

SOUTH AFRICA / JUDGMENT

Mdeyide v Road Accident Fund (EL91/2004) [2006]

ZAECHC 125 (3 October 2006)

[2006] ZAECHC 125

COURT

High Courts - Eastern Cape

BEFORE

S V Notshe

CASE / FILE NUMBER

EL91/2004

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NOTSHE AJ,

[1] The Plaintiff instituted action proceedings against Road Accident Fund, the defendant herein, claiming compensation for damages incurred as a result of injuries sustained in a motor vehicle accident. Plaintiff relies on the provision Section 17 of the Road Accident Fund Act, 1996 (Act No. 56 of 1996) (“the RAF Act”). [2] It is common cause that the accident occurred on 08 March 1999. The Plaintiff lodged his claim with the Defendant on 11 March 2002 after the expiry of a period of three years from the date upon which the accident occurred. [3] The Defendant raised the following special plea to Plaintiff’s particulars of claim:

“1. In terms of Section 23(1) of the Road Accident Fund Act 56 of 1996 (“the Act”) the right to claim compensation from the Defendant under the Act shall become prescribed upon the expiry of a period of three years from the date upon which the cause action arose. 2.

The cause of action arose on 8 March 1999, the date on which the accident occurred. 3.

The claim was lodged with the Defendant on 11 March 2002, after the expiry of a period of three years from the date upon which the cause of action arose. 4.

The Defendant thus pleads that Plaintiff’s claim has become prescribed.”

“1. Ad paragraphs 1 to 3 thereof: 1.1

The allegations contained in these paragraphs are admitted. 1.2

Plaintiff pleads however that when lodging the claim herein Defendant’s attention was specially drawn to the fact: 1.2.1

Defendant responded in correspondence, inter alia on 14 February 2003, a copy of which is attached hereto marked Annexure “A”, advising that “the claim has been repudiated on the basis of prescription”, but advising further that the Defendant was prepared to entertain the claim provided that Defendant be supplied with: 1.3.1

proof that Plaintiff was blind already on the date of the accident, and 1.3.2

“Notice of Condonation”. 1.4

Save as aforesaid and save for admissions contained therein, Plaintiff joins issue with the Defendant on its special plea”.

[6] The Defendant filed a rejoinder to Plaintiff’s replication. The rejoinder is denying that the Defendant waived its right to plead prescription. Defendant further pleaded in the rejoinder that it had no power or authority to entertain a claim “after completion of the period of prescription as provided for in Section 23 of the Road Accident Fund Act No. 56 of 1996 ”. [7] The Plaintiff filed a surrejoinder to the Defendant’s rejoinder. The surrejoinder is to the effect that the prescription began to run when the Plaintiff had knowledge of the identity of the debtor or the facts from which the debt arose. He averred that the prescription ran from 17 September 1999 when he consulted with his attorneys. The Plaintiff further pleaded in the surrejoinder that Defendant did not, within 60 days of the date on which the claim was lodged, object to the validity of the claim. He concluded by averring that the claim is accordingly deemed valid in law in all respects. [8] At the hearing of the matter the Plaintiff, supported by Defendant applied for the separation of the issues in terms of Rule 33(4) of the Uniform Rules. He applied that the issue of the special plea be adjudicated separately from other issues. I granted that order. [9] The parties then handed up a bundle of documents and a minute of the further pre-trial conference that was held. Therein Defendant admitted that Plaintiff is half blind and has been so since childhood and that he is totally blind in the right eye and can distinguish shades of light and dark in the left eye, that he has undergone no schooling and is illiterate, and that he was guided by another person prior to the accident. [10] The Plaintiff gave evidence testifying basically to what had been admitted. He said that he is totally blind in the right eye and the left eye is partially blind. He is illiterate and 32 years of age. He also testified to the effect that his mind was affected by the accident. He does not know how long a week is and how long a month is. At some stage he was unconscious when he was in hospital. He only heard after he had been discharged from hospital that he had to go to his present attorneys Messrs Niehaus McMahon & Oosthuizen. His wife accompanied him to those offices. He did not know why he had to go to those offices. His wife told to go there. He did not know that he had to be compensated for the accident. He did not know who had to pay him. He did not know why he had to be compensated. He married his present wife only after the accident. His wife deserted him after he had consulted with these attorneys. He cannot read his own letters. He has never used a telephone. He was advised by his wife and her aunt. [11] Mr Niehaus, an attorney at the attorneys Messrs Niehaus McMahon & Oosthuizen also testified on behalf of the Plaintiff. He testified in respect of the letters that he wrote to the Defendant’s offices and the

