructive knowledge of the debt. The burden shifts only if the Defendant has established a prima facie case.[16] Furthermore, it is the negligent and not the innocent inaction that s (12) (3) of the Prescription Act seeks to prevent and courts must consider what is reasonable with reference to the particular circumstances the plaintiff finds himself or herself in[17].

[101] The expert evidence advanced by the Plaintiff established the following: according to Dr Tucker, Reyners had suffered a depressed compound skull fracture which caused a subdural haematoma and a midline shift in the fall off the train. As a

[16] Gericke v Sack 1978 (1) SA 821 (A) at 827 D-G;
[17] Macleod v Kweyiya 2013 (6) SCA at para [13].

result of that injuries, Reyners suffers emotional lability, emotional incontinence and is prone to seizures or epilepsy. In cross-examination Dr Tucker testified he did not establish whether Reyners could manage his affairs and accepted the joint minute of the neuropsychologists' report that Reyners is unable to attend to his affairs.

[102] Dr Le Fevre, a practicing psychiatrist testified and confirmed his report in respect of Reyners curatorship application, namely:

> *"He suffered a traumatic brain injury when he fell out of the train. It has resulted in dementia due to traumatic brain injury and he has permanent loss of cognitive abilities and executive functioning. He is not fit to instruct his attorney and to manage his affairs. Curators ad litem and bonis should be appointed."*

Dr Le Fevre was also clear that Reyners condition would have arisen as of the time that the injury was suffered on 20 February 2001.

[103] In cross-examination Dr Le Fevre conceded that he did not enquire about Reyners fitness to deal with money and his recommendation of a curator bonis may not have been appropriate at that moment.

[104] Coetzee, a clinical psychologists and who specializes in neuropsychology, received instructions to evaluate whether Reyners was in need of a curator ad litem. Having performed various tests over a period of time she concluded that *'there was significant and tell-tale signs of executive dysfunction and memory impairment'. And on scoring the memory impairment was pronounced'*.

[105] With regard to the impact of his physical symptoms on his daily life she recorded the following:

> *"I highlighted the impact that his physical symptoms have on his day to day functioning and on his psychological wellbeing. So we have got here a young man who not only struggles cognitively, not only struggles interpersonally, but also struggles with the headaches, epileptic brain activity, the embarrassment of suffering seizures, having the injury, lost his career trajectory, having lost social connections within family where siblings are doing well."*

[106] Coetzee further contextualized Reyners cognitive ability in the following terms:

> *"But even though he has areas of preserved cognitive ability, there are specific and significant areas of difficulty, complex attention and memory, detract from his ability to utilize that residual capacity. So whatever intellectual ability, residual innate capacity is there, these deficits make it very difficult for him to utilize what is there in an effective manner."*

[107] Coetzee was also clear in her evidence that Reyners condition has arisen as of date of the incident, 20 February 2001 and that, as of that date, he would have been unable to manage his affairs and would have required the assistance of both curator ad litem and a curator bonis.

[108] Dr Hemp, the psychologist the Defendant consulted, and in respect of whom a report had been filed to rebut any aspect of Coetzee's evidence, was not call as a witness.

[109] In the Neuropsychological Joint Minute dated 9 May 2016 at page 752-754 of the record, both Hemp and Coetzee agreed that a curator ad litem and curator bonis should be appointed to assist Reyners. In the Joint Minutes of the occupational therapists on page 750 of the record, the occupational therapists of both parties agreed that Reyners required a curator bonis.

[110] This brings me to the question as to the effect of an agreement recorded by experts in a joint minute. In Thomas v BD Sarens (Pty) Ltd[18] the court at para (9) said that where certain facts are agreed between the parties in civil litigation, the court is bound by such agreement, even if it is sceptical about those facts. Where the parties engage experts who investigate the facts, and where those experts meet and agree upon those facts, a litigant may not repudiate the agreement 'unless it does so clearly and, at the very latest, at the outset of the trial' (para 11). In the absence of a timeous repudiation, the facts agreed by the experts enjoy the same status as facts which are common cause on the pleadings or facts agreed in a pre-trial conference

[18] [2012] ZAGPJHC 161

(para 12). Where the experts reach agreement on a matter of opinion, the litigants are likewise not at liberty to repudiate the agreement. The trial court is not bound to adopt the opinion but the circumstances in which it would not do so are likely to be rare (para 13).

