

SOUTH AFRICA / JUDGMENT

Jethro N.O v Road Accident Fund (10534/2006) [2015] ZAWCHC 101 (29 July 2015) [2015] ZAWCHC 101

COURT

Western Cape High Court, Cape Town

BEFORE

J Cloete

CASE / FILE NUMBER

10534/2006

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT OF
SOUTH AFRICA

(WESTERN CAPE DIVISION,
CAPE TOWN)

Case No: 10534/2006**DATE: 29 JULY 2015****In the matter between:**

PAUL JOHN DANIEL JETHRO

N.O.....Plaintiff

v

ROAD ACCIDENT

FUND.....Defendant

Court: Justice J Cloete

Heard: 14 May 2015

Delivered: 29 July 2015

JUDGMENT

CLOETE J:

Introduction

- [1] The plaintiff is the curator ad litem to Susanna Jacoba Agenbag ('the patient') who was born on [1.....] [N.....] [1.....] and who, for present purposes, the parties accept has been in a persistent vegetative state since 20 February 1994 when, at the age of [2.... Years], she suffered serious injuries whilst travelling as a passenger in a motor vehicle which was involved in an accident near Vredendal in the Western Cape.
- [2] On 14 February 1997 Adv S Mouton ('Mouton') was appointed as curator ad litem to the patient to institute an action against the deceased estate of the driver of the vehicle in which the patient had been travelling, one Johannes Vermeulen, who died at the scene ('the identified driver') and Sentrasure, which was the designated insurer (appointed agent) of the identified driver in terms of the Schedule to the former Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 ('the MMF Act'). The claim against the deceased estate of the identified driver was not pursued due to his lack of means, although it is common cause that this fact has no bearing on the issues before me.
- [3] On 7 July 1998 Mouton accepted R25 000 in settlement of the patient's claim and signed the relevant discharge form. This amount was the maximum payable by an appointed agent for such a claim in terms of regulation 2 of the Multilateral Motor Vehicle Accidents regulations promulgated under the MMF Act ('MMF regulations').
- [4] On 15 June 2003 the plaintiff was appointed as curator ad litem to institute a claim based on professional negligence against Schreuders Attorneys, who had handled the patient's claim, and on 5 May 2004 action was duly instituted by the plaintiff against these attorneys for payment of R8.9 million ('the Schreuders case'). The cause of action was that the attorneys had negligently failed to: (a) ascertain that the accident was caused partly by the negligence of the driver of an unidentified vehicle ('the unidentified driver') which would have meant that an unlimited claim lay against the Multilateral Motor Vehicle Accidents Fund ('MMF') in terms of regulation 3 of the MMF regulations; and (b) bring a claim based on the negligence of the unidentified driver within two years of the accident thus, it was alleged, permitting the claim to prescribe.
- [5] The attorneys defended the claim and on 17 March 2005 an order was granted referring certain issues for determination up front in terms of rule 33(4). They were:

‘6.1 Whether, had the Defendant instituted action against the Multilateral Motor Vehicle Accidents Fund on behalf of the patient on the basis of the facts pleaded by the Plaintiff in paragraphs 4 and 5 (as amended) of the particulars of claim, claiming her full damages, such claim would probably have succeeded in the absence of a challenge to the validity of regulation 3(1)(a)(v);

6.2 whether an attorney in the position of Defendant would have been negligent in not advising his client to pursue such claim, assuming he had knowledge of the facts set out in paragraphs 4 and 5 (as amended) of the particulars of claim.’

[In Padongelukkefonds v Prinsloo 1999

(3) SA 569 (SCA) regulation 3(1)(a)(v) was declared ultra vires and thus invalid. It had provided that the MMF would not be liable for an unlimited claim unless it was shown that the unidentified vehicle had made physical contact with the claimant, his or her vehicle, or anything which caused the injuries or death.]

[6] The facts pleaded in the amended paragraphs of the particulars of claim were that:

‘4. Die voorval is veroorsaak deur die nalatigheid van beide VERMEULEN en ’n onbekende bestuurder van ’n onbekende motorvoertuig.

5. Die onbekende bestuurder was ook nalatig deurdat hy:

- (a) versuim het om enigsins en/of behoorlik uit te kyk;
- (b) versuim het om die onbekende voertuig enigsins of behoorlik te beheer;
- (c) toegelaat het dat die onbekende voertuig van die pad afloop, stof en klippies opslaan wat teen die voorruit van motorvoertuig [CY 3.....] (onmiddelik agter hom) gespat het, die uitsig van die bestuurder VERMEULEN belemmer het, en veroorsaak het dat die genoemde voertuig die pad verlaat en omgeslaan het;
- (d) te vinnig gery het in die omstandighede.

5.1 Alle moontlike pogings was aangewend om die onbekende bestuurder se besonderhede vas te stel, maar sodanige pogings was onsuksesvol.’

[7] For purposes of determination of those issues the parties assumed that the accident occurred as the plaintiff had pleaded. On 9 June 2005 Foxcroft J ruled in the plaintiff’s favour, finding that Schreuders had been negligent in failing to institute an unlimited claim on the patient’s behalf. It was not necessary for the court to make a finding on the issue of prescription.

