

SOUTH AFRICA / JUDGMENT

Maboyane v Basson (20780/2021)

[2024] ZAGPPHC 625 (20 June 2024)

[2024] ZAGPPHC 625**COURT**

North Gauteng High Court, Pretoria

BEFORE

N Davis

CASE / FILE NUMBER

20780/2021

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Source record**HIGH****COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****CASE****NO: 20780/2021****1.REPORTABLE:****NO.****2.****OF INTEREST TO****OTHER JUDGES: NO****3.REVISED.****20****June 2024****In****the matter between:****COLLEN****JABULANI MABOYANE****Plaintiff****and****DANIEL****JAKOBUS BASSON****Defendant**

Summary:

extinctive prescription – action instituted against plaintiff's erstwhile attorney for allegedly having allowed plaintiff's claim against the Road Accident Fund to become prescribed – action instituted 15 years after collision and 13 years after last interaction with attorneys – special plea of prescription upheld.

ORDER

1.
The special plea of extinctive prescription is upheld and it is declared that the plaintiff is precluded from pursuing his claim for damages arising from the motor vehicle accident which he had been involved in on 14 January 2006 against the defendant.

2.
Each party to pay its own costs.

JUDGMENT

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically with the effective date of judgment being 20 June 2024.

DAVIS, J

Introduction

- [1] The plaintiff was a passenger in a motor vehicle which had been in a collision on 14 January 2006. The defendant is the plaintiff's erstwhile attorney. The plaintiff alleged that the defendant had allowed the plaintiff's claim for damages against the Road Accident Fund (the RAF) to become prescribed by having failed to institute action on his behalf against the RAF.
- [2] The defendant pleaded that his mandate had been terminated prior to any possible claim against the RAF having become prescribed. The defendant further pleaded by way of a special plea, that the claim against him had in turn become prescribed.
- [3] At the commencement of the hearing the issues of merits, including that of prescription, were separated from the issue of quantum.

Relevant chronology

As in any matter where extinctive prescription plays a role, the chronology of events is crucial. This can be summed up as follows:

14 January 2006

Date of accident. This was confirmed by an
Accident Report form completed on that day.

21 January 2006

An “agent”, one Jacoline, referred the plaintiff to
his first set of attorneys, MD Booyens Inc attorneys to whom he furnished a mandate to pursue a
claim against the RAF. The plaintiff’s
particulars were completed on an “instruction sheet” and an office file was opened for him.

6 March 2006

The plaintiff deposed to an affidavit completed
by the attorneys on his instructions regarding the merits of the accident.

26 July 2006

MD Booyens Inc sends a letter to the plaintiff,
calling upon him to attend to their offices and is advised that upon failure to do so within 14 days,
his file would be transferred to Bares & Basson attorneys, in the same building, on the same fee
terms as agreed to with MD Booyens Inc Attorneys, who will be closing their offices.

11 August 2006

The plaintiff in writing cancels the mandate of
MD Booyens Inc attorneys and mandates Bares & Basson attorneys to pursue his claim against
the RAF. A new power of attorney,
incorporating a contingency fee agreement is also signed. A written consent to obtain medical
records is also signed on the same day.

29 September 2006 The plaintiff supposedly deposed to an affidavit
drawn up by Bares & Basson attorneys, confirming that the plaintiff was a passenger in the
vehicle in question during the collision
(erroneously recorded as having taken place on 21 January 2006) and that he had not been
wearing a seat belt.

20 March 2008

An internal office memo in the plaintiff’s file at

Bares & Basson recorded the following: “Gloria phone this client. Ask his (sic) if he had any loss of income or medical expenses. The taxi he was travelling in did not have permit. So we cannot claim general damages”. The memo thereafter recorded the following: “- left the message with a certain lady/she don’t want to say her name but she will ask Collen to phone me” (“Collen” is a reference to the plaintiff).

26 March 2008

The memo is annotated as follows:

“- phoned again, the lady says she told Collen my message, he said he will phone us Client phoned me/ he says he will go the owner of the taxi and ask for permit and by the time he got an accident he was not working and he went to the hospital for one day and he did not pay”.