[111] In Bee v Road Accident Fund[19], the Supreme Court of Appeal endorsed the approach adopted in BD Sarens and at para 65 – 66 stated the following:

> *"[65] In my view, we should in general endorse Sutherland J's approach, subject to the qualifications which follow. A fundamental feature of case management, here and abroad, is that litigants are required to reach agreement on as many matters as possible so as to limit the issues to be tried. Where the matters in question fall within the realm of the experts rather than lay witnesses, it is entirely appropriate to insist that experts in like disciplines meet and sign joint minutes. Effective case management would be undermined if there were an unconstrained liberty to depart from agreements reached during the course of pre-trial procedures, including those reached by the litigants' respective experts. There would be no incentive for parties and experts to agree matters because, despite such agreement, a litigant would have to prepare as if all matters were in issue. In the present case the litigants agreed, in their pre-trial minute of 14 March 2014, that the purpose of the meeting of the experts was to identify areas of common ground and to identify those issues which called for resolution.*
>
> *[66] Facts and opinions on which the litigants' experts agree are not quite the same as admissions by or agreements between the litigants themselves (whether directly or, more commonly, through their legal representatives) because a witness is not an agent of the litigant who engages him or her. Expert witnesses nevertheless stand on a different footing from other witnesses. A party cannot call an expert witness without furnishing a summary of the expert's opinions and reasons for the opinions. Since it is common for experts to agree on some matters and disagree on others, it is desirable, for efficient case management that the experts should meet with a view to reaching sensible agreement on as much as possible so that the*

[19] 2018 (4) SA 366 (SCA) (29 March 2018)

expert testimony can be confined to matters truly in dispute. Where, as here, the court has directed experts to meet and file joint minutes, and where the experts have done so, the joint minute will correctly be understood as limiting the issues on which evidence is needed. If a litigant for any reason does not wish to be bound by the limitation, fair warning must be given. In the absence of repudiation (ie fair warning), the other litigant is entitled to run the case on the basis that the matters agreed between the experts are not in issue."

[112] In casu, the parties were also requested to identify any admissions which they wish to make, either in terms of the pleadings and or in addition thereto, any other admissions which may assist in narrowing the issues in a pre-trial minute.

[113] The Defendant admitted that the sequelae of the Plaintiff's injuries are as agreed to in the joint minutes by the occupational therapists and the neuro-psychologist.

[114] The issues of dispute between the parties were therefore limited. The clinical picture with regard to the head injury and subsequent brain damage suffered by Reyners was therefore not in issue. The evidence that Reyners is a person under disability or impediment as of the time he fell from the train on 20 February 2001 stands uncontested and was not rebutted by the Defendant. According to the joint minutes as prepared by the experts of both parties, Reyners requires the assistance of both curator ad litem and curator bonis. That evidence is also uncontested as the Defendant failed to call any of its expert witnesses to rebut or repudiate it.

[115] In my view, all the evidence, including that of the expert witnesses is vital to determine the issue(s) in dispute between the parties. This is not a matter where evidence of lay witnesses should carry more weight than the opinions of the experts. The expert evidence was not based on scant information but on proper collateral information. Its probative force is therefore important and cannot be ignored[20].

[20] Helen Suzman Foundation v President of the RSA and others 2015 (2) SA (1) (CC) para [30].

[116] Much has been made whether there was proper investigation in terms of Rule 57 to determine whether Reyners have the necessary mental capacity to understand and appreciate at a level which is sufficient to enable him to manage his own affairs and to institute action. In my view, the proceedings in the court *a quo* was not about reviewing the proceedings of the appointment of a curator. The belated challenge by the Defendant, about whether a curator should have been appointed, or misgivings as to the process of the appointment, is therefore of no assistance to it.