- [8] On 22 February 2006 the plaintiff was appointed as curator ad litem to institute the unlimited claim against the defendant (the present action) in the amount of R8.9 million. The parties accept that this was the purpose of his appointment although the terms of the order itself were couched widely, authorising the plaintiff 'om alle noodsaaklike stappe te neem wat nodig is om 'n aksie (eis)... in te stel en te finaliseer...'.
[9] The present action was instituted on 28 September 2006 in that amount, being the total value of the patient's unlimited claim less the sum of R25 000. On 29 June 2011 a deed of settlement was concluded in the Schreuders case in which the plaintiff accepted payment of R1 035 000 on the patient's behalf, such payment being made without admission of liability.
[10] In the present action the defendant filed both a plea and special plea. These were subsequently amended. In an order granted on 9 September 2014 the issues raised in the special plea were separated in terms of rule 33(4) and it is these issues which were argued before me, as well as certain others which the parties agreed should likewise be determined.

Issues for determination

- [11] The issues are as follows:

11.1 whether the signature of the discharge form by Mouton has the effect of precluding the plaintiff from succeeding in the present action;

11.2 whether the absence of an affidavit prescribed by regulation 3 of the regulations promulgated under the MMF Act debars the plaintiff from succeeding, should it be found that the patient has been in a persistent vegetative state since the date of the accident;

11.3 whether the fact that the current claim for compensation was not submitted to the defendant within the time prescribed by regulation 3(2) of the aforementioned regulations debars the plaintiff from succeeding in recovering damages on the patient's behalf;

11.4 whether the plaintiff could institute the present unlimited claim against the defendant after the patient's mother admitted in an affidavit dated 24 April 2003 that the claim had prescribed; and

11.5 whether the plaintiff and/or the patient's mother (in her capacity as curator bonis) have waived or abandoned her claim for general damages which is part of her present unlimited claim.

- [12] In order to determine these issues I will refer where necessary to other events and legal developments which occurred after the accident.

- [13] It is also common cause that the patient's claim is governed by the provisions of the MMF Act because s 28 of the Road Accident Fund Act 56 of 1996 ('the RAF Act') stipulates that any claims arising prior to its enactment on 1 May 1997 shall be dealt with as if it had not been passed.

The first issue: settlement of the limited claim

[14] At the heart of this issue is whether Mouton, in signing the discharge form, accepted R25 000 in full and final settlement of all claims which the patient might have against the defendant arising from the accident.

[15] This in turn involves the interpretation of the order granted on 14 February 1997 in which Mouton was appointed as curator ad litem.

[16] To contextualise the meaning of that order the plaintiff relies inter alia on certain undisputed facts which are contained in the affidavits of the patient's mother and her attorney filed in support of the application for Mouton's appointment.

[17] Although the defendant does not object to reference being made to the papers filed in that application, it contends that the plaintiff may not rely thereon to contradict, alter, add to or vary the terms of the discharge form because any such reliance is hit by the parol evidence rule and cites in support thereof KPMG Chartered Accountants (SA) v Securefin Ltd and Another 2009 (4) SA 399 (SCA) at para [39].

[18] However the plaintiff does not rely on this evidence to interpret the discharge form, which is a contract, but rather to interpret the order which conferred certain powers on Mouton.

[19] Furthermore, in Standard Bank of South Africa Ltd v Swanepoel NO (20062/2014) [2015] ZASCA 71 (22 May

2015) at para [19] the Supreme Court of Appeal referred to KPMG (supra) at para [39] and stated that:

'It points out only that parol evidence may not be led to alter or vary the terms of a contract. And it says expressly that in interpreting a contract the Court must have regard to the context, or factual matrix, which in this case would be all the documents relied upon and the trust deed.'

[See also First National Bank – A division of FirstRand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd and Another (1054/2013)

[2015] ZASCA 6 9 March 2015] at para [16]].

[20] In Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para [18] it was held that:

'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each

possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against,

the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’

[21] Also relevant is the following passage from *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa and Others* 2013 (2) SA 204 (SCA) at paras [13] – [14]:

‘[13] As indicated earlier in the judgment, the determination of this appeal depends on the proper interpretation of the Preller J order. The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court’s intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual, well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention. See *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A).

[14] It is necessary to place the Preller J order in proper perspective and to examine its terms and purpose in order to determine the intention of the learned judge when he used the word “initiate”. In so doing one has to consider the context in which the order was made.’

[22] Having regard to these principles the following emerges. The patient’s mother, Mrs Martha Agenbag, was the applicant in the application for the appointment of Mouton as curator ad litem. In her founding affidavit she declared that she had instructed new attorneys, Buchanan Boyes, to institute claims in terms of the MMF Act against Sentrasure and the identified driver’s deceased estate and that she wished Mouton to be appointed to assist the patient in those claims.

[23] Mr Christoff Jooste of Buchanan Boyes deposed to a supporting affidavit in which he specifically confirmed his instruction to institute such claims. Nowhere in either affidavit was mention made of the existence or even the possibility of a claim against an unidentified driver. Both deponents made it clear that the sole purpose of Mouton’s appointment would be for him to deal only with those two claims.