23 April 2008

The memo is further annotated as follows:

“Please phone again. I spoke to his mom (Rosinah Mawela) she will (sic) him the message”.

30 April 2008

A letter is sent by the defendant in the following

terms: “We spoke to your mother on 23 April and informed her that we can’t continue with your claim. She said she will tell you. There is nothing to claim. You don’t have any loss of income or medical expenses and your taxi didn’t have a permit. We are closing our file”.

Unknown date in 2017 The plaintiff talks to an RAF employee during an

RAF “roadshow” at a nearby school. He is informed that a claim had been lodged on his behalf but had never been pursued. The plaintiff was advised to go back to his attorneys whereafter he again approached “Jacoline” who took him to Andre du Plessis Inc, who became his subsequent attorneys.

10 September 2018 - A written document purporting to terminate the

mandate of Bares & Basson attorneys is generated. The plaintiff denies the signature ascribed to him on the termination document.

10 September 2018 - The plaintiff furnished his current attorneys with

a written mandate to pursue his claim against either the RAF or the defendant (who has since continued with the practice of Bares & Basson).

3 June 2021

The summons in respect of the claim which

forms the subject matter of the current action is served on the defendant.

The plaintiff's evidence

- [4] The plaintiff testified that on the day of the accident his friend, Godfrey had to drop someone off but didn't want to drive alone. The plaintiff agreed to accompany his friend. After the drop-off, it was only Godfrey and the plaintiff in the vehicle, a red Toyota Venture. At some point Godfrey lost control of the vehicle, veered off the road and collided with an electrical junction box. The plaintiff lost consciousness and was taken from the accident scene to the Gerorge Mukhari hospital. The Accident Report indicated that the accident occurred on the Soutpan Road and other evidence identified this as between Soshonguve and Mabopane (this was not in dispute between the parties).
- [5] The plaintiff testified that he had sustained injuries to his head, shoulder and chest. He only remained in hospital for one day.
- [6] At the time of the accident, the plaintiff was employed at AI Manufacturers. He had been working there at the time for a year and a couple of months. Some time the accident his employment was terminated as he was continuously absent from work due to chest pains. His work entailed loading vehicle door panels on an assembly line to an overhead conveyer belt. He was only able to work for 2 or 3 days before he had to visit a doctor, who provided him with a medical certificate. When this went on for too long to his employer's liking, his employment was terminated.
- [7] Approximately a week after the accident, the plaintiff was referred by an acquaintance to an "agent" who he only knows as Jacoline, who "deals" with RAF claims. Jacoline accompanied the plaintiff to the offices of MD Booyens Inc attorneys where he gave the version referred to in paras [5] and [6] above and to whom he gave a mandate to pursue a claim against the RAF.
- [8] The particulars and mandate was furnished to a lady at the firm who had a consultation with him and who had questioned him about the accident. Although she was employed at the attorneys firm, the plaintiff did not think that she was an attorney. The plaintiff had to take time off from work, but he could not remember whether the lady asked about his employment. From the "instruction sheet" to which I shall refer later, it appears that some employment particulars had in fact been noted.
- [9] When asked about what the lady would have told the plaintiff about the way forward, the plaintiff testified that the lady had said that "they" would evaluate the matter and "come back" to the plaintiff with a figure.
- [10] The plaintiff could not remember when or how many times had returned to the attorneys' offices, but claimed that they never came back to him. He did not have a phone but at one stage gave his mother's contact details. (This appears to accord with the file contents which indicated that the plaintiff's mother had been contacted from time to time).