[117] Our law is clear, if a plaintiff does not have the capacity to litigate, the assistance of a curator ad litem is required. In Mdeyide[21] the CC confirmed that "*if it is suspected that a person is of unsound mind and as such incapable of managing his affairs, proceedings can be instituted for a declaration by the court to that effect and for the appointment of curators to his person and property."*

[118] In casu, the Plaintiff did precisely that what was decided in Mdeyide, to institute proceedings as contemplated in terms of Uniform Rule 57[22] and did not wait until judgment was given, as in Mdeyide.

[119] In that case, Mdeyide accompanied by his wife attended the offices of his attorney on 17 September 1999, six months after being discharged from the hospital. Mdeyide was walking on the road near East London on 8 March 1999 when he was struck by a motor vehicle and apparently rendered unconscious. He was transported by ambulance to the hospital from the scene of the accident where he was treated and discharged on 15 March 1999. Mdeyide had no independent recollection of the accident other than the memory of being struck by a motor vehicle. Soon after visiting his attorney, the Mdeyide's wife deserted him. He was living in an informal settlement and drifting from place to place. It was only on 23 January 2002, that the

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[21] RAF v Mdeyide 2008 (1) SA 535 CC at para [38]

[22] Rule 57 (1) reads as follows:

> 'Any person desirous of making application to the court for an order declaring another person (hereinafter referred to as "the patient") to be of unsound mind and as such incapable of managing his affairs, and appointing a curator to the person or property of such patient shall in the first instance apply to the court for the appointment of a curator and litem to such patient.'
>
> The remainder of the rule sets out how an application is to be substantiated, requiring, inter alia, affidavits by two medical practitioners who have conducted recent examinations of the patient with a view to ascertaining and reporting on his medical condition.

attorney managed to secure his attendance for a further consultation. Another consultation was arranged with him to return to sign an affidavit. He failed to keep the appointment. The attorney, on 11 March 1999 more than three years from the date of the collision, despite not having contact with him lodge a claim for compensation on his behalf. That was done by registered post, sending the necessary documentation to Road Accident Fund, including unsigned affidavits by both Mdeyide and his wife. The Fund contended that Mdeyide's claim had prescribed under s 23 (1) of the Road Accident Fund Act 56 of 1966. The trial court only dealt with the issue of prescription. In Mdeyide's case it was only him and his attorney that testified. It was evident during his testimony he had no concept of time and space and was unable to narrate his version of events as a result of the head injuries he sustained during the collision. Although the trial court found Mdeyide's claim had prescribed, it ruled that s 23(1) of Road Accident Fund Act infringes upon the rights of the plaintiff of access to courts as enshrined in the Constitution and declared it inconsistent with the Constitution. The matter was accordingly referred to the Constitutional Court for confirmation of the order of invalidity.

[120] The Constitutional Court in dealing with the matter held, that the court a quo prematurely embarked upon an inquiry into the constitutionality of s 23 (1) of Road Accident Fund Act because if at the time of the trial Mdeyide had been unsound of mind he would, without the assistance of a curator ad litem, have lacked locus standi. In the result the trial court's order was set aside in its entirety and the matter was remitted for a rule 57 enquiry.

[121] In view of the above-mentioned, the Defendant's reliance on Mdeyide for the proposition that Uniform Rule 57(1) was not properly followed is therefore misplaced as the facts in this case are clearly distinguishable. In the present instance, a curator ad litem was appointed on 7 February 2013, to the person of Reyners. When summons was served on 23 August 2013 it was pleaded that a curator ad litem was appointed as such. At no stage in the pleadings had it ever been suggested by the Defendant that the appointment of the curator had in any way been irregular or improper. There was also an application to substitute the name of the curator ad litem for another. That was also not challenged. Even when the amendment to the

particulars of claim was sought to reflect the name change of the curator ad litem, in this Court, the Defendant did not object to it.