[24] The consent signed by Mouton in anticipation of his appointment declared that he had read the papers and was willing to be so appointed. It can thus be accepted that Mouton himself knew exactly what his limited powers would be in the event of the application succeeding.

[25] The order of 14 February 1997 expressly stipulates that Mouton was authorised and directed to institute only those two claims and ‘om enige sodanige aksie te skik’. The literal translation of ‘enige sodanige aksie’ is ‘any such claim’ (Pharos Afrikaans/English Dictionary 2005 ed). The ordinary meaning of ‘any such claim’ read in the light of the order as a whole leads me to conclude that the only reasonable interpretation to be placed thereon is that Mouton’s

powers extended no further than to: (a) institute claims against Sentrasure and the identified driver’s deceased estate; and (b) settle only those claims and not any other claim

which the patient might have.

[26] Support for this interpretation is to be found in the following parts of the discharge form subsequently signed by Mouton in his aforementioned capacity on 7 July 1998, namely that:

25.1 The reference to any unidentified vehicle involved was marked by him as ‘not applicable’, as was that to ‘any other vehicles involved in the accident’; and

25.2 despite the actual value of the claim against Sentrasure and the identified driver already being greater at that stage, it was recorded by Mouton that it was limited to only R25 000.

[27] It is so that Mouton proceeded to acknowledge that he accepted payment of R25 000 ‘in full and final settlement of all and any claims of whatever nature, present or future’ against the MMF arising from the accident. As pointed out by plaintiff’s counsel, had the patient being capable of managing her own affairs and had she signed the discharge form herself, she might well have been precluded from later bringing an unlimited claim because the acknowledgment contained in the discharge form is cast in wide terms. However Mouton’s acknowledgement must be seen in its proper context, namely that: (a) he could only ever have acted within the confines of the limited powers conferred on him by the order; and (b) the only claims which he was authorised to settle in terms of that order were those which lay against Sentrasure and the identified driver’s deceased estate.

[28] It is the defendant’s contention that Mouton’s signature of the discharge form resulted in a compromise, the purpose being to put an end to any further claims. It is argued that the signed discharge form has the same effect as *res judicata* and thus constitutes a bar to the patient pursuing an unlimited claim, save in the event of default on payment by the MMF which did not occur.

[29] In support hereof the defendant relies on *Van Zyl v Niemann* 1964 (4) SA 661 (A) at 669H-670A and *Hlobo v Multilateral Motor Vehicle Accidents Fund* 2001 (2) SA 59 (SCA) at para [10]. *Van Zyl* merely confirms at 669H that ‘[D]it is duidelik dat ’n skikkingssooreenkoms dieselfde uitwerking het as *res judicata* en gevolglik ’n aksie op die oorspronklike skuldoorsaak uitsluit’. Of course in the present matter the original cause of action is the accident. However three potential claims arose therefrom, and Mouton was only authorised by an order of court to advance and to compromise two of them (although it is accepted that pursuit of an unlimited claim would have dispensed with the limited claim). The defendant

correctly points out that it is not a requirement for a valid compromise that the parties thereto must have known of their comprised rights: *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others* 1978 (1) SA 914 (AD) at 922D-923D. To my mind however this does not adequately address the fundamental issue because irrespective of whether Mouton was aware of the existence or possibility of a claim against an unidentified driver when he signed the discharge form, he was not authorised to advance that claim, let alone to compromise it. It was never Mouton's claim but always that of the patient's.

To the extent therefore that the defendant contends that Mouton nonetheless purported to advance and to compromise that claim, then he exceeded his authority and he could not have bound the patient in any event. In this regard it is noted that the defendant (correctly) does not suggest that the order of February 1997 conferred on Mouton any form of ostensible authority insofar as the patient's claims are concerned.

[30] In *Hlobo* the Supreme Court of Appeal dealt with the ambit of authority of a legal representative in the execution of his or her client's mandate and confirmed at para [10] that it may include in certain instances compromising the client's claim in the absence of instructions to the contrary (see also *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and Another* 2010 (4) SA 122 (SCA) at para [11]). However in the present matter Mouton did not act as the patient's legal representative and was not carrying out a client's mandate. When he was appointed as curator ad litem he stepped into the patient's shoes but only to the limited extent that the court order authorised him to do so. If the purpose of the order was to authorise Mouton to advance and compromise any of the patient's claims of whatsoever nature against the defendant arising from the accident then it would have said so.

[31] Some support for my view that Mouton's powers as curator ad litem were limited to the confines of the order appointing him as such is to be found in *Kotze NO v Santam Insurance Ltd* 1994 (1) SA 237 (CPD), where it was accepted that because the initial order had only authorised the curator ad litem to investigate a specific issue, he could not proceed to institute action against the defendant without first approaching court again for an order conferring that power upon him:

'Counsel before us were agreed that the effect of the order appointing Adv Kotze as curator ad litem could not have been to empower the curator to proceed with the trial action without further ado, but was only to authorise him to investigate the legal question raised in the special plea and to decide how to proceed with the conduct of the litigation. That was what was intended by the draft order placed before my Brother King and the Court order went no further.' [At 243F-G].

