

SOUTH AFRICA / JUDGMENT

Mokoena v Road Accident Fund (RAF344/15) [2017] ZANWHC 47 (6 July 2017) [2017] ZANWHC 47

COURT

North West High Court, Mafikeng

BEFORE

Kgoele

CASE / FILE NUMBER

RAF344/15

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IN

THE NORTH WEST HIGH COURT

MAHIKENG

RAF

344/15

In

the matter between:

BASIL
MOKOENA
PLAINTIFF
And
THE
ROAD ACCIDENT FUND
DEFENDANT
CIVIL
MATTER
DATE
OF HEARING
:
27 Feb and 3 April 2017
DATE

OF JUDGMENT :

6 JULY 2017
FOR

THE PLAINTIFF :

Adv VAN
DER HAER
FOR

THE RESPONDENT : Adv MONNAHELA

JUDGMENT

KGOELE J:

1. This matter concerns a determination of a special plea of prescription in terms of section 23(3) of the Road Accident Fund Act No 56 of 1996 (the Act). The accident on which the plaintiff based his claims occurred on the 24 April 2005. By agreement between the parties, the only issue which this Court is called to adjudicate upon at this stage is the special plea raised by the defendant.
2. Two witnesses testified during the hearing of the special plea. Mr Mokoena who is the plaintiff in this matter and Ms Mavis Thole who was the claims handler in the matter of the plaintiff.
3. According to the testimony of the plaintiff he lodged his claim on the 2 August 2005. He was already having the hospital records at that time. At the time of the accident he was a police investigator and was driving an official police vehicle. According to him he had visited the offices of the defendant several times to make inquiries. The inquiries included telephone conversations. He testified that at some point when he was at the defendant's offices he was given a form and instructed by one of the employees of the defendant to go to his banking institution to confirm his banking details and return the form back to them which he did.
4. He further testified that at no stage did anyone from the defendant inform him that his claim may prescribe and that he may enlist the services of an attorney. He further indicated that he continued making telephone calls but experienced problems as their telephone was continuously engaged. It was only in 2015 after he became frustrated by the fact that his claim was taking long to be finalised that he went to see an attorney who then issued summons in 2015. He denied receiving any written communication from the defendant

through the post, including a letter informing him of the date of prescription of his claim and a letter informing him that the

defendant had repudiated his claim.

5. Under cross-examination he admitted that he had done nothing for a period of approximately five years (2010-2015) regarding his claim. He further denied that his claim was repudiated by the defendant, which is a defence from the defendant that is contained in the Pre-trial minutes that were signed by his attorney.
6. Ms Mavis Thole, the claims handler who dealt with the plaintiff's claim testified on behalf of the defendant that the form the plaintiff testified about was not given to him by the hand, but was posted to him together with the letter containing the date of prescription of his claim. She further testified that she is the one that generated the said form and the letter

informing him of the time of prescription. After signing the said letter, she left it at their mail room for it to be dispatched. Further that, under normal circumstances the personnel at the mail room would have posted it. Lastly that she also generated the repudiation letter dated 17 May 2010 which was posted to the plaintiff.