[122] So, despite having had an opportunity to lead evidence about its misgivings as to the appointment of the curator ad litem, the Defendant elected not to do so. It simply failed to gainsay the evidence of the Plaintiff as to the disability and impediment under which Reyners suffers. But despite the Defendant's, belated protestation, the reports of its own experts had established that Reyners requires the assistance of a curator ad litem and curator bonis.

[123] The Defendant's belated criticism regarding the proceedings in terms of Rule 57 is therefore unconvincing and of no assistance in determining the main issues.

[124] The Defendant also relied on the dictum in Du Toit NO obo Ntsikelelo Mafanya v RAF case no A 585/2015 dated 21 September 2016 WCHC. In that matter the question as to whether the plaintiff lacked legal capacity at the time of concluding a settlement agreement was in dispute. Mafanya's legal representatives concluded a settlement agreement on his behalf despite the fact that he had been examined approximately two month before the settlement by the plaintiff's medical experts to determine his mental capacity. In the affidavit of Dr Reid it had been pertinently stated that the patient's head injury was 'without evidence of a significant brain injury' and there had been 'no neuro-cognitive change… expected after such a degree of injury'. The report of Dr Zabow had provided no indication on which material information he based his conclusion. In the report of Ms Coetzee she had expressed no clear opinion as to Mafanya's mental capacity at the relevant time when the settlement agreement was concluded. On the basis of all the evidence the court came to the conclusion that there was a range of factors ranging from him signing a power of attorney, to his ability to furnish instructions to his legal team and find Mafanya had the necessary mental capacity to instruct his attorneys. In rejecting the experts' opinions, the court held they relied on scant information to come to their conclusion.

[125] *In casu*, the facts are significantly different. In the present instance, the issue whether Reyners requires a curator was never in issue on the evidence, including

the joint minutes of the experts. The main focus of the experts was on Reyners mental capacity as from the time of the fall. It was never suggested, by the Defendant or anyone else that Reyners condition had been anything different at any intervening stage. The Defendant simply failed to refute or gainsay the evidence that was led by the Plaintiff on that point. I therefore disagree that the expert witnesses was based on unsubstantiated information and that the agreement between the parties' experts did not amount to an agreement that Reyners had no capacity to litigate in the years following the accident.

[126] This brings me to the testimony of Grove and Cupido. The proposition that the evidence of Grove and Cupido has firmly established that Reyners was in possession of the minimum facts necessary to institute action, is without merit. It is well accepted in our law that persons that has a disability, poor, illiterate and in many respects less empowered, like Reyners in this instance, normally acquire knowledge of the existence of a claim through word of mouth and day- to -day interaction[23].

[127] It is common cause that Grove told Reyners about his fall from the train. In fact, Grove testified, at the time of the incident, his level of education was only matric and not in a position to advise Reyners. He also confirmed that Reyners would not have been aware of a claim against the Defendant. Cupido on more than one occasion mentioned Reyners inability to remember things and his poor working memory. Grove also mentioned about Reyners sudden short temper and unwarranted aggressive behaviour after the fall. The fact that Reyners was capable of continuing with some form of life after the fall, cannot possibly mean he must have obtained knowledge of all the material facts from which the debt arose or which he needed in order to institute action. His failure to acquire such knowledge can hardly be regarded as unreasonable having regard to the context of his physical and mental condition, the pain he is suffering, his memory function and socio environment in which he found himself [24].

[128] On the objective facts, apart from Grove telling Reyners he fell from the train, there is no evidence to suggest that Reyners was informed or in possession of

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[23] RAF v Mdeyide (II) 2011 (2) SA 26 CC at para 83.
[24] Brand v Williams 1988 (3) SA 908 (C) at 925 I.

sufficient facts to cause him, on reasonable grounds, to suspect that there was negligence (fault) which had caused the damages he suffered and which in turn would have caused him to seek further advice. The reasoning by the Constitutional Court in Links v Dept of Health[25] at para 45, is in my view instructive, where the following was held:

> *"In a claim for delictual liability based on the Aquilian action, negligence and causation are essential elements of the cause of action. Negligence and, as this court has held, causation have both factual and legal elements. Until the applicant had knowledge of the facts that would led him think that possibly there had been negligence and that this had caused his disability, he lacked knowledge of the necessary facts as contemplated in s 12(3)."*