[32] The approach sanctioned in the court a quo was accepted, with apparent approval, when the matter served before the then Appellate Division in *Santam Insurance Ltd v Booij* [1995] ZASCA 52; 1995 (3) SA 301 (AD) at 309G-I:

‘I may add that counsel of the parties to the present appeal

“were agreed that the effect of the order appointing Adv Kotze as curator ad litem could not have been to empower the curator to proceed with the trial action without further ado, but was only to authorise him to investigate the legal question raised in the special plea and to decide how to proceed with the conduct of the litigation”.

That was the effect of the order granted by King J on 12 May 1993.’

[33] Having regard to the above, it is my view that because Mouton had no authority to compromise the unlimited claim he could not have done so, irrespective of whether he was aware of its existence or not. I am thus persuaded that the signature of the discharge form by Mouton does not have the effect of precluding the plaintiff from succeeding in the present action.

The second issue: absence of regulation 3(1) affidavit

[34] Regulation 3(1)(a)(iii) of the MMF regulations reads as follows:

‘(3) Liability of the MMF in respect of Claims Arising from Driving of Motor Vehicle in case where Identity of Neither Owner nor Driver thereof established.—(1) The liability of the MMF in terms of the Agreement in respect of claims for bodily injury or death arising from the driving of a motor vehicle of which the identity of neither the owner nor the driver can be established (hereinafter referred to as the unidentified motor vehicle) shall be subject to the following conditions:

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

(i)

(ii)

(iii) the claimant submitted, if reasonably possible, within 14 days after he was in a position to do so an affidavit to the police in which particulars of the occurrence that gave rise to the claim concerned are fully set out;’

[emphasis supplied]

[35] At the commencement of argument I was informed that the parties had agreed on a bundle of pleadings, affidavits and documents to which reference could be made during the hearing and which were to be regarded as correctly reflecting the contents of the various court files.

[36] Included therein were the particulars of claim in the Schreuders case, the relevant paragraphs of which read as follows:

‘9. Gedurende of omtrent 4 Augustus 1994 en te Garies het die pasiënt se vader, JOHANNES AGENBAG, opdrag aan die Verweerder gegee om ’n derdeparty-eis namens die pasiënt in te stel.

10. Dit was 'n geïmpliseerde, alternatiewelik, 'n stilswyende term van die ooreenkoms tussen die pasiënt se vader en Mnr ANDRIES SCHREUDER, 'n vennoot van die Verweerder, dat hy die redelike standaard van kennis, bekwaamheid en toewyding wat van 'n redelike man, naamlik in die geval, die gemiddelde prokureur in die huidige omstandighede, verwag kon word, sou uitoefen in die behartiging van die pasiënt se eis (saak).

10.1 Daar was dus 'n deliktuele regsplig op die voormelde prokureur om toe te sien en te sorg dat hy alle redelike stappe neem soos wat van hom verwag was in die uitoefening van sy mandaat om die pasiënt se eis na behore in te stel.

11. Die vermelde prokureur het sy mandaat teenoor die pasiënt verbreek deurdat hy onregmatiglik en nalatiglik versuim het om:

(a) die redelike standaard van kennis;

(b) bekwaamheid;

(c) die redelike toewyding, te handhaaf soos wat vereis word van 'n prokureur in die lewering van professionele dienste aan sy kliënt; en in die redelike en behoorlike uitoefening van sy plig en mandaat, 'n onbeperkte gemeenregtelike eis teen die Padongelukkefonds in te stel ingevolge die Multilaterale Motorvoertuigongelukkefondswet 93 van 1989 ("die Wet"), gelees met die gepaardgaande en relevant regulasies daarvan.'

[37] Also included was the application by the patient's mother for the appointment of the plaintiff as curator ad litem to institute the unlimited claim against the defendant. The relevant paragraphs of her founding affidavit read as follows:

'9. Op 8 Junie 1994 (it is common cause that the date of 1984 in the affidavit is incorrect) is 'n Geregtelike Doodsondersoek ingevolge Wet 58 van 1959 met betrekking tot die ongeluk afgehandel en is bevind dat die dood van die bestuurder ("Vermeulen") nie veroorsaak is deur die handling of versuim wat 'n misdryf aan die kant van enige persoon uitmaak nie.