responses that he received from the Defendant. [12] Subsequent to the hearing and oral argument I drew to the attention of the parties that the provisions of Section 39(2) of the Constitution oblige me, when interpreting any legislation, to promote the spirit, purpose and objects of the Bill of Rights. I then requested the parties to submit written argument and if necessary make oral submissions regarding the following aspects: 12.1

whether the obligation imposed by Section 39(2) of the Constitution entitles me to consider, *mero motu*, the question of whether the provisions of Section 23(1) of the Road Act, 1996 (Act No. 56 of 1996) are consistent with the Constitution; and, 12.2

what course of action to be taken if I find that they are inconsistent with the Constitution.

I also directed that the Department of Justice be given notice of my request and that they could apply to join the proceedings as a party.

[13] The parties submitted additional written submissions and made oral submissions. I am indebted to the parties for their assistance in this regard.

[14] The issues raised by the special plea and subsequent pleadings thereto are the following:
14.1

whether Defendant waived its rights to plead prescription; 14.2

whether Defendant by failing to object within 60 days of the date on which the claim excluded the Defendant from pleading prescription; 14.3 whether Section 12(3) of the Prescription Act is applicable in this matter; 14.4 whether the Plaintiff's claim has prescribed as pleaded by Defendant; and 14.5 whether Section 23(1) of the Road Accident Fund Act, 1996 is inconsistent with the Constitution.

[15] I will now deal with these issues *seriatim*. WAIVER

[16] Plaintiff avers that the Defendant waived its right to plead prescription because of the fact that it wrote a letter to the Plaintiff's attorneys wherein it said that it was prepared to entertain the claim provided that the Plaintiff supplied proof that he was blind at the time of the accident and a notice of condonation. Defendant responded thereto by averring that it did not have authority to condone the Plaintiff's prescribed claim and the invitation to submit certain documents and a notice of condonation was made without authority and in error [17] The test to determine the intention to waive is adjudged either by the express intention to waive or by its outward manifestations. The party who alleges waiver has to plead and bears an onus to prove such waiver. It is not presumed. Clear proof thereof is required, If the waiver has not been expressly stated the conduct from which waiver is inferred must be unequivocal and must be consistent with no other hypothesis. See: *Road Accident Fund v Mothuphi* 2000 (4) SA 38 (SCA)

[19] In my judgement the Defendant's conduct does not amount to waiver. Instead Defendant expressly stated that it repudiates Plaintiff's claim on the basis that it had prescribed. It seems as if the author of the letter was under the impression that the Defendant had the

power to condone and entertain a prescribed claim. It is beyond doubt that Defendant does not have such power. The Defendant cannot confer upon itself such power. *Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA) at 148.

[20] In the circumstances Defendant did not waive its right to raise the defence of

prescription. **WHETHER PLAINTIFF'S CLAIM IS DEEMED VALID IN LAW IN ALL RESPECTS**

[21] In its surrejoinder the Plaintiff pleaded that Defendant did not object to the validity of his claim within 60 days of the date on which the claim was lodged with the Defendant. It averred that accordingly his claim is deemed to be valid in law in all respects. In a nutshell Plaintiff avers that the Defendant accepted that its claim was valid in all respects and had not prescribed.

[22] The Plaintiff relies on the provision of Section 24(5) of the Road Accident Fund Act. The aforesaid section provides as follows: "If the Fund or the agent does not, within 60 days from the date on which a claim was sent by registered post or delivered by hand to the Fund or such agent as contemplated in subsection 1, object to the validity thereof, the claim shall be deemed to be valid in law in all respects". [23] The provisions of Section 24(5) of the Road Accident Fund Act have been subject of interpretation in recent cases. All the cases are unanimous in their conclusion. The Supreme Court of Appeal has said the final word in this matter in the Supreme Court of Appeal has said the final word in this matter in the following terms: "... the purpose of Section 24 is to ensure that, before the onset of litigation, sufficient particulars about the claim are placed before the Fund to enable it, timeously, to make a decision whether it resisted or settled the claim. The section has nothing to do with issues not specified therein. Simply put it is incapable of breathing life into a claim that failed to arise because of non-compliance with the substantive requirement found in reg 2(1)(c). Per Mlambo JA in *Thugwana v Road Accident Fund*, 2006(2) SA616 (SCA) at 619. It is clear from the above dictum that the failure to object to the claim that had been lodged did not resuscitate Plaintiff's claim.