[129] There is also no evidence to suggest that Reyners at will, postponed the commencement of prescription by sitting back and adopting a supine attitude[26]. In June 2010, when his neighbour Chadwick talked to him about the accident, he and his mother soon thereafter attended the offices of his current attorneys. These facts differ significantly from that in Mdeyide II[27]. In that case, Mdeyide found out, by word of mouth, within six months after the accident that he had a claim against RAF, despite his disability and socio-economic circumstances, and visited his attorney soon thereafter with his wife. The Constitutional Court held that Mdeyide had knowledge of all the material facts from which the debt arose or which he needed in order to institute action and correctly so.

[130] In the present instance, it can hardly be suggested that Reyners in his state of mind had sufficient knowledge of the facts, given Grove and Cupido's testimony, that would led him to think there was possible negligence and that it caused his disability. Our law does not require a person to do the impossible[28].

[131] This brings me to the issue of whether Reyners has the capacity to litigate since the date of the incident and therefore could himself instruct an attorney to institute proceedings without the assistance of a curator. As stated previously, the

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[25] 2016 (4) SA 414 CC and the cases referred to therein.
[26] Macleod v Kweyiya 2013 (6) SCA 1 at para [9] and the cases referred to therein.
[27] Ibid, para [90].
[28] Van Zyl N.O. v Road Accident Fund (CCT 114/20) [2021] ZACC 44 (19 November 2021).

Defendant's own expert recommended that a curator ad litem be appointed for the person of Reyners. That body of evidence is important. There is no evidence to suggest Reyners mental condition had deteriorated to that extend that the need for a curator ad litem only arose since 7 February 2013. The expert evidence is clear, Reyners condition has arisen as of date of the incident being 20 February 2001, and from that date he requires the assistance of both curator ad litem and curator bonis. That evidence is incontrovertible. There exists no plausible reason in law or fact to reject it. In that regard the dictum in Theron v AA Life Assurance Association Ltd[29] at 740 H- 741 A, is in this instance helpful where the court held that:

> *"..[W]here a particular a particular situation requires a particular level of understanding, and that level of understanding is wanting, the person will not have capacity to act to have locus standi, to litigate means…that a person must be able to make meaningful contributions to his litigation and be able to give proper instructions to his legal representatives, which in turn, means being able to make rationally motivated decisions. Litigation in the particular situation and the particular level of understanding demanded by the situation includes the ability to make rational decisions. The capability to understand court proceedings at a basic, concrete level is insufficient; what is required is the capacity to understand the proceedings at a level which is sufficient to enable the litigant to give meaningful instructions to his legal representatives, ie to make rational decisions."*

[132] In my view, the totality of all the evidence, has overwhelmingly established that Reyners cannot manage his own litigation, does not understand the proceedings at a level which is sufficient to allow him to give meaningful instructions to his legal representatives and to make rationally motivated decisions[30]. The mere fact that Grove was of the view that Reyners may have been capable of telling an attorney that he fell from a train, or whether he may have gone to an attorney had that been suggested to him earlier, is nothing more than to understand court proceedings at a basic and concrete level. On the facts of this case, that is wholly insufficient to

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[29] 1993 (1) SA 738 CPD

[30] Jonathan v General Accident Insurance Co of SA Ltd 1992 (4) SA 618 CPD at 627H.

contend that Reyners has the capacity to litigate since the date of the incident and therefore could himself instruct an attorney to institute proceedings[31].

[133] Furthermore, there is no basis on the facts of this matter, to conclude that an adverse inference must be drawn from the fact that Reyners and or his mother did not testify. There was nothing in the Defendant's evidence that the Plaintiff needed to rebut. The Defendant bears the onus on prescription, that the Plaintiff had knowledge of all material facts from which the debt arose or which he needed to know in order to institute action[32].

[134] On a conspectus of all the evidence and for the reasons mentioned above, the Defendant in my view failed to discharge the onus in respect of the special plea.