- [11] During cross-examination, it became a bit unclear whether the plaintiff had visited MD Booyens Inc attorneys on 21 January 2006 (being the date erroneously indicated on the attorneys instruction sheet as the date of the accident) or only on 6 March 2006. It was on the latter date that the plaintiff deposed to his first affidavit regarding the merits of the accident. The plaintiff identified his signature and incidentally it was the defendant, who was then a partner in Bares & Basson attorneys, who had commissioned the affidavit. In the end, nothing much turns on the discrepancies between these two dates.
- [12] Also during cross-examination, the plaintiff was quizzed on other letters sent to him by his attorneys which he claims he either hadn't received or which he could not remember. What the plaintiff could recall having received, was the letter of 27 July 2006 whereby MD Booyens Inc advised him of the closure of their offices and the transfer of his file to Bares & Basson attorneys. He also recalled and identified the written cancellation and transfer of the mandate to attorney and the new power of attorney, all signed on 11 August 2006.
- [13] In respect of the events of 11 August 2006, the plaintiff denies having met Mr Basson (the defendant). Jacoline had come to the plaintiff and told him he must accompany her to Bares & Basson's offices (in the same building as that of MD Booyens Inc), which he did and where he again spoke to a lady. He maintained this denial when confronted with an office note from the defendant, noting a consultation between the two of them.
- [14] The plaintiff could not recall having received any messages from his mother regarding his claim, but confirmed his signature on the merits affidavit of 29 September 2006.
- [15] When confronted in cross-examination about the issue regarding a valid Road Carrier permit of the Toyota Venture, the plaintiff reiterated that, although Godfrey was a taxi driver, he was not "on duty" when the accident had occurred and that they were travelling in a private vehicle.
- [16] It was put to the plaintiff that part of the reason why the defendant had believed that the plaintiff had no claim, was that, at the time, claims by plaintiffs injured in single-vehicle accidents were capped at R25 000,00 for special damages only and that general damages (although still subject to the same cap) could only be claimed in respect of claimants who were passengers conveyed for reward by persons operating in terms of a valid Road Carrier permit.[1]
- [17] The plaintiff's response to this line of questioning was that he knew nothing about the possibility of a limited claim nor about the implications of the existence of a road carrier permit as no-one had ever advised him thereof or explained the nature of his claim to him.
- [18] The plaintiff also denied having received any telephone calls from the defendant's staff or queries regarding his medical expenses or loss of employment.

- [19] When asked to explain the time lapse between the time the defendant claimed the mandate had been cancelled in April 2008 and him approaching his latter (current) attorneys, his response was repeatedly “they said they would come back to me”.
- [20] The plaintiff explained that, due to the fact that he had heard nothing from his attorneys, that he decided to make enquiries from the RAF at its “roadshow”. He was then cross-examined as to why he had not made earlier enquiries. It was put to the plaintiff that had he at any stage after April 2008 made enquiries from the defendant, he would have been informed of the closure of his file and he agreed with this proposition.
- [21] The plaintiff was also confronted with the issue of him having previously relied on Jacoline and why he had not reverted to her when he did not hear anything for many years. His response was that the two of them were no longer “close” and that she lives in Hammanskraal while he lived in Soshanguve.
- [22] The plaintiff’s stock answer to repeated questions in cross-examination as to why he never made enquiries nor reverted to

his attorneys for almost a decade, despite having incurred medical expenses and despite suffering hardship after having lost his

employment, was simply that he did not know the law and had heard that RAF claims take a long time to be finalised. In addition, he repeated that he was waiting for the attorneys to “get back” to him.

- [23] Despite the issues of merits and quantum having been separated at the commencement of the hearing, the plaintiff was cross-examined in relation to the contents of the medico-legal reports filed on his behalf under the rubric of testing the plaintiff’s credibility.

Extensive probing was conducted as to perceived discrepancies of versions told to the various experts and criticism was expressed as to why many of these aspects were not disclosed to the defendant at the time. Even the issue of whether the plaintiff had been wearing a seatbelt was concussed. As will be seen later, not much turned on this line of questioning.

- [24] The next witness called to testify on behalf of the plaintiff was Ms Tsatsewane Jacoline Malungane. She testified that she did not know the plaintiff but only “came into contact” with him. He had told her that he had been in an accident and made enquiries about someone who could assist him. She told the plaintiff that she “worked with” Mr Booyens in respect of RAF claims and took the plaintiff to MD Booyens Inc’s offices.
- [25] Ms Malungane knew about Mr Booyens’ subsequent departure to Cape Town and the transfer of his files to Mr Basson. She could not recall the dates of the plaintiff’s consultations at either attorneys firms to which she had taken him and was not present at any of those.

