

SOUTH AFRICA / JUDGMENT

Mguzula v Road Accident Fund (RAF 372/2018) [2020] ZANWHC 35 (29 June 2020) [2020] ZANWHC 35

COURT

North West High Court, Mafikeng

BEFORE

M M Leeuw

CASE / FILE NUMBER

RAF 372/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH WEST

DIVISION, MAHIKENG

CASE

NO: RAF 372/2018

In

the matter between:

NOKUTHULA
RUTH MGUZULA
PLAINTIFF
And
ROAD
ACCIDENT
FUND
DEFENDANT

JUDGMENT

LEEUEW JP:

Introduction

- [1] The defendant raised a special plea on prescription, relating to an action for damages instituted by the plaintiff, for injuries sustained in a motor vehicle collision in which she was a passenger.
- [2] The accident occurred on the 18 November 2013 at the N4 Road between Mahikeng and Zeerust. The motor vehicle, a white Toyota with registration number HZF [...], was at the time driven by one Lucky Dangazela, who is the insured driver as defined in the Road Accident Fund Act (the RAF Act)[1]. In terms of Rule 33(4) of the Uniform Rules of Court[2], the issue relating to prescription is separately adjudicated.

Background Information

- [3] The plaintiff's cause of action arose on the 18 November 2013 when the accident occurred. Prior to issuing summons, before the claim could prescribe, the defendant wrote a letter dated 29 January 2015 to the plaintiff stating amongst others, the following:

"Offer of settlement-merits (negligence) without prejudice,

The Road Accident (RAF) has considered the available evidence relating to the matter in which the motor vehicle accident giving rise to this claim occurred. The RAF has concluded that the collision resulted from the sole negligence of the RAF's insured driver.

Consequently, without prejudice, the RAF offers to settle the issue of negligence vis-à-vis the occurrence of the motor vehicle collision on the basis that the insured driver was solely negligent in causing the motor vehicle collision.

This offer is limited to the aspect of negligence as to the manner in which the collision occurred. This offer may not be interpreted or construed in a manner that would have the RAF concede any other aspect of the claim. To avoid doubt, the RAF reserves all its rights in law with regards to all other procedural and substantive aspects of the claim."

- [4] Pursuant thereto, On 20 July 2017, the defendant made an offer of settlement to the plaintiff's attorneys of record, which offer was stated: "without prejudice", or admission of liability, in full and final settlement of your claim, the amount as set out hereunder." The settlement amount is not included in the offer. On 26 October 2018, one (1) year and three
- (3) months after the settlement offer was made, the plaintiff's attorney, hand-delivered and dispatched through an e-mail, "a duly signed acceptance of defendant's merits offer". This acceptance was made after the defendant had repudiated its offer on 29 August 2018.

- [5] Summons together with the Particulars and Claim was issued on 23 November 2018, for a total claim for damages of two million rand (R2 million). The defendant filed a plea and special plea, one of which is on prescription.
- [6] The defendant avers in its special plea that:
- (a) the motor vehicle collision occurred on 18 November 2013, and that the plaintiff lodged her claim with the defendant on 2 February 2015. Summons was issued on 23 November 2018, which claim had already prescribed on 17 November 2018. Consequently, action was instituted five (5) years from the date in which the cause of action arose; and
 - (b) Counsel for the defendant further submits that the plaintiff was required to accept the offer within thirty
- (30) days of the offer, which offer lapsed because plaintiff accepted the offer long after the expiry of the thirty (30) days period.

[7] Plaintiff, in replication, submits that:

the running of prescription was interrupted as contemplated in section 14(1) of the Prescription Act[3], by the admission of liability through an offer to the plaintiff as per letter dated 20 July 2017.

Issues

- [8] The issues to be decided are:
- (a) whether the plaintiff's debt was due;
 - (b) whether the defendant acknowledged liability to the claim;
 - (c) if the answer to (b) is yes, whether such acknowledgement interrupted the running of prescription.
 - (e) Costs; and
 - (f) the Order.

The Law

When is a debt due?

[9] Section 12 of the Prescription Act provides that:

“(1) Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due.

- (2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) 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.

(4)

[10] In *Truter and Another v Deysel*, [4] the Court stated that:

“For the purpose of the Act, the term ‘debt, includes a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.”

Furthermore, in paragraph [20] “. . . the presence or absence of negligence is not a fact, it is a conclusion of law to be drawn by the court in all the circumstances of the specific case. Section 12(3) of the Act requires knowledge only of the material facts from which the debt arises for the prescriptive period to begin running – it does not require the knowledge of the relevant legal conclusions (i.e. known facts constitute negligence) or of the

existence of an expert opinion which supports such conclusions.”

See also *Minister of Finance & Others v Gore NO*, [5] the Court stated that:

“This court has, in a series of decisions, emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case ‘comfortably.’