10. Alreeds tydens die verhoor van die Geregtelike Doodsondersoek was daar 'n eedsverklaring van: (a) ene Frederik Christoffel ("Truter") gedateer 20 Februarie 1994 beskikbaar ('n Afskrif van hierdie eedsverklaring word hierby aangeheg, gemerk Aanhangsel "FCT"); en (b) Jacobus Groenewald ('n Afskrif van hierdie eedsverklaring word hierby aangeheg, gemerk Aanhangsel "LG"). Hierin beweer Truter dat hy ook 'n passasier in Vermeulen se voertuig was. Groenewald bevestig ook in sy verklaring dat daar twee motorvoertuie by die voorval betrokke was. Onderwyl Vermeulen-hulle gery het, het 'n wit Isuzu bakkie ("n onbekende voertuig") verbygekom waarvan die registrasie nommer en besonderhede omtrent beide die

bestuurder en die eienaar onbekende is, Vermeulen se voertuig verbygesteek. In die proses het die onbekende voertuig na links

gedraai en op die gruis beweeg. Die gruis het so 'n geweldige stof of 'n "rook" veroorsaak en van die gruisklippies

het teen Vermeulen se voorste ruit gespat dat dit Vermeulen se uitsig belemmer het. Vermeulen het toe beheer oor sy voertuig verloor, die pad verlaat en sy voertuig het omgeslaan. As gevolg van hierdie ongeluk is Vermeulen dood en die pasiënt nog steeds in 'n koma...

13. Op 9 Junie 2005 het Sy Edele, Regter Foxcroft, onder Saaknommer 4389/2004, bevind dat die pasiënt se voormalige prokureur, Andries Schreuder wel nalatig was om slegs 'n beperkte eis en nie 'n eis vir algemene skade teen die Fonds in te gestel het nie. 'n Afskrif van hierdie uitspraak word hierby aangeheg, gemerk Aanhangsel "UIT"...
17. Dit is duidelik met respek dat die pasiënt nie in staat is om haar eie sake te behartig of die voorgenome eis in te stel nie. Gevolglik is dit noodsaaklik dat: (a) 'n curator ad litem aangestel word ten einde haar by te staan in die voorgenome aksie teen die voorgenome Verweerder in te stel; en
(b) 'n curator bonis aangestel word om die administrasie van enige vergoeding wat sy mag ontvang, asook haar boedel en sake te behartig.
18. Indien die voorgenome eis suksesvol is, sal daar op 'n latere stadium aansoek gedoen word by hierdie Agbare Hof om die aanstelling van: (a) curator bonis; en (b) curator personae van die pasiënt. Ek is bereidwillig om as curator bonis op te tree indien dit hierdie Agbare Hof sou behaag.'
- [38] Given that the issue under consideration was formulated by the parties to relate only to the absence of the regulation 3(1)(a)(iii) affidavit, the plaintiff's counsel confined their submissions accordingly.
- [39] The plaintiff submits that regulation 3(1)(a)(iii) is not intended to non-suit a claimant who is unable, due to circumstances beyond his or her control, to make such an affidavit because it is only required if it is reasonably possible for the claimant to do so. In support of this submission the plaintiff referred to Road Accident Fund v Thugwana 2004 (3) SA 169 (SCA) where the Supreme Court of Appeal considered the successor to this regulation, being regulation 2(1)(c) contained in Government

Gazette 17939 of 25 April 1997, and which is in virtually identical terms. At para [7] it held that:

'If a claimant is physically or mentally incapable of making an affidavit, it cannot be said that he or she is in a position to do so.'

- [40] Given the parties' agreement that for purposes of adjudication of the separated issues the court should assume that the patient has been in a persistent vegetative state since the collision, it must logically follow that she has not been physically or mentally capable of making the regulation 3(1)(a)(iii) affidavit and it has thus not been 'reasonably possible' for her to do so.
- [41] The defendant however contends that the patient's interests should nonetheless have been protected by her mother, either in that capacity or in her capacity as curator bonis (it is not suggested that any such obligation fell on Mouton or the plaintiff). The defendant sought to

broaden the ambit of this limited issue by submitting that no explanation has been provided as to what reasonable steps were taken (presumably by the patient's mother) to identify the owner or driver of the unidentified vehicle (in accordance with regulation 3(1)(a)(ii)) and, because no affidavit has been submitted, the defendant is not liable for the unlimited claim.

- [42] In support hereof the defendant relies on *Mbatha v Multilateral Motor Vehicle Accidents Fund* [1997] ZASCA 25; 1997 (3) SA 713 (SCA) at 718F-H and *Geldenhuis & Joubert v Van Wyk & Another* 2005 (2) SA 512 (SCA) at paras [24] and [29].
- [43] However in *Mbatha* the Supreme Court of Appeal considered regulation 3(2)(a)(i) which pertains to the lodging of an unlimited claim against the MMF within two years from the date upon which it arises, and whether or not this regulation was ultra vires the MMF Act. It was in that context that the findings at the passage relied upon by the defendant were made. There was furthermore no suggestion that the claimant in *Mbatha* had suffered from any physical or mental impairment.
- [44] Geldenhuis dealt with the corresponding provisions in the later Road Accident Fund Act 56 of 1996 and cited *Mbatha* with approval at para [24]. At para [29] the Supreme Court of Appeal made the point that it had not been asked to determine whether an unassisted person under a legal or other disability (for example a minor without a guardian) would be hit by the two-year prescription period. It is thus my view that the aforementioned authorities do not assist the defendant.
- [45] To my mind there was no obligation on the patient's mother, in her capacity as such, to ensure that she submitted the affidavit on the patient's behalf. The patient was not a minor when the accident occurred and immediately prior to the accident did not suffer from any legal or other disability which in the ordinary course might have placed such an obligation on someone other than her. The patient's mother was eventually only issued with letters of curatorship bonis by the Master on 4 September 2003, nine years after the accident, in circumstances which are entirely unclear. Furthermore, the extracts which I have quoted from the particulars of claim in the *Schreuders* case coupled with the finding of Foxcroft J, strongly indicate that the patient's parents rather relied on *Schreuders* Attorneys to protect her interests. In these circumstances the defendant's argument cannot hold water.
- [46] I accordingly find that the absence of the regulation 3 affidavit does not debar the plaintiff from succeeding, should it be found that the patient has been in a persistent vegetative state since the date of the accident.