[24] In the result the failure by the Defendant to object to Plaintiff's claim does not validate Plaintiff's prescribed claim. **WHETHER THE PROVISIONS OF SECTION 12(3) OF THE PRESCRIPTION ACT, 1969 ARE APPLICABLE** [25] It is trite law that the provisions of the Prescription Act, 1969 apply in the matters instituted under the Road Accident Fund Act unless they (the Prescription Act provisions) are inconsistent with the provisions thereof. See: *Road Accident Fund v Smith* NO 1999 (1) SA 92 (SCA) at 98 and 100.

(d) save where an Act of Parliaament provides otherwise, three years in respect of any other debt" (emphasis has been added).

[31] Section 12 of the Prescription Act provides for the time when prescription begins to run. Section 12(3) of the Prescription Act provides as follows: "A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care". [32] The question, therefore, is whether the provision of Section 12(3) of the Prescription Act is inconsistent with the

provisions of Section 23 of the Road Accident Fund. It is clear from the above that Section 23 lays down the time when prescription shall begin to run in respect of claims instituted under the RAF Act. It deals with the very same issue that Section 12(3) of the Prescription Act seeks to deal with. As stated above Section 11(d) of the Prescription Act applies only where there is no Act of Parliament applicable in respect of a particular debt. [33] In this case the RAF Act deals with the period of prescription and the time when the prescription begins to run in respect of debts incurred under it. In the case of non-fatal accidents the date of the accident is the date on which prescription begins to run. *Evins v Shield Insurance Co. Ltd.* 1980 (2) SA @ 839C-F. *Trutter and Another v Deysel*, [2006] ZASCA 16; 2006 (4) SA 168 (SCA) at 174. [34] The Supreme Court of Appeal In *Road Accident Fund v Smith NO*, supra, held that the Section 13(1)(a) of the Prescription Act was applicable to the prescription of debts incurred in terms of Multilateral Motor Vehicle Accidents Fund Act where the claim was on behalf of an insane person. At p.102-103. See: *Klopper: Law of Third Party Compensation*, (Butterworths), p.284. The case is however distinguishable from the present case. Besides the fact that it was dealing with a different legislation, a predecessor to the RAF Act, it dealt with a different issue. The issue there was the question of claims of insane persons. Those claims are dealt with differently both by the RAF Act and the Prescription Act. The case is however important because it reinforces the view that the Prescription Act will apply only where there is no inconsistency between its provisions and the provisions of another Act of Parliament dealing with the issue of prescription in respect of certain debts. See also: *Saner*, supra, at p.4-5. [35] In this case there is inconsistency between the RAF Act and the Prescription Act in relation to claims arising from the provisions of Section 17 of the RAF Act. The inconsistency is however confined to claims wherein the provisions of Section 23(2) and (3) of the RAF Act do not apply. Section 23(1) of the RAF Act lays down that the prescription begins to run “from the date upon which the cause of action arose”. On the other hand Section 11(d) of the Prescription Act provides that the prescription does not begin to run until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises. There is a proviso to the fact that “... a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care”. It also provides that the prescription will not begin to run if the debtor willfully prevents the creditor from coming to know of the existence of the debt. [36] In the result the provisions of the Prescription Act do not apply in respect of claims arising from RAF Act and that are not affected by the provisions of Section 23(2) and (3) of the aforesaid Act. I would have preferred that the provisions of the Prescription Act be applicable to the aforesaid claims. The difficult constitutional questions would have been avoided. It would give a satisfactory relief to the Plaintiff and also protect the interests of the Defendant. Unfortunately the conclusion that I have reached is unavoidable. [37] This, however, is not the end of the matter. Section 39(2) of Constitution enjoins that in interpreting and applying the RAF Act I must promote the spirit, purport and objects of the Bill of Rights. Section 39(2) of the Constitution provides as follows: “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”. As a result thereof I have to consider whether the

provisions of Section 23 of the RAF Act are consistent with the Constitution. I am of the view that I am empowered to consider whether those provisions are inconsistent with the Constitution even if the issue has not been raised by the parties. I am however obliged to give parties notice of the intended consideration and invite them to make submissions and/or lead evidence. See: *Van der Merwe v RAF and Another*, [2006] ZACC 4; 2006 (4) SA 230 (CC) at 241[7]. In this case I extended the invitation to the Department of Justice as well.