[135] It follows that the decision of the court a quo cannot be faulted. The order I would have made is to uphold that decision and dismissing the Defendant's special plea on prescription, and dismissed the appeal with costs.

LE GRANGE, J

NUKU J

[136] I have had the benefit of reading the judgment prepared by my Sister, Mantame J (first judgment) and that prepared by my Brother, Le Grange J (second judgment) in this matter. I agree with the outcome proposed in the first judgement that the appeal should be upheld with costs.

[137] I write separately to deal with three issues. Firstly, I deal with what I consider to be a misdirection by the trial court when it dismissed the special plea raised by the appellant. Secondly, in as much as I agree with the outcome proposed in the first judgment, I do so for slightly different reasons that I will deal with in this concurring

[31] Ibid ft 29.
[32] Macleod v Kweyiya supra at para 10 and 11

judgment. Finally, I briefly set out the reasons for my disagreement with the second judgment.

[138] The first judgment provides a detailed description of the facts that I gratefully adopt. I also endorse the conclusion of the first judgment that on the evidence presented before the trial court, the trial court should have come to the conclusion that the appellant had discharged the *onus* resting on it to prove its special plea in that the evidence established that Mr Reyners had acquired knowledge of the facts from which the debt arose when he was told by Mr Grove, a day after the accident, that his injuries were caused when he fell from a moving train while the doors were open, and with this knowledge, Mr Reyners, acting reasonably, could have acquired knowledge of the identity of the debtor, namely, the appellant in this instance.

[139] The part that I am respectfully unable to agree with in the first judgment is the conclusion that on the evidence, presented before the trial court, the trial court should have found that the appellant "*discharged the onus that Mr Reyners had the capacity to litigate and instruct an attorney*." I consider it to have been the respondent who bore the evidential burden to establish that Mr Reyners "*had no capacity to litigate and instruct an attorney*", and my conclusion in this regard is that the respondent failed to discharge this evidential burden. Although this does not make any difference to the outcome proposed in the first judgment, I considered it necessary to set out what I consider to be the correct legal position. I will return to this, however, after dealing with what I consider to have been a misdirection by the trial court.

[140] I also consider it helpful to first set out the issues that the trial court was called upon to determine. Thereafter, I will set out how the trial court determined these issues, and why I am of the view that the trial court misdirected itself. Thereafter, I will return to deal with the reasons for my disagreement with the first judgment. Lastly I then deal with the reasons for my disagreement with the second judgment.

[141] The trial court described the issues for determination in paragraphs [2] to [4] of the judgment as follows:

"*[2] …. Defendant raised a special plea of prescription, alleging that the plaintiff's claim prescribed, and that prescription against the defendant commenced to run from the date of the accident on 20 February 2001. The defendant alleges that plaintiff failed to institute the action within three years of the occurrence, and the claim has prescribed in terms of s11 (d) of the Prescription Act 68 of 1969 ("the Prescription Act").*

[3] Plaintiff submits that by virtue of his mental defect, Denzil would not have had knowledge of the identity of the debtor and the facts from which the debt arose as contemplated in s 12 (3) of the Prescription Act. Consequently, prescription would only have commenced to run against Denzil from 7 February 2013, when he was placed under curatorship.

[4] The plaintiff further contends that prescription did not commence to run as of 20 February 2001, as a result of injuries suffered by Denzil, which rendered him a person of unsound mind, incapable of managing his own affairs and without the capacity to litigate. In the alternative, plaintiff contends that due to the injuries sustained by Denzil on 20 February 2001, he was rendered "insane" as contemplated in s 13(1)(a) of the Act (sic), and consequently the running of prescription was accordingly delayed until a year after the relevant impediment had ceased to exist…."