7. During cross-examination she agreed that the letter dated 17 May 2010 was generated after the claim of the plaintiff has prescribed and conceded that the plaintiff's claim prescribed whilst it was still being handled by her. She is furthermore not sure whether the letters she send were received by the plaintiff but she used the address the plaintiff gave to her.
8. At the end of the hearing of the evidence summarised above Judgment was reserved which as per agreement between the parties was to be delivered after the written heads from both parties had been received. It appears that whilst the Court was awaiting the written heads of arguments from both parties as agreed, the plaintiff filed a notice of amendment of its pleadings and a replication and both were served on the defendant's attorney. In the heads compiled by the plaintiff's Counsel it was intimated that the purpose of these two pleadings is to bring the pleadings in line with the testimony of the two witnesses and evidence presented to the Court.
9. In reply the defendant indicated in their heads of argument that the two pleadings should be disregarded by the Court because; (i) they are both not properly before the Court; (ii) the new cause of action the plaintiff wants to rely on was not even canvassed during the trial by both parties.
10. It is important to immediately deal with the two belated pleadings from the onset. A careful analysis of the Rule 28 Notice and the Replication accompanying it clearly indicates that the plaintiff now wants to rely on or to base his cause of action on an alleged breach of the duty of care which the defendant allegedly owed him. It appears that the plaintiff expect this Court to dismiss the defendant's special plea on the basis that the plaintiff's claim prescribed "in the hands" of the defendant.
11. Whilst it is trite that a party can amend its pleadings at any time before judgement, there must be special circumstances that justifies that. But the law does not end there, it must also be clear that the party seeking amendment is not employing a technical advantage over the other.
12. In casu, it appears that this is the case. The cause of action which the plaintiff now seeks to employ is a claim for breach of legal duty of care which is determined in terms of section 12(1) read with section 12(3) of the Prescription Act 68 of 1969. This simply means the plaintiff's claim is now changed to be based on tort which comprised of the following elements: (a) a legal duty towards the plaintiff to exercise care, skill or both in the processing of the plaintiff's claim, (b) breach of such duty by the defendant and (c) actual loss to the plaintiff as a result of the breach. Unfortunately in the plaintiff's claim no reference was made to the Prescription Act at all. In addition, the evidence led by both parties did not deal with the elements which have been enumerated in this paragraph which

need to be proven. What exacerbates the problem is that the evidence led only related to the dispute regarding the question of prescription in terms of the Road Accident Fund Act as claimed by the plaintiff up until their case was closed.

13. The purpose of pleadings is trite. It was stated as follows in *Molusi and Others v Voges and Others* NNO: 2016 (3) SA 370 (CC) at paragraph 28:

“The purpose of pleadings is to define the issues for the other party and the Court. And it is for the Court to adjudicate upon the disputes and those disputes alone. Of course, there are instances where the court may, of its own accord (mero motu), raise a question of law that emerges fully from the evidence and is necessary for the decision of the case as long as its consideration on appeal involves no unfairness to the other party against whom it is directed. In (Minister of Safety & Security v Slabbert

(2009) ZASCA 163, (2010) 2 All SA 474 (SCA) at para 11) the Supreme Court of Appeal held:

“ A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.”(Emphasis added.)

14. However, in *Slabbert*, which was referred to in the quotation of the *Molusi* matter quoted above, Mhlantla JA stated at paragraph 12 that:

“ There are....circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This occurs where the issue in question has been canvassed fully by both sides at the trial. In South British Insurance Co. Ltd v Unicorn Shipping Lines (Pty) Ltd, this court said:

‘However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence.

This means fully canvassed by both sides in the sense that the Court was expected to pronounce upon it as an issue.”

15. What adds to the woes of the plaintiff is that he did not deliver the purported replication accompanying the amendment notice within the prescribed periods stipulated by the Uniform Rules of Court. In addition, no condonation application accompanied the said replication.
16. Based on the consideration made above, this Court can only adjudicate the issue of the alleged breach of duty of care in this judgment if it was “fully canvassed” by both parties during the trial with a view that the Court should adjudicate upon it. On the evidence before this Court, it cannot be said that both parties intended the Court to rule on the alleged breach of the duty of care. The plaintiff adduced no evidence on most of the allegations contained in his purported rule 28 notice. The defendant in the conduct of its trial, could not have been expected to deal with whether the plaintiff’s claim based on a breach of the duty of care had also prescribed in terms of the Prescription Act when it was not called upon to answer such a case in the first place. As already stated above, the defendant’s special plea

was based on the Road Accident Fund Act. I furthermore agree with the defendant that the two pleadings in the manner they were brought are not properly before this Court. I will therefore adjudicate the issue in casu without reference to the purported amended plea and the accompanying replication.

17. But even if this Court wanted to lean backwards with the aim to accommodate the plaintiff by adjudicating the issue of estoppel, there are some further problems that the plaintiff will encounter in the pursuit of these two pleadings. The plaintiff Mr Mokoena has not suggested, let alone testified, that the defendant or Ms Thole had by its of her conduct in accepting his claim internally, created a reasonable impression on him that the defendant will waive its right to raise prescription “in perpetuity”. In other words, there is no evidence by the plaintiff of any representation by the defendant or Ms Thole.
18. The Supreme Court of Appeal held in the case of *The Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at paragraph 28 that:

“The very first requirement for estoppel by representation is a representation made by a party against whom estoppel was raised” (Emphasis added).”