CONSTITUTIONALITY OF SECTION 23(1) OF THE RAF ACT [38] There can be no doubt that Section 23(1) of the RAF Act limits the right of claimants of access to courts. It limits a right that is guaranteed by Section 34 of the Constitution. Section 34 provides as follows:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”. The Constitutional Court has confirmed that the rules or law, whether statutory or otherwise, that prevent institution of legal proceedings beyond a certain period, limit the right of access to court. Whether that limitation is justifiable is a different issue. “[12] It does not follow, however, that all limitations which achieve a result so laudable are constitutionally sound for that reason. Each must nevertheless be scrutinised to see whether its own particular range and terms are compatible with the right which Section 22 bestows on everyone to have his or her justiciable disputes settled by a court of law. The right is denied altogether, of course, whenever an action gets barred eventually because it was not instituted within the time allowed. But the prospect of such an outcome is inherent in every case, no matter how generous or meagre the allowance may have been there, and it does not per se dispose of the point, as I view that at any rate. What counts rather, I believe, is the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the limitation leaves open in the beginning for the exercise of the right. For the consistency of the limitation with the right depends upon the availability of an initial opportunity to exercise the right that amounts, in all the circumstances characterising the class of case in question, to a real and fair one. The test, thus formulated, lends itself to no hard and fast rule which shows us where to draw the line. In anybody’s book, I suppose, seven years would be a period more than ample during which to set proceedings in motion, but seven days a preposterously short time. Both extremes are obviously hypothetical. But I postulate them in order to illustrate that the enquiry turns wholly on estimations of degree.” Per Didcott J in *Mohlomi v Minister of Defence*, [1996] ZACC 20; 1997 (1) SA 124(CC) at para.11, 12. See also: Cora Hoexter: *The New Constitutional & Administrative Law*, Vol 2 (Juta) at 308–309. [39] The issue of whether the provisions of a predecessor to the RAF Act, Article 57 of the Agreement which forms a Schedule to the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989, were inconsistent with the Constitution, came indirectly before the Supreme Court of Appeal. In *Road Accident Fund v Mothuphi*, supra. Unfortunately the issue was not on all fours with the present issue. In that matter the plaintiff challenged the validity of the decision of the RAF to rely on the provisions of Article 57. Plaintiff averred that the decision of the RAF was inconsistent with the provisions of Section 33 of the Constitution. See: *Road Accident Fund v Mothuphi* at para. 41–42. The Court gave short shrift to the attack on the basis that there was no factual foundation for the averments. See: Para 43–44. [40] The issue

of whether the prescriptive provision of Article 57 were inconsistent with the Constitution was not decided. The Supreme Court of Appeal did not take upon itself to consider the issue. Whether it should have considered the issue, as it is enjoined by the provisions of Section 39 of the Constitution, is not before me for decision. [41] The decision of the Cape High Court In Bellocchio Trust Trustees v Engelbrecht NO 2002 (3) SA 519 (C) is not helpful either. The decision did not refer to the Constitutional Court decision in Mohlomi. Supra. It seems as if the constitutional issue of limitation of the provisions of Section 24 of the Constitution was raised at a late stage of the proceedings. It was raised at the stage of an application for leave to appeal. The Court was not properly assisted by the raising of the issue timeously and properly and presentation of proper argument. [42] The approach to be adopted in enquiring whether a law is inconsistent with the Constitution is a two-stage approach. The first stage is whether the right in question has in fact been infringed. The second stage is whether the infringement is justified. See: Ian Currie and Another: The New Constitutional and Administrative Law (Juta) at 339. [43] Section 23(1) of the RAF Act is a limitation of the right contained in Section 34 of the Constitution. The aforesaid provision is prima facie unenforceable on the ground it is inconsistent with the provisions of Section 34 of the Constitution. It can only be upheld if it passes the justifiability test as laid down in Section 36 of the Constitution. Section 36 provides as follows: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose". The test thereof has been stated in the following terms: "[15] The question which arises then is whether Section 33(1) (now Section 36 of the Constitution) of the Constitution countenances the infringement. That depends, in the first place, on its passing the tests of reasonableness and justifiability which are set there. Both tests require the competing interests and values that it impairs and promotes to be weighed against one another for an appraisal of their proportionality. Some factors which count on that leg of the enquiry, and the most telling of those as I see them, were underline by Chaskalson P in S v Makwanyane and Another when he listed –