[142] On the issue of which party bore the *onus* or evidential burden in respect of the issues for determination, the trial court stated the following which accords with what the parties had agreed and which, in any event, in my view, reflects the correct legal position:

"*The defendant raised a special plea and the onus is accordingly on the defendant to prove that plaintiff's claim has prescribed. (See: MacLeod v Kweyiya 2013 (6) SA 1 (SCA) at 6F; Van Zijl v Hoogenhout 2005 (2) SA 93 (SCA) at 107G). Insofar as the plaintiff relies on the provisions of s13(1)(a) of the Prescription Act, plaintiff has an evidential burden to establish that Denzil did not have the mental capacity to institute his claim and that he laboured under the alleged impediment*."

[143] The agreement of the parties referred to in the preceding paragraph is contained in paragraph 6 of the minute of a Rule 37 pre-trial conference dated 29th October 2019 where it is recorded as follows:

> "*6. The parties are to discuss which issues in dispute require the duty to begin and/or the onus of proof.*
>
> *It was agreed that the plaintiff has the duty to begin and has the onus of proof in respect of all issues, including those issues raised in Plaintiff's Replication but excluding the Defendant's Special Plea of Prescription.*
>
> *Defendant has the onus of proof in respect of the Special Plea of Prescription*."

[144] In determining the issues referred above, the trial court came to the conclusion that the appellant had failed to discharge the *onus* in respect of its special plea. The significance of this, in my view, is that what this meant was that the appellant had failed to prove that '*Mr Reyners had actual or deemed knowledge of the facts from which the debt arose as well as the identity of the debtor*', and not that the respondent had discharged the evidential burden resting on it to prove that the prescription did not commence running, or the running of the prescription was delayed because of the impediment under which Mr Reyners laboured.

[145] However, the reasons provided for the conclusion that the appellant failed to prove its special plea demonstrate that the trial court conflated the issues relating to the appellant's special plea and the respondent's replication to the appellant's special plea.

[146] As the case law referred to in the trial court's judgment demonstrates, all that was required of the appellant to prove its special plea was that Mr Reyners had deemed, or had actual knowledge of the facts from which his claim arose as well as the identity of the debtor. The trial court did not, and could not, reject the evidence of Mr Grove and Ms. Cupido that Mr Reyners was told that he sustained his injuries

when he fell from a moving train while the doors were not closed. These are the facts from which the Mr Reyners' claim arises and so, in my view, this evidence proved that Mr Reyners had actual knowledge of the basic facts from which the claim arose.

[147] With the knowledge of what caused his injuries, all that Mr Reyners had to do was to consult an attorney for the purposes of enquiring whether he may have any recourse and, if so, against whom. This is what Mr Reyners did not do until he was advised by his neighbour, Mr Trevor Chadwick ("*Mr Chadwick*") about a possible claim arising from the injuries he had sustained. In fact, it is clear from the evidence that it was only after this encounter with Mr Chadwick that Mr Reyners sought legal advice, and from which advice he was able to acquire the actual knowledge of his debtor, namely, the appellant.

[148] It can thus be accepted that until he received legal advice from his attorney of record, Mr Reyners did not have actual knowledge of his debtor. The Prescription Act, however, does not only require actual knowledge because in circumstances where the creditor could have acquired actual knowledge, had he or she acted reasonably, he is deemed to have acquired knowledge of the identity of his or her debtor and prescription commences to run from the date the creditor is deemed to have acquired knowledge of the identity of the debtor.

[149] Mr Reyners acquired actual knowledge of the basic facts from which his claim arose during 2001, and had he sought legal advice during 2001, he would have acquired knowledge of the identity of his debtor. I say this because, with the information that he was told by Mr Grove, and had he acted in the same manner that he acted after his encounter with Mr Chadwick, he would then have been advised that he has a claim against the appellant, and would have been able to pursue it in the same manner that he has done, albeit many years after his claim arose.

[150] The trial court's conclusion, therefore, that the appellant had failed to prove its special plea is at odds with the evidence referred to above. It appears that the trial court attempted to get around this issue by considering the respondent's replication that Mr Reyners had had no capacity to litigate. This, however, is a separate and discrete issue in respect of which the respondent bore the evidential burden to

establish the impediment pleaded by the respondent, and it was not for the appellant to prove that Mr Reyners was not subject to the pleaded impediments. As the first judgment correctly points out, the delay in the prosecution of the claim by Mr Reyners was due to his ignorance which cannot interrupt the running of prescription.