The third issue: failure to lodge the unlimited claim within the two-year period prescribed by regulation 3(2)

- [47] It is common cause that the unlimited claim was not lodged with the MMF within the prescribed two-year period from the date of the accident as required by regulation 3(2)(a) of the MMF regulations which provide that:

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

- (a) (i) A claim for compensation for loss or damage suffered by the claimant shall be delivered to the MMF within two years from the date upon which the claim arose *mutatis mutandis* in accordance with the provisions of Article 62 of the Agreement.
- (ii) The provisions of subparagraph (i) shall also apply to all third parties and claimants, irrespective of whether they are subject to any legal disability.’

[48] S 13(1)(a) of the Prescription Act 68 of 1969 (‘the Prescription Act’) stipulates that:

‘13. Completion of prescription delayed in certain circumstances.---(1) If---

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

and

- (i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a) ... has ceased to exist;

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

[49] S 16 of the Prescription Act, in general terms, makes its provisions (including s 13) applicable to all debts other than where an Act of Parliament prescribes a different period.

[50] In *Moloi and Others v Road Accident Fund* [2000] ZASCA 144; 2001 (3) SA 546 (SCA) the Supreme Court of Appeal considered regulation 3(2)(a) in light of ss 13 and 16 of the Prescription Act. It held at paras [14] – [17] that the regulation was invalid as being contrary to s 16 of that Act.

[51] Although the court dealt specifically with the position of a claimant who had been a minor at the date of a collision, the ratio applies equally to the patient, being a person ‘under curatorship or ... prevented by superior force ... from interrupting the running of prescription’ as envisaged by s 13(1)(a) and she is thus in the same position as a minor. Given the assumption that, for purposes of these proceedings, the patient remains in a permanent vegetative state, she therefore similarly enjoys the protection afforded by *Moloi* and completion of the statutory prescriptive period remains delayed.

[52] Although the Supreme Court of Appeal held in *Geldenhuis and Joubert* (*supra*) that the corresponding provisions in the Road Accident Fund Act 56 of 1996 and its regulations were valid, and expressed doubt as to the correctness of the decision in *Moloi*, it did not overrule that decision and this court is accordingly bound thereby. Indeed, I did not understand the defendant to seriously contend otherwise. The defendant rather advanced arguments

similar to those in respect of the second issue, namely that the obligation fell on the patient's mother to have complied with regulation 3(2)(a). To my mind, the same considerations in rejecting the defendant's arguments apply to the third issue. In any event s 13(1)(a) of the Prescription Act specifically excludes the running of prescription (as provided therein) against a person under curatorship.

[53] It follows that this issue must be decided in the plaintiff's favour.

The fourth issue: whether the plaintiff could institute the unlimited claim subsequent to the admission by the patient's mother that it had prescribed

[54] In her affidavit filed in support of the application for the plaintiff's appointment as a curator ad litem in the Schreuders case, the patient's mother made the following allegations:

'17. Die vermelde prokureur het sy mandaat teenoor die pasiënt verbreek, deurdat hy onregmatiglik en nalatiglik versuim het om in die redelike en behoorlike uitoefening van sy plig en mandaat 'n onbeperkte gemeenregtelike eis teen die Padongelukkefonds in te stel ingevolge die Multilaterale Motorvoertuigongelukkefondswet 93 van 1989 ("die Wet"), gelees met die gepaardgaande en relevante regulasies daarvan.

18. Vermelde gemeenregtelike eis moes binne twee jaar na die ongeluk ingestel gewees het. Dit was nie deur Mnr Schreuder gedoen nie. Gevolglik het hierdie gemeenregtelike eis om algemene skadevergoeding alreeds verjaar.'

[55] In similar vein, the defendant sought to attribute to the patient the state of mind of the patient's mother. In my view, the short answer to this is that, even if it were possible to do so (which for the reasons already given I do not accept) the admission by the patient's mother has no legal effect in light of the decision in Moloi which preceded it.

[56] As pointed out by the plaintiff's counsel, an incorrect concession of law made by a party's legal representative is not binding on the party concerned. Logic dictates that such a concession which directly affects the patient, made by a person without any authority to bind her (in this instance, the patient's mother) can scarcely have more effect.

[57] It follows that the defendant's argument on the fourth issue must fail.

The fifth issue: whether the plaintiff and / or the patient's mother (in her capacity as curator bonis) have waived or abandoned her claim for general damages which is part of her present unlimited claim

[58] As I understand it, the defendant's argument is that by instituting the action in the Schreuders case the plaintiff and / or the patient's mother (as the applicant in the application for the plaintiff's appointment as curator ad litem for this purpose) waived or abandoned the patient's claim for general damages against the defendant.