'... the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.'" Per Didcott J in Mohlomi v Minister of Defence, supra, at para. 15. [44] There can be no doubt that Section 23(1) is a law of general application. A law is of general application if it is derived from a source with lawful authority to issue the rule and must be accessible, clear and precise. Dawood and Another v Minister of Home Affairs & Others, 2000 (3) 936 CC p.966 [47]. [45] Section 36 requires that a Court should consider "the extent that the limitation is reasonable and justifiable". As stated in the Mohlomi decision,

the range, terms, the availability of an initial opportunity to exercise the right” and the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the limitation leaves open in the beginning for the exercise of the right ...” are all factors to be taken into account in considering whether the limitation is reasonable and justifiable. I should also attempt to find “less restrictive means to achieve the purpose” of the legislation. See Section 36(e) of the Constitution; De Villie: *Judicial Review of Administrative Action in South Africa*, (Butterworths) at 440. [46] The Constitutional Court SV Manamela, 2000 (3) SA 1 (CC). has held that the approach to the question of the justification of the limitation is the following: “The approach to limitation is, therefore, to determine the proportionality between the extent of the limitation of the right considering the nature and importance of the infringed right, on the one hand, and the purpose, importance and effect of the infringing provision, taking into account the availability of less restrictive means available to achieve that purpose. The limitation analysis that follows will therefore first consider the extent of the limitation of the right caused by Section 37, and will then turn to the purpose, importance and effect of Section 37. These are the two issues whose relative weight determines the outcome of the limitation analysis. That analysis therefore concludes by comparing the relative weight. As stated above, our difference with the majority lies not in the approach to the limitation analysis, but in its application in the current case”. Per O’Regan J et al. *Cameroon* AJ at 32 [66]. See also para. 34 of the majority judgment. [47] The other approach that has been suggested is to first consider the factors and thereafter perform the balancing exercise to determine whether the limitation is reasonable and justifiable. Currie, p.340. The two approaches are compatible with each other. Whichever approach one adopts the results should be the same. [48] The right that is limited by Section 23(1) of the RAF Act is a right to access to courts. It is a right guaranteed by Section 34 of the Constitution. It is one of the cornerstones of the Bill of Rights and open and democratic society. In the absence of this right all other rights guaranteed by the Constitution become an illusion. It will not help to afford people human dignity, equality and freedom unless they have access to Court wherein they can defend, protect and vindicate their rights. Without the right of access to Courts the Bill of Rights would be a dead letter. [49] In this case the right that has been limited is the right of the claimant in respect of claim where the driver has been identified. The plaintiff had a common law right to claim damages from the negligent driver. The legislation stepped in and took away that right. *Geldenhuis & Another v Van Wyk & Another* But for the provisions of the RAF Act the plaintiff would have the same right as other claimants in respect of claims not covered by the RAF Act. His claim would have been governed by the provisions of the Prescription Act. Prescription would not start running until he had “knowledge of the identity of the debtor and of the facts from which the debt arises ...” In this respect a case of unequal treatment can be made. [50] I accept that there is valid reason for the requirement of the institution of proceedings within a specific period. The purpose is laudable. “[11] Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the right and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained

may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken". Per Didcott J in *Mohlomi v Minister of Defence*, supra, at para. 11. [51] Section 23(1) provides for the prescription of a claim three years from the date upon which the cause action arose. I do not have a problem with the period of prescription. The claim however prescribes irrespective of whether the claimant was aware of the claim or not. Most importantly and as in the 1989 Act it does not make provision for the condonation of the failure to lodge a claim prior to the expiry of the three year period.