[26] After Ms Malungane's interaction with the plaintiff, she had not heard from him for many years until he had approached her and told her about the RAF "roadshow people" and that his claim featured on the RAF's system but was "dormant". She then took the plaintiff to his current attorneys. This was, she said, in September 2018.

[27] That concluded the plaintiff's case on the merits and the issue of prescription.

The defendant's case

[28] Mr Basson was the first witness in his own defence. He had done his candidate attorneyship ("articles") at Bares attorneys, then was a professional assistant at that firm and then entered into partnership by about 2005. After he had bought out Mr Bares in 2006, he continued with the firm as a sole proprietorship, keeping the name Bares & Basson. Shortly after taking over the firm on his own, the next door firm of MD Booyens Inc closed and the defendant took over all its files which mostly consisted of RAF work.

[29] Pursuant to the taking over of the files of MD Booyens Inc, who had sent letters to all its clients, advising them of the closure and take-over, the defendant had perused all the client files. It was after this and in response to the MD Booyens Inc letter, that the defendant saw the plaintiff on 11 August 2006. The defendant testified that he had discussed the plaintiff's case with him and his power of attorney (including the fee agreement) and mandate were signed in his presence as well as the authority to inspect medical records. The defendant's secretary, Ms Jolene de Wet, although not present at the time, signed these documents afterwards as a witness.

[30] The sole record of the defendant's consultation with the plaintiff on 11 August 2006, was a barely legible file note made by the defendant, which simply reads: (translated) "cons with Collen. Discuss PoA" ("PoA" is a reference to the power of attorney).

[31] Two days later the defendant reported the taking over of the plaintiff's case to the RAF and furnished copies of the documents signed on 11 August

2008. By that time the plaintiff's claim had already been lodged with the RAF together with the Accident Report which had also already been obtained as well as a hospital report from George Mukhari hospital.

[32] The defendant further testified that due to the fact that the vehicle in which the plaintiff had been travelling was a Toyota Venture and due to the fact that such vehicles are "usually" used as taxi's, he decided that it was necessary to ascertain whether the Venture in question had a road carrier permit. This took quite some time to establish from the Department of Transport.

- [33] In the meantime, the RAF enquired in writing whether the plaintiff had been wearing a seatbelt at the time of the collision. To establish this, the defendant wrote to the plaintiff on 21 September 2006, requesting him to contact the defendant's offices. Of all the letters written to the plaintiff, this request was the only one to contain a translation: "Re kgopela le phounele mo offising ka tshoganetšo go ga direla go bonana lerena". No explanation was given for the reason for the translation as it was not done by the defendant personally.
- [34] It was pursuant to the above letter that the plaintiff again attended to the defendant's offices and signed the pre-prepared statement on 29 September 2006, indicating that the plaintiff had not been wearing a seatbelt. The defendant explained in relation to this "affidavit" that "sometimes we work on a file and an affidavit is signed but not commissioned". What then happened was that another attorney "commissions" the purported affidavit after the fact. This is what happened in this instance and the plaintiff's "seatbelt declaration" was "commissioned" by one Juanita de Jager, an attorney then also practicing in the same building, on 28 November 2006.
- [35] The defendant confirmed having given the instruction to his staff to do the telephonic enquiries and communications with the plaintiff listed in the chronology mentioned earlier. He also confirmed having diarised the file from time to time and identified such diarisation by him on the file cover (which reflects 5 such diarisations).
- [36] Finally, on 19 March 2008 the Department of Transport confirmed that the vehicle in question had no Road Carrier permit to transport passengers for reward on the route along which the accident had occurred.
- [37] This prompted the defendant to instruct his staff to ascertain whether the plaintiff had any claim for past medical expenses or loss of income which could have constituted a valid claim, limited to R25 000.00.
- [38] Pursuant to the telephone responses recorded earlier, and which had been reported to the defendant, he concluded that the plaintiff had no claim. It was pursuant to this, that the letter of 30 April 2008 had been sent, advising the plaintiff of the closure of the file.
- [39] The office file indicated that, despite this letter, the file was diarized until February 2009. The defendant indicated that this was done because "... maybe the client brings a permit or further instructions".
- [40] Hereafter the file was archived in 2009 and nothing was heard from the plaintiff until his current attorneys requested particulars of the matter in November 2018.
- [41] Initially the defendant responded as follows (before later retrieving the file from his archives): "We don't keep files for such extended periods as this. On the documentation provided there is a letter from our offices dated 2006. This is 12 years ago. Nothing further happened. We can unfortunately not be of any assistance".