[11] Section 23 of the RAF Act provides that:

“(1) Notwithstanding anything to the contrary in any law contained, but subject to subsections (2) and (3), the right to claim compensation under section 17 from the Fund or an agent in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity of either the driver or the owner thereof has been established, shall become prescribed upon the expiry of a period of three years from the date upon which the cause of action arose.

(2) Prescription of a claim for compensation referred to in subsection

(1) shall not run against–

(a) a minor;

(b) any person detained as a patient in terms of any mental health

legislation; or

(c) a person under curatorship.

However, Section 23(3) provides that:

- (3) Notwithstanding subsection (1), no claim which has been lodged in terms of section 17(4)(a) or 24 shall prescribe before the expiry of a period of five years from the date on which the cause of action arose.”[6]

See also Section 10 of the Prescription Act.[7]

- [12] In the present case, it is common cause that the plaintiff’s claim against the defendant prescribed on 17 November 2018. The debt arose on 18 November 2013, which is a date when the cause of the action occurred. The plaintiff was entitled to enforce her rights immediately or soon thereafter, to avoid the prescription of her claim.[8]

Acknowledgement of liability?

- [13] Section 14 of the Prescription Act provides that:

“(1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.

- (2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt, from the date upon which the debt again becomes due.”

- [14] The RAF Act does not have a similar provision prescribing for interruption of prescription save for claims, in respect of minors, persons with mental disability and persons under curatorship which are not affected by prescription as provided in section 23(2) of the RAF Act.[9] Compare *Road Accident Fund v Mdeyide*, [10] where the court held the view that where a claimant is not protected against prescription in terms of the RAF Act, the party may be able to seek protection under the Prescription Act.

- [15] In *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd*, [11] the court had to decide the question whether the law recognizes an exception to the “without prejudice” rule, where a party seeks to rely on acknowledgment of liability by the debtor only for the purpose of interrupting prescription as contemplated in s 14 of the Prescription Act. Lewis JA for the majority decision held the view at para [39] that:

“Where acknowledgments of liability are made such that, by virtue of s 14 of the Prescription Act, they would interrupt the running of prescription, such acknowledgments should be admissible, even if made without prejudice during settlement negotiations, but solely for the purpose of interrupting prescription. The exception itself is not absolute and will depend on the facts of each matter. And there is nothing to prevent the parties from expressly or impliedly ousting it in their discussions. What the exception allows for, as I see it, is the prevention of abuse of the without prejudice rule, and the protection of a creditor. It is not, a question of the without prejudice rule trumping prescription. It is a question of recognizing that both s 14 of the Prescription Act and the without prejudice rule protect policy interests, and recognizing an exception so that both interests are properly served.”

[16] In *Road Accident Fund v Mothupi*[12] at paragraph 37, the Court held the view that: “... acknowledgment of liability for the purpose of s14 of the Prescription Act is a matter of fact, not a matter of law. Thus it was stated in *Agnew v Union and South West Africa Insurance Co. Ltd* 1977 (1) SA 617 (A) at 623 A – B:

Of daar in 'n bepaalde geval 'n erkenning van aanspreeklikheid was, is 'n feitlike vraag wat betrekking het op die bedoeling van die person wat as skuldenaar aangespreek is. In dié verband het *Broome RP*, die volgende gesê in *Petzer v Radford (Pty) Ltd*, 1953 (4) SA 314 (N) op bl 317 en 318:

‘To interrupt prescription an acknowledgment by the debtor must amount to an admission that the debt is in existence and that he is liable therefor’.”

It is by no means inconceivable that in a particular case the Fund may be disposed, either because of difficulties of proof or because the amount in issue is not substantial, not to contest negligence, without necessarily admitting or conceding that the insured driver was in fact wholly or partly to blame for the collision.

[17] Furthermore, Nienaber JA held the view that an admission of indebtedness without an admission of liability is not sufficient to interrupt prescription. He stated after referring to case law, that:

“[38] An acknowledgement of negligence on the part of the insured driver, coupled with a willingness to seek a settlement of the quantum if such can be reached, is not an acknowledgment of the existence of a debt or of a present liability (cf Markham’s case, supra, at 676F; Benson and Another v Walters and Others, supra, at 87C-D); at most it is an acknowledgment of a potential liability if certain conditions are fulfilled (a settlement of the quantum), failing which litigation would have to follow. In Benson’s case, supra, the majority of the court at 86H put it on the footing that the Act ‘requires an acknowledgment of liability (‘aanspreeklikheid’)

and not merely an acknowledgment of indebtedness’. ...In this case there is not even common ground on a minimum amount which is acknowledged by the Fund. The admission, in short, must cover at least every element of the debt and exclude any defence as to its existence. An admission relating solely to the negligence of the insured driver does not comply with that requirement.” (emphasis added)

[39] On the facts of this case, where the alleged concession as to negligence does not consist of a single act but of an impression due to inaction over a prolonged period, it is even more difficult to conceive how the requirement of s 14 can be said to have been fulfilled.”