"Consequently it does not matter how special, worthy, unusual or exceptional the circumstances or explanation might be as to why the claim was lodged within the required period. If lodged outside the three year period the claim lapses and cannot be enforced". Saner, p.4-38. [52] The offending limitation in Section 23(1) is not the three-year period of prescription. It is the insufficient and inadequate room that is left open in the beginning for the exercise of that right. It does not take into account the fact that there might be a justifiable reason for the delay. It does not take into account the ignorance and illiteracy of the some, if not majority, of the people that the legislation is intended to protect. [53] It is important to note that the other legislation which limit the constitutional rights of access to court have been amended to include the requirement of knowledge of the cause of action, the debtor and condonation. See: S130(5) of the Correctional Services Act, 1998, S3(4) (a) and (b) of the Institution of Legal Proceedings Against Certain Organs of State Act, 2002, S344(3) of Merchant Shipping Act, 1951, S39(3) of the Public Service Proclamation R103 of 1994, S57(5) of the South African Police Act, 1995. Prescription penalises unreasonable inaction, not inability to act, Where, therefore, that statute speaks of prescription beginning to run when a wrong is 'first brought to the knowledge of the creditor', it presupposes a creditor who is capable of appreciating that a wrong has been done to him or her by another: Compare *Wulfes v Commercial Union Assurance Co of SA Ltd* 1969 (2) SA 31 (N) at 37A and *SA Mutual Fire and General Insurance Co Ltd v Mapipa* 1973 (3) SA 603 (E) at 608F – 609D". Van Zyl v Hoogenhout, 2005 (2) SA 93 (SCA) at 103B[19]. [54] Any law that does not recognise the principles underlying the prescription rules is not serving the purpose of the prescription law. Any law that does not recognise that there are persons who may not be minors nor insane but would not have 'knowledge of the debtor and facts from which the debt arises ..." is not living up to the realities of South Africa. The following dictum of Didcott J In *Mohlomi v Minister of Defence*. describes, accurately, the state of affairs of the majority of persons in South Africa: "[14] That disparity must be viewed against the background depicted by the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons. The severity of Section 113(1) which then becomes conspicuous has the effect, in my opinion, that many of the claimants whom it hits are not afforded an adequate and fair opportunity to seek judicial redress for wrongs allegedly done to them. They are left with too short a time within which to give the requisite notices in the first

place and to use in the second. Their rights in terms of Section 22 are thus, I believe, infringed". At 131. The above dictum is apposite to the RAF Act. Mr Justice Cameron Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuzo and Others 2001 (4) SA 1184 (SCA) at 1190. confirmed and described the situation appropriately when he said the following: "The law is a scarce resource in South Africa". [55] In my judgement the unacceptably restrictive part of Section 23(1) is the failure to include the requirement that prescription should begin to run when the claimant has knowledge of the identity of the debtor and of the facts from which the debt arises. It should also have a provision allowing for the condonation of a delay. Section 23(1) would still serve its purpose even if these other requirements are included. [56] The final question then is whether the provision of Section 23(1) of the RAF Act are a limitation that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors ..." "Although Section 36(1) differs in various respects from Section 33 of the interim Constitution, its application continues to involve the weighing up of competing values on a case-by-case basis to reach an assessment founded on proportionality. Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. The proportionality of a limitation must be assessed in the context of its legislative and social setting. Accordingly, the factors mentioned in Section 36(1) are not exhaustive. They are key considerations, to be used in conjunction with any other relevant factors, in the overall determination whether or not the limitation of a right is justifiable". S V Mamela, supra. At p.20 [33]. [57] In my view the laying down, by Section 23(1), of the prescription period of three years is justifiable. It serves a useful and important purpose. Section 23(1) however provides that the running of the three-year period begins "from the date upon which a cause of action arose". It makes no provision for condonation or knowledge of the debtor and the facts from which the debt arises. The failure to make such provision is not reasonable and justifiable. [58] Section 23(1) in so far as it does not make provision for the knowledge by the claimant and condonation for lateness does not measure up to the yardstick suggested by the Constitutional Court. In Mohlomi v Minister of Defence, supra. It allows for prescription to begin to run irrespective of the knowledge of the claimant. It has no provision for an application for the condonation of a delay. "A handy yardstick against which to measure the limitation imposed by Section 113(1) on the actions that it controls will be found in Chapter III of the Prescription Act 68 of 1969. The chapter deals in general with debts extinguished by the effluxion of time, or prescribed as it calls the process. It consists of Sections 10-16. In terms of Section 11(d), as read with Section 10(1), the period of prescription pertaining to delictual debts is three years, 'save where an Act of Parliament provides otherwise'. It starts to run, according to Section 12(1), 'as soon as the debt is due'. Section 12(3) deems the debt not to be due, however, 'until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises' or until he or she could have learnt of those circumstances 'by exercising reasonable care'. Section 13(1)(a) caters for minors, extending the period in their cases. And Section 16(1) ordains that:

‘(T)he provisions of this chapter shall, save insofar as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period with which ... an action is to be instituted in respect of a debt ..., apply to any debt arising after the commencement of this Act’. The Appellate Division of the Supreme Court held in *Hartman v Minister van Polisie* that the provisions of the chapter were indeed inconsistent with Section 32(1) of the old Police Act, its counterpart to Section 113(1). It followed that the time allowed there for actions to begin against the police was no alternative period of prescription regulated otherwise by the chapter, but a ‘vervaltermyn’ to which none of the relaxations applied and the expiry of which therefore exhausted the allowance automatically and immediately. That the same went for Section 113(1) itself was decided by the Appellate Division in the later case of *Pizani v Minister of Defence*, where Corbett JA said: ‘The consequence ... is that a plaintiff who has failed to comply with the time limitation of Section 113(1) is generally debarred from suing and cannot rely upon any of the grounds which delay the commencement of the running of prescription (see Section 12 of the Prescription Act) or delay the completion of prescription (see Section 13 of the Prescription Act). One of the grounds which delays the commencement of the running of prescription is the creditor’s lack of knowledge of the identity of the debtor and the facts from which the debt arises ... From a general equitable point of view, it seems unfortunate that this provision of the Prescription Act, at least, does not apply to expiry periods’. The remedy for the inequity lay, he added, 13 in the hands of the Legislature. The hint has not, however, been taken. So Section 113(1) remains one that differs markedly and materially in its effect from the provisions of the chapter, not only requiring actions to be instituted much earlier but also insisting on strict compliance with the requirement in all cases governed by it, no matter how harsh that may turn out to be in the circumstances of some individual ones”. At para. 13, 14 and 19. [59] In my view Section 23(1) of the RAF Act, in so far as it does not make provision for the knowledge of the debtor and of the facts which the debt arises, infringes upon the rights of the plaintiff of access to courts as enshrined in the Constitution. Such infringement is not justifiable in terms of Section 36 of the Constitution.

[60] The question now is whether I should sever the offending paragraph and read-in the appropriate wording. The parameters within which severance and reading can be effected are the following: “Severance of words from a legislative provision is appropriate where it is necessary to remove an offending portion from the provision. Reading words into a provision arises when it is necessary to add words in order to cure it of constitutional inconsistency. The cases set useful guidelines. 85 The ‘cured’ provision must be consistent with the Constitution and its basic values. The result of the curative process must interfere with the statute as little as possible. The remedial step should be capable of sufficient precision and should be as faithful as possible to the legislative scheme at hand. Lastly, the resort to the surgical remedies of severance and reading-in should not be preferred if they are likely to lead to an ‘unsupportable budgetary intrusion.’” *Van der Merwe v RAF*, supra at 264 [73]. [61] The offending part of the legislation and the portion that should be read-in are closely connected to the legislation. If I were to read-in I would have to introduce new issues of condonation in the section in question. I would end up step g outside the thickets of the

interpretation and application of the law where I am a forester and venturing into the high seas of legislation making. I am not a voyager and not qualified to do that. That would offend against the principle of the separation of powers. In my view the reading in and severance would not be an appropriate remedy in the circumstances of this case. The legislature is the appropriate arm of government that should cure the defect. [62] In the result I make the following order: 1.

Section 23(1) of the RAF Act, in so far as it does not make provision for the knowledge of the debtor and of the facts from which the debt arises, infringes upon the rights of the plaintiff of access to Courts as enshrined in the Constitution and is declared inconsistent with the Constitution; 2.

The defendant's special plea is dismissed;

3.

The order made in paragraph 1 shall come into effect from the date of this order and shall have no effect on judgements that have already been made;

4.

The defendant is directed to pay the costs of the plaintiff; and

5.

The matter is referred to the Constitutional Court for the confirmation of the order of invalidity.

S V Notshe Acting Judge of the High Court

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