[151] To the extent that the judgment of the trial court is capable of being read in such a manner that suggests that the respondent discharged the evidential burden to prove that Mr Reyners had no capacity to litigate, such a conclusion is also not supported by the evidence that was presented. The first difficulty in this regard is the fact that on the evidence that was presented, the initiation of the claim against the appellant followed immediately after Mr Reyners came to know of the possibility of the claim. In this regard, the evidence is clear that the encounter that led to the discovery of this possible claim was between Mr Reyners and Mr Chadwick and that it was Mr Reyners who then conveyed this to his family. If Mr Reyners could convey this to his family, I can find no reason why he could not have been able to seek legal advice had he learnt of this possible claim soon after he became aware of the cause of his injuries. It was not because of his lack of capacity to litigate that Mr Reyners did not timeously pursue his claim and the trial court misdirected itself in holding otherwise.

[152] The first judgment has dealt with the insufficiency of the evidence, including the expert evidence, to establish that Mr Reyners lacked the capacity to litigate and I am in agreement that the evidence did not establish that Mr Reyners lacked capacity.

[153] As already stated, the only part of the first judgment that I am unable to agree with, is the conclusion that the appellant "*discharged the onus that Mr Reyners had the capacity to litigate and instruct an attorney*…" The basis of my disagreement is that this is not an aspect in respect of which the appellant bore the *onus* to prove. It was, as recorded in the trial court's judgment, an issue in respect of which the respondent bore the evidential burden to prove and for the reasons contained in the first judgment, the respondent failed to discharge this evidential burden, and the consequence of which should have been that the appellant's special plea should have been upheld.

[154] The basis of my disagreement with the second judgment is that it also appears to conflate the issues to the extent that there is a suggestion that the appellant was required to prove that Mr Reyners had the capacity to litigate, and as already stated, this was for the respondent to establish and he has failed to do so.

[155] The second judgment further refers to the agreement recorded in paragraph 9.8 of the minute of a Rule 37 pre-trial conference dated 29 October 2019 where the appellant was requested to admit that "*the fall caused plaintiff a traumatic brain injury which resulted in, inter alia, permanent loss of cognitive abilities and executive functioning, dementia problems, epilepsy, memory problems, word finding difficulties, irritability, aggression, apathy and a change of personality*". To this the appellant responded by stating that "*Defendant admits that the sequelae of Plaintiff's injuries are as agreed to in the joint minutes by the occupational therapists and neuro-psychologists*." The joint minute dated 9 May 2016 signed by Dr Frances Hemp, a neuropsychologist appointed by the appellant and Ms Mignon Coetzee, a neuropsychologist appointed by the respondent records their agreement that "*a Curator ad litem as well as Curator bonis should be appointed to assist Mr Reyners*." On the basis of this agreement, the second judgment suggests that it was not open to the appellant to contest the issue of Mr Reyners' capacity to litigate.

[156] In my view, however, the agreement between the parties' experts about the appointment of a *curator ad litem* and a *curator bonis* to assist Mr Reyners, does not amount to an agreement that Mr Reyners had no capacity to litigate in the years following the accident, an aspect which remained in dispute. The respondent was well placed to place the evidence relating to the circumstances around which the respondent's attorney was approached to prosecute the claim against the appellant, and whether Mr Reyners required assistance when he approached the respondent's attorney, but the respondent failed to do so. In this regard the respondent could have presented the evidence of Mr Reyners and/or that of his mother and/or that of the respondent's attorney. This, in my view, was a crucial piece of evidence if the respondent is to be believed that Mr Reyners did not have capacity to litigate in the years following the fall from the train which caused him bodily injuries. These were the witnesses who were presumably readily available, and the failure to call them

meant that there was an important missing link in the respondent's evidence, and hence his failure to prove that Mr Reyners had no capacity to litigate in the years following his fall from the trained which caused him the injuries.

NUKU, J