Analysis

[18] I alluded above that plaintiff submitted her claim for compensation to the RAF in terms of section 17(1) of the RAF Act. On 29 January 2015 the defendant acknowledged that the collision resulted from the sole negligence “insured driver was negligent”. Pursuant thereto on 20 July 2017, the defendant dispatched the “Offer and Acceptance of Settlement”

endorsed “Without Prejudice” (“Settlement Offer”) in which the following is stated: “The RAF offers, without prejudice or admission of liability, in full and final settlement of your claim, the amount as set out hereunder.” This appear to be an acknowledgment of liability in respect of both merits and quantum, albeit the quantum amount is not stated in the offer.

- [19] However, defendant also indicated that this offer “may not be interpreted or construed in a manner that would have the RAF concede any other aspect of the claim. To avoid doubt, the RAF reserves all its rights in law with regards to all other procedural and substantive aspects of the claim”. The procedural aspect of this claim may have included amongst others, the issuing of the summons to avoid prescription.
- [20] Pursuant thereto, in the offer of the 20 July 2017, the defendant offered to pay in full settlement of the claim, an amount which is not specified. It however pertinently states that it does not admit liability. The defendant repudiated the liability on 29 August 2018 stating the following as the reasons:

“non-serious injuries: Minor Injuries / Loss not proven.”

- [21] It is clear from the abovementioned offers to settle, the defendant did not acknowledge liability as envisaged in section (14)(1) of the Prescription Act. The proviso in section 17(1) of the RAF ACT[13] provides that the obligation of the RAF to “compensate a third party for non-pecuniary loss shall be limited to compensation for serious injury as contemplated in subsection (1A) and shall be by way of a lump sum”. It can thus be assumed that the issue relating to whether or not the injury was serious, would still have to be established in order for the defendant to be held liable to compensate the plaintiff.
- [22] I am of the view that on the facts of the present case the acknowledgment of liability, was limited to the merits and negligence of the insured driver, but did not amount to acknowledgment of liability, sufficient to interrupt the running of prescription as envisaged in section 14 of the Prescription Act. In the result I find that the offer of settlement made on the 27 July 2017 did not amount to an acknowledgement of liability. Consequently, the plaintiff’s claim has been extinguished by prescription.

Costs:

- [23] The plaintiff is not to blame for failure to timeously issue summons in this matter. It was the duty of the attorneys of record to ensure that they act swiftly in order to avoid the prescription of her claim. An order of costs cannot be made against her.

Order:

- [24] In the result I make the following order:

1. The special plea is upheld and the plaintiff’s action is dismissed.
2. There is no order as to costs.

M M LEEUW

JUDGE PRESIDENT

NOTH WEST DIVISION OF THE HIGH COURT

APPEARANCES

HEARD ON : 03 MARCH 2020

DELIVERED ON : 29 JUNE 2020

FOR THE PLAINTIFF : ADV. MOUKANGWE

INSTRUCTED BY :

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REF: K SEABI/B3587/23/18

- [1] Act 56 of 1996 - Section 17(1) provides that: The Fund or an agent shall – (a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established; (b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established, be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.

[1] Act 56 of 1996 - Section 17(1) provides that: The Fund or an agent shall –

- (a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;
- (b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,

be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.

[2] Rule 33(4) provides that: If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such questions has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.

[3] Act 68 of 1969

[4]

[2006] ZASCA 16; 2006

(4) SA 168 (SCA) at para [16].

[5] 2007

(1) SA 111 (SCA) at 119J – 120A: See also *Unilever Bestfoods Robertsons (Pty) Ltd v Soomai & Another* 2007 (2) SA at 359H when

Farlam JA stated that “what prescribes in terms of the Prescription Act . . . is a “debt”, that is to say, not

a “cause of action”, but a claim.”

[6] Section 24 prescribes for the procedure to be followed in a claim for compensation and accompanying medical reports under section 17(1) of the Road Accident Fund Act. (See Section 17(1) in footnote 1.) Furthermore subsection 3 of section 23 was amended to include 5 years (Section 10 of Act 19 of 2005 with effect from 1 August 2008.)

[7] Section 10 of the Prescription Act provides that: “(1) Subject to the provisions of this Chapter and of Chapter IV, a debt

shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the

prescription of such debt.

[7] Section 10 of the Prescription Act provides that:

“(1) Subject to the provisions of this Chapter and of Chapter IV, a debt

shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the

prescription of such debt.

[8] See Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Helterman Deutsch (Pty) Ltd [1990] ZASCA 136; 1991 (1) SA 525 (A) at 532H.

[9] See para. [11] above

[10]

[2007] ZACC 7; 2008

(1) SA 535 (CC) at paras [39] and [40] and Road Accident Fund v Smith NO 1999 (1) SA 92 (SCA) at 98F-G.

[11] 2017

(6) SA 55.

[12] 2000

(4) SA 38 (SCA)

[13] See fote1 above

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