It is significant to point out that in casu, the plaintiff never pleaded estoppel before an amendment was sought. In addition, it was also never put to Ms Thole during cross-examination that the Fund had made any representation to the plaintiff regarding its right to raise prescription. Estoppel was never fully canvassed or investigated

during the hearing. Having failed to even establish the very first requirement of estoppel by representation, it is unnecessary to even begin to consider the other requirements for estoppel as to whether they had been established or not as it will be an academic exercise.

19. Ms Mavis Thole, the claims handler who dealt with the plaintiff’s internal claim and who testified at the hearing, is sought in the belated pleadings to be joined to the action as the second defendant. Yet, she was not alerted to the possibility of being joined when she testified at the hearing. It is clear that the purported Rule 28 notice has not been served on her and she has not been given an opportunity to decide whether to object to the notice or not. Ms

Thole is therefore not a party to the proceedings before this Court as she has not been formally joined.

20. Coming to the merits of the issues that were before this Court, it is quite obvious from the evidence led that the plaintiff in this matter is not a lay person. He is a police officer who was an investigating officer of cases referred to the police. It is highly improbable to belief his version that he did not know or ought to have not known that his claims will prescribe. He could also not give any possible explanation why he did not again physically visit the defendant’s offices like he did before when he experienced problems with contacting them telephonically. He also did not give reasons why he did not seek an advice of a legal representative timeously like he did after a long time.

21. He denied receiving any written communication from the defendant through the post office, yet under cross-examination he confirmed

both addresses that were written in the letter Ms Thole claimed to have send to him. If one looks at the said letter, it is dated 22 July 2008. It further indicates on it that the date of prescription is 23/04/2010. It further indicates that "it is your responsibility to notify the RAF one month before, should prescription a lapsing of your claim is looming". On the face of it, it clearly shows that the bank form is attached and should be referred back to the RAF by post or hand delivered. The Bank details form shows that it was signed on the 18 of September 2008 by the bank. This date somehow lends credence to the version of Ms Thole that she signed the letter and send it in July 2008 as it depicts. The unfortunate situation is that, despite the plaintiff being literate, he cannot remember/estimate even the date when he was given the form by hand as he alleged and when he took it back. He cannot also remember the name of the person he gave it to including that of the person he was continuously making enquiries from at the office of the defendant. In fact it was very difficult to get evidence regarding any the dates from him. What aggravates the matter is that he conceded that there was a lapse of a period of five years wherein he did not contact the defendant at all. His version simply comprises of a bare denial of having received the correspondence discovered by the defendant by post.

22. It is clear that the plaintiff does not address in his heads of argument prescription of the claim in term of the Road Accident Fund Act but relies heavily on the cases that deals with prescription of matters under the Prescription Act. It will be unfair for this Court

to have regard to those arguments and authorities relied upon and hold that the defendant breached the duty of care it allegedly owed to the plaintiff when the issues that relates to the breach were not canvassed by both parties in evidence. At the hearing much was said about the fact that the plaintiff is a lay person and had not been advised that his claim would prescribe and was not advised to consult an attorney. A police officer who investigates cases cannot be expected to not have any knowledge that he can consult an attorney if he has problems. In addition, the papers that were send to him explained everything. Lastly, in case of the Road Accident Fund and Another V Mdeyide. 2011 (2) SA 26 (CC) it was said that knowledge is not a requirement under the debt in terms of the Act, but it is a requirement under the Prescription Act.

23. It is common cause that the accident in which the claim of the plaintiff arose occurred on the 20 April 2005. As indicated in the papers that were send to him, five year period elapsed on the 23 April 2010. The plaintiff's claim was therefore in terms of the Road Accident Fund Act already prescribed when the summons were issued.

24. Consequently the following order is made:

24.1. The Special Plea raised by the defendant is upheld with costs.

A.M.KGOELE

JUDGE OF THE HIGH COURT

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