- [42] The defendant maintained that he had given the plaintiff's case the necessary attention and that he had terminated his mandate prior to the prescription of any possible claim. He confirmed that the claim against the RAF had prescribed on 13 January 2011.
- [43] In cross-examination, the defendant was questioned about "Risk Alert Bulletins" which had been circulated amongst members of the profession since 2005. These indicated that amendments to the limited claims regime were underfoot. These bulletins continued advising the profession on a regular basis until the actual amendments were effected.
- [44] In particular, the defendant was referred to the fact that the first of these amendments came into effect on 1 August 2008. The defendant conceded that he had a duty to keep abreast of legal developments in his field of practice and that he knew of these bulletins, but did not read all of them and could not recall the particular ones referred to. He also read articles in the De Rebus, but could not remember whether he did so regularly prior to 2008. He recalled having noted the published Bill regarding changes to the limited claims regime, but could not recall having studied it or its implications.
- [45] The defendant was referred to a number of Risk Alert Bulletins, but in particular to a bulletin circulated in August 2010. In that bulletin, practitioners were advised under a heading "IMPORTANT NOTICE" as follows: "MVA practitioners should avoid settling with the RAF any "limited claims" in respect of passengers falling under sections 18(1) and 18(2) ... If these matters have not yet been settled, the full amount of damages should be claimed from now on". This advice followed on the decision of *Mvumvu v Minister of Transport* delivered in the Western Cape Division on 28 June 2010 which, so the advice went, was then on its way to the Constitutional Court. The defendant said that the bulletin had not come to his attention but that he was aware of the Constitutional Court litigation.
- [46] The defendant's attention was drawn to the RAF's view of the plaintiff's claim which had been noted in its file by way of a handwritten file memo. The memo summarized the accident description given by the plaintiff and as contained in the Accident Report, and also read: "Claim limited to special damages only ... Injuries SMR laceration above R eye, bruises forehead, painful R Shoulder. Waiting for Mvumvu outcome – limited claim". The defendant's response was, had he been the plaintiff's attorney at the time, he would similarly have awaited the "Mvumvu outcome". He also conceded the correctness of a further memo on the RAF's file which read as follows: "Date of accident: 14.01.2006. Date of Lodgment: 16.05.2006. Service of Summons: before 13.01.2011. No summons on file. Matter prescribed".
- [47] The defendant view was that his file had been closed and that the plaintiff's claim against the RAF had become prescribed prior to the Constitutional Court judgment[2] and that the Amendment Act was only applicable to claims arising after 1 August 2008.

[48] The remainder of the cross-examination centered around criticism of the defendant having himself assessed the seriousness of the plaintiff's injuries and having failed to consider its impact on the plaintiff's employment or future employability. The defendant remained steadfast that he had reacted to what had been conveyed to him, which led him to believe that the plaintiff had not suffered a loss of income.

[49] Two further witnesses were called by the defendant. They were Ms Lepua Gloria Mashego and Ms Brenda Modimela. Both had previously been in the defendant's employ.

[50] Ms Mashego testified that she had previously been employed by MD Booyens Inc and had "transferred" to the defendant's practice in October 2006. Her duties were diarising of files, clerical work and the telephoning of clients as instructed. She spoke English and Sesotho.

[51] Ms Mashego testified that the file notes of 20 March 2008 contained an instruction to her with which she had complied and that her

compliance and responses obtained from the plaintiff and his mother on 26 March 2008 had correctly been noted by her in her own

handwriting.