- [59] In support of this argument the defendant contends that since 2003 (when the patient's mother deposed to the affidavit in support of that application) the 'outward manifestation' of the plaintiff and / or the patient's mother has been the explicit admission that the unlimited claim had prescribed and that Schreuders Attorneys were negligent in allowing it to prescribe, and so, the argument goes, the patient cannot both have her cake and eat it.
- [60] The defendant relies on various authorities but I will not refer to all of them due to overlap. In *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at paras [15] –
- [19] it was held that:
- 'Inferred waiver:
- [15] Waiver is first and foremost a matter of intention. Whether it is the waiver of a right or a remedy, a privilege or power, an interest or benefit, and whether in unilateral or bilateral form, the starting point invariably is the will of the party said to have waived it...
- [16] The test to determine intention to waive has been said to be objective (cf *Palmer v Poulter* 1983 (4) SA 11 (T) at 20C-21A; *Multilateral Motor Vehicle Accidents Fund v Meyerowitz* 1995 (1) SA 23 (C) at 26H-27G; *Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd* 1996 (2) SA 537 (C) at 543A-544D). That means, first, that intention to waive, like intention generally, is adjudged by its outward manifestations (cf *Traub v Barclays National Bank Ltd*; *Kalk v Barclays National Bank Ltd* 1983 (3) SA 619 (A) at 634H-635D; *Botha (now Griessel) and Another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) at 792B-E); secondly, that mental reservations, not communicated, are of no legal consequence (*Mutual Life Insurance Co of New York v Ingle* 1910 TS 540 at 550); and, thirdly, that the outward manifestations of intention are adjudged from the perspective of the other party concerned, that is to say, from the perspective of the latter's notional alter ego, the reasonable person standing in his shoes.
- [17] The third aspect has not yet been finally settled by this Court, or so it would seem (cf *Thomas v Henry and Another* 1985 (3) SA 889 (A) at 896G-898C). What the one party now says he then intended and what his opposite number now says he then believed may still be relevant (*Thomas v Henry and Another* (supra at 898A-C)), although not necessarily conclusive. The knowledge and appreciation of the party alleged to have waived is furthermore an axiomatic aspect of waiver (*Martin v De Kock* 1948 (2) SA 719 (A) at 732-3). With those two qualifications I propose, in this judgment, to apply the test of the notional alter ego.
- [18] The outward manifestations can consist of words; of some other form of conduct from which the intention to waive is inferred; or even of inaction or silence where a duty to act or speak exists...

[19] Because no one is presumed to waive his rights (cf *Ellis and Others v Laubscher* 1956 (4) SA 692 (A) at 702E-F), one, the onus is on the party alleging it and, two, clear proof is required of an intention to do so (*Hepner v*

Roodepoort-Maraaisburg Town Council 1962 (4) SA 772 (A) at 778D-779A; *Borstlap v Spangenberg en Andere* 1974 (3) SA 695 (A) at 704F-H). The conduct from which waiver is inferred, so it has frequently been stated, must be unequivocal, that is to say, consistent with no other hypothesis.'

[61] From *Mothupi* it is evident that:

(a) the defendant bears the onus; (b) clear proof of waiver is required; and (c) conduct from which waiver is to be inferred must be unequivocal and capable of no other interpretation.

[62] The findings of the court in *Mosholi v Putco (Pty) Ltd* 2011 (5) SA 38 (GNP) at 48H-49G, also relied upon by the defendant, serve to illustrate what is required to persuade a court of an unequivocal waiver:

'In die onderhawige geval word staatgemaak daarop dat die eiseres uitdruklik by ooreenkoms afstand gedoen het van haar regte deur die Fonds kwyd te skeld van sy onbeperkte aanspreeklikheid wat hy teenoor die eiseres sou gehad het. Dit is in hierdie verband belangrik om daarop te let dat geen getuienis hoegenaamd voor die hof geplaas is oor die konteks en die agtergrondomstandighede waarteen die gemelde kontrak tussen die eiseres en die Fonds gesluit is nie, behalwe dat daar aan die hof meegedeel is dat dit 'n skikking was wat aangegaan is nadat die eiseres die Fonds vir sy statutêre maksimum as versekeraar ten aansien van die Putco bus van R25 000 in die landdroshof aangespreek het. 'n Hof sal daarteen waak om die bepalings van 'n kontrak of die kontrak self in isolasie te interpreter, en alhoewel ons howe slegs in geval van dubbelsinnigheid die sogenaamde omringende omstandighede

van 'n kontrak as uitlegmiddel toegelaat het, is mettertyd aanvaar dat die agtergrondomstandighede altyd toelaatbaar was. Vele sake toon aan dat die onderskeid tussen agtergrondomstandighede en omringende omstandighede soms baie moeilik is om te bepaal, en daar was reeds sterk obiter dicta van die eenparige banke van die Hoogste Hof van Appèl het beslis dat hierdie onderskeid oorboord gegooi behoort te word. Sien: *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2000 (4) SA 399 (HHA) ([2009] 2 All SA 523) paras 38 and 39; *Pangpourné Properties Ltd v Gill & Ramsden (Pty) Ltd* 1996 (1) SA 1182 (A) op 1187E-F; *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another* [2008] ZASCA 94; 2008 (6) SA 654 (HHA).