[52] Ms Modimela had similarly "transferred" from MD Booyens Inc to the defendant's practice in October 2006. Her duties were the same as that of Ms Mashego and she could also speak English and Sesotho.

[53] She recognized the file notes made on 20 and 26 March 2008 as being in Ms Mashego's handwriting. She noted an instruction from the defendant's secretary, one Charmaine, on 23 April 2008 to telephone the plaintiff again. This she did and used the cellphone number noted by Ms Mashego on the memo. The plaintiff's mother answered and did not understand the enquiry addressed to her by Ms Modimela regarding the "taxi permit". She then asked the plaintiff's mother to ask the plaintiff to phone the attorney's office and this is what Ms Modimela noted on the memo in her own handwriting. The plaintiff never phoned her back.

[54] Ms Modimela further confirmed that she had attended to the posting of the letter advising the plaintiff on 30 April 2008 that his file would be closed.

[55] In cross-examination Ms Modimela conceded that when a client could not be reached on a particular number, alternate telephone numbers are then tried. She had noted the instruction sheet obtained by MD Booyens Inc in the file with the work telephone number of the

plaintiff on it, but, having received an answer telephonically from the plaintiff's mother, had not "focused" on other numbers.

[56] That concluded the defendant's case.

Evaluation: Negligent performance of an attorney's duties?

[57] There is no dispute about the defendant's mandate and that he, as the plaintiff's attorney, had a duty to perform that mandate to pursue a claim against the RAF with the skill, knowledge and diligence expected of a practicing attorney.[3]

[58] The plaintiff alleged in his particulars of claim that the defendant had been negligent in the performance of his mandate in the following terms:

"The defendant in executing the aforesaid mandate was negligent in one, all, or some of the following respects:

13.1

He failed to properly investigate the injuries suffered and sequelae thereof, alternatively the severity of the injuries and sequelae, of the claim to be instituted against the Road Accident Fund;

13.2

He failed to appoint any medical experts to assess the injuries, alternatively the seriousness and/or extent of the injuries sustained

and the sequelae thereof of the plaintiff and quantum of the claim;

13.3

He failed to investigate, alternatively adequately investigate the claim;

13.4

He failed to take into consideration the future loss of earnings, past loss of earnings and earning capacity of the plaintiff;

13.5

He failed to have the plaintiff's injuries assessed and investigated at all, alternative properly have the plaintiff's

injuries assessed and investigated;

13.6

He failed to appreciate the seriousness of the injuries suffered by the plaintiff;

13.7

He failed to properly investigate and appoint experts to advice on the extent of the injuries and loss suffered by the plaintiff as a result of the collision;

13.8 He failed to issue summons, against the Road Accident Fund which resulted in the claim becoming prescribed".

- [59] Even if one were to accept in the defendant's favour that the plaintiff's claim had been one of limited special damages at the time and even if one were to accept that the defendant may have been justified in having decided not to wait for statutory amendments at the time that he had decided to terminate his mandate on 30 April 2006, it is clear that the plaintiff had up to that date been ill-served by his attorney.
- [60] By the time that the defendant says he had a consultation with the plaintiff on 11 August 2006, only the most perfunctory steps had been taken on his behalf. The defendant cannot be blamed for the steps taken by MD Booyens Inc, but those steps at least placed the defendant in possession of the Accident Report, a section 19(1) affidavit by the plaintiff, hospital records from the George Mukhari hospital and the RAF lodgment form (Form 1) submitted on 16 May 2006.
- [61] The defendant was also in possession of a letter sent to the plaintiff on 26 June 2006 advising him as follows: "We advise that we have lodged your claim with the Road Accident Fund and they have 120 days to investigate the merits of the claim ... We will be issuing summons soon and will keep you updated regarding the progress of the matter ...".
- [62] Most importantly, though, was the fact that the defendant had been in possession of the "Instruction Sheet" compiled by, MD Booyens Inc. In it, the plaintiff's employment particulars were recorded as follows: "Tel work: 012 541 3470/1/2, Employer's name: A I Manufacturers, Occupation: Assembler".
- [63] At the sole consultation the defendant said he had with the plaintiff, nothing was noted by him in the office file, save for the cryptic note referred to in paragraph [4] above, dated 11 August 2006.
- [64] If the defendant had not consulted with his newly acquired client on that day, but the plaintiff's version is accepted that he had only been attended to by the defendant's secretary (who had signed the pre-prepared documents as a witness), then that failure would in itself constitute a negligent abdication of the defendant's duties to acquaint himself with his client's case first-hand.
- [65] If however, it is accepted in favour of the defendant that he had indeed consulted with the plaintiff, the failure to ascertain for himself what the plaintiff's circumstances at the time were, amounts to negligent conduct. On a conspectus of all the evidence absolutely no enquiries had been conducted relating to the plaintiff's employment, termination of employment, future employment or employability. No enquiries had been made whether the injuries which the defendant had noted in the hospital records had any sequelae, whether the plaintiff still had symptoms or needed future treatment or whether those injuries had any work-related consequences. All this constitute a negligent discharge of an attorney's duties to properly investigate his client's possible claim.

- [66] Even if, on the defendant's version, the file contents had satisfied him as to the plaintiff's circumstances at the time of his consultation, it is totally inexplicable why the defendant conducted no investigation and made no enquiries as to the discrepancy between the employment noted in the instruction sheet and the alleged absence of employment at the time of the accident as noted by Ms Mashego in her note of the telephone conversation on 26 March 2008.
- [67] The defendant simply relied on a cryptic instruction to Ms Mashego noted in the office file on 20 March 2008 by his secretary and an equally cryptic response by his clerical staff. This similarly display a disregard for the plaintiff's circumstances.
- [68] Even if one were to accept in the defendant's favour that his time-consuming attempt to find out if the Venture in question had a Road Carrier permit in order to allow for a claim for general damages in favour of the plaintiff, this line of enquiry was done negligently. It was done contrary to the facts as testified to by the plaintiff, it was not properly explained to the plaintiff, it was done on the defendant's unilateral pre-conception that a Venture driven in a rural area must be assumed to have been a taxi.
- [69] Even if the defendant had consulted with the plaintiff on 11 August 2006, no evidence was presented as to any advice given to the plaintiff as to the limited nature of his claim or, if it had been given, in what language that would have been. If one assumes from the one translated letter sent to the plaintiff that the defendant had at least acknowledged that English was not his client's first language, the termination of mandate letter sent on 30 April 2008, being a document of crucial importance, contained no such translation.
- [70] No effort had been made by the defendant to ascertain whether the plaintiff had received the aforesaid letter or whether the plaintiff knew or was aware that he no longer had an attorney pursuing any claim against the RAF. In the absence hereof, the holding over of the closed file until February 2009 "in case" anything turns up, was strange, to say the least.
- [71] The conclusion that I reach is that even on the most beneficial evaluation of the facts, the defendant had been negligent in not having pursued a claim for (at least) a loss of income on behalf of the plaintiff and by terminating his mandate on erroneous grounds. The result was that action had not been instituted for recovery of these damages, which ultimately led to the prescription of the plaintiff's claim against the RAF.

Evaluation: the plea of prescription

- [72] Even if one were to accept the plaintiff's evidence that he had not received the termination of mandate letter, one must examine whether his claim against the defendant had not become prescribed by the time action had been instituted on 3 June 2021.
- [73] The parties were ad idem that the applicable period of prescription is three years.[4]