Dit is dus om hierdie rede dat dit vir 'n hof ongewens is om die finale betekenis van 'n kontrak te bepaal voordat die getuienis van die partye ten aansien daarvan volledig aangebied en geventileer is.

Nou is dit so dat in die onderhawige geval die verweerder slegs staatmaak op die feit dat die skikkingskontrak aangegaan is en dat geen getuienis hoegenaamd omringend die aangaan van die gemelde kontrak is aangebied nie. Van groot belang in hierdie verband is dat, toe die eiseres – wat na bewering haar onbeperkte eis teen die Fonds "weggeteken" het en afstand daarvan gedoen

het toe sy die skikkingsooreenkoms aangegaan het-getuig het, nie 'n enkele vraag in hierdie verband aan haar gevra is nie. Geen stelling is aan haar gemaak om te bepaal of sy met volle kennis van haar regte afstand gedoen het van hierdie sogenaamde onbeperkte eis teen die Fonds toe sy die skikkingsooreenkoms aangegaan het nie. Mnr Potgieter het inderdaad geen vrae hoegenaamd aan die Eiseres gevra nie.

In die lig van die bietjie agtergrondsgetuienis wat wel voor my geplaas was waarteen die skikkingsooreenkoms aangegaan is, is ek hoegenaamd nie oortuig dat die eiseres by aangaan van die skikkingsooreenkoms enigsins die bedoeling gehad het om afstand te doen van 'n moontlike onbeperkte eis wat sy teen die Fonds gehad het nie.'

[63] In considering the defendant's argument the starting point is to determine who exactly it was who was authorised to waive the patient's claim for general damages against the defendant. For the reasons already given, I am not persuaded that the patient's mother had any authority to do so, whether in her personal capacity or in her capacity as curator bonis.

[64] It is apparent from both the application to have the plaintiff appointed as curator ad litem in the Schreuders case (in 2003), as well as the particulars of claim in the action that followed (during 2004) that no-one involved at the time (not least of all the plaintiff) was aware of the decision in Moloi; or put differently, there is no clear proof of this or of any unequivocal conduct from which such a conclusion could be drawn. The indications are rather to the contrary, given the action against Schreuders Attorneys on the basis that their professional negligence had caused the claim to prescribe. Waiver is not lightly presumed; and one cannot waive or abandon a right of which one is unaware. It follows that I am unable to find on this basis that when the plaintiff was appointed as curator ad litem in the Schreuders case and instituted the subsequent action against those attorneys, he knew of the existence of an unlimited claim against the defendant but instead elected to proceed against Schreuder's attorneys on the

grounds of professional negligence.

[65] There is an additional and important consideration, namely that the plaintiff was not clothed with any authority to deal with the unlimited claim against the defendant until, at the earliest 22 February 2006, when his powers were extended accordingly by the order made on that date. Furthermore, since that date, the steps that were taken against the defendant rather evidence conduct inconsistent with a waiver or abandonment of the unlimited claim against it. The settlement of the action against Schreuders Attorneys on 29 June 2011 post-dated *litis contestatio* in the present action (the plaintiff's replication to the defendant's special plea was filed on 17 August 2007) and was concluded without admission of liability. The defendant was not a party to this settlement, and there is insufficient information before the court at this stage as to the circumstances in which it was concluded. In my view it would also be going too far to find that settlement of the Schreuders case put paid to the plaintiff's general damages claim (or indeed the unlimited claim) against the defendant.

[66] Accordingly this issue must also be determined in the plaintiff's favour.

Costs

[67] Given that the plaintiff has succeeded on all of the separated issues, there is no reason why costs should not follow the result.

Conclusion

[68] In the result the following order is made:

1. It is declared that:

1.1 The signature of the discharge form by Adv S Mouton on 7 July 1998 does not preclude the plaintiff from succeeding in the present action.

1.2 The absence of an affidavit prescribed by regulation 3 of the regulations promulgated under the former Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 does not debar the plaintiff from succeeding in the present action, should it be found that the patient has been in a persistent vegetative state since the date of the accident.

1.3 The fact that the current claim for compensation was not submitted to the defendant within the time prescribed by regulation 3(2) of the aforementioned regulations does not debar the plaintiff from succeeding in recovering damages on the patient's behalf.

1.4 The plaintiff was entitled to institute the present unlimited claim against the defendant despite the admission by the patient's mother in an affidavit dated 24 April 2003 that the claim had prescribed.

1.5 The plaintiff and / or the patient's mother (in her capacity as curator bonis) have not waived or abandoned her claim for general damages which is part of her present unlimited claim.

2. The defendant shall pay the costs of these proceedings, including any reserved costs orders, on the scale as between party and party and including the costs of two counsel where employed.

J I CLOETE

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