- [74] The period of extinctive prescription begins to run as soon as a claimant in the position of the plaintiff has knowledge of the identity of the debtor and of facts giving rise to the claim. A claimant who could have acquired the necessary knowledge of these facts by exercising reasonable care, is deemed to have had such knowledge.[5] The running of prescription is only interpreted by the service of a summons.[6]
- [75] The defendant argued (and pleaded) that the three year period started running from date of termination of his mandate on 30 April
2008. This would only be correct if one firstly could accept that the plaintiff had received the letter and secondly if, upon receipt of the letter, the plaintiff should have realized that he had a claim against the attorney.
- [76] Starting with the second of the above aspects, once the plaintiff had received the letter, he should have realised that when the defendant stated that he had no loss of income (or medical expenses) and that the vehicle was alleged to have been a taxi without a permit, that his attorney was terminating his mandate on totally incorrect facts. A reasonable person would then have been prompted to resort either to the attorney or to a new attorney. The plaintiff conceded that, had he made enquiries at the defendant's offices, he would have found out about this erroneous termination (and that he could then even have pursued his claim against the RAF).
- [77] This brings one then to the question of receipt of the letter. Even if one were to accept the plaintiff's evidence of not having received the letter, then a reasonable person in his position would have acquired knowledge of this termination of mandate by reverting to the attorney from time to time. This fact the plaintiff had conceded in cross-examination and this would have happened had he made any enquiries during 2008 or even 2009 (when the file had been archived). Even though the plaintiff testified that he had not done so due to the fact that he was waiting for the defendant to "come back" to him and that RAF claims took long to resolve, his failure to make any enquiries up to the time of prescription of his claim in 2011 is too unreasonable to satisfy the requirements of the Prescription Act. Before that time he could by exercising reasonable care, have ascertained that his attorney was no longer acting according to the plaintiff's mandate. This failure is exacerbated by the fact that the plaintiff had not even attempted to find out any progress of his claim via Jacoline who had always previously assisted him.
- [78] Even if by an untenable stretch of the limits of prescription, plaintiff is excused for his inaction for more than three years since his last contact with the defendant (which, on his version, was prior to March 2008), then at the very latest, he should have become aware of the lapsing of his claim against the RAF by the time he spoke to RAF employees during the roadshow of 2017.

[79] Summons was however only served on 3 June 2021, that is a period of more than three years since the above date and since the plaintiff would (at the very latest) have become aware of the facts which could have established any claim against the defendant. The plaintiff offered no explanation for this further lapse of time and I therefore find that his claim against the defendant had become prescribed.

[80] The special plea of extinctive prescription should therefore be upheld.

Costs

[81] The general rule is that costs follow the event. In the exercise of a court's discretion, this rule may be departed from where the interests of justice and considerations of fairness merit such departure. The claim by the plaintiff against his attorney cannot be pursued by him due to the fact that the plaintiff had, by his own conduct, allowed the claim to become prescribed. The claim however, was based on the negligent conduct by an officer of this court who had failed his client. This last factor weighs heavily with this court. Exercising the court's discretion and by balancing the conduct of the two parties, I find that it would be fair and just that each party pays his own costs.

Order

[82] In the premises the following order is made:

1. The special plea of extinctive prescription is upheld and it is declared that the plaintiff is precluded from pursuing his claim for damages arising from the motor vehicle accident which he had been involved in on 14 January 2006 against the defendant.
2. Each party to pay its own costs.

N DAVIS

Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing: 13,14,15 &16 February 2024

Judgment delivered: 20 June 2024

APPEARANCES:

For the Plaintiff:

Adv M Snyman SC

Attorney for the Plaintiff

Andre du Plessis Inc., Pretoria

For the Defendant:

Adv G F Heyns SC

Attorney for the Defendant: Ditsela Incorporated, Pretoria

- [1] This was the summary put to the plaintiff in respect of the regime in place prior to the legislative amendments brought about by the Road Accident Fund Amendment Act 19 of 2005 (the Amendment Act) and the Road Accident Fund (Transitional Provisions) Act 15 of 2012.
- [2] *Mvumvu v Minister of Transport & Another* 2011 (2) SA 473 (CC).
- [3] See: Harms, Amler's Precedents of Pleadings, Seventh Edition at par 59 and the cases quoted there.
- [4] Section 11 of the Prescription Act, 68 of 1969.
- [5] See section 12(3) of the Prescription Act and *Van Immerzeel & Pohl v Samancor Ltd* 2001 (2) SA 90 (SCA) and *Van Zijl v Hoogenhout* 2005 (2) SA 93 (SCA).
- [6] Section 15 of the Prescription Act.

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Prepared on 11 October 2026 · Esheria