IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA DIVISION,)

(1) NOT REPORTABLE

(2) NOT OF INTEREST TO OTHER JUDGES

CASE NO: 23310 / 2015

28/3/2018

In the matter between:

MOFIHLI CHRISTOPHER MOKOENA PLAINTIFF

and

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

HOLLAND-MUTER A/J:

[1] The plaintiff, a 48 year old unemployed male, was involved in a motor vehicle collision on 25 February 2009 in President Street, Bloemfontein. The plaintiff, a pedestrian was in the process of crossing the said street when the vehicle with registration number [….] collided with him.

[2] The plaintiff suffered bodily injuries as a result of the collision and lodged a claim for compensation directly at the offices of the defendant' s Bloemfontein Office on 27 October 2009. See why he lodged the claim directly at the Fund below.

[3] At the pre-trial between the parties' attorneys on 12 February 2018, the

parties compiled a list of admissions between themselves for the determination of the special plea as raised by the defendant. The list is as follows:

3.1 The accident occurred on 25 February 2009 (asset out in the particulars of claim and above.

3.2 The plaintiff lodged his claim directly with the Road Accident Fund on 25 October 2009;

3.3 The defendant allocated the plaintiff with the following serial number to wit **1440894;**

3.4 The plaintiff's claim was filed in timeously with the defendant and there is no prescription in this regard;

3.5 Summons was issued on 3 I March2015 in this matter and it was served on the defendant on 13 April 20I 5;

3.6 No legal proceedings had been instituted against the defendant before in these current proceedings;

3.7 The defendant informed the plaintiff of its decision to repudiate the claim only through a letter dated 30 September 2014;

3.8 The onus to proof prescription is on the defendant.

[4] The matter to be heard was the special plea of prescription as raised by the defendant. The parties agreed in the pre-trial conducted on 12 February 2018 that the question of merits and quantum be postponed for later determination.

[5] Neither the plaintiff nor the defendant called any witnesses at the trial on 2 March 2018 and both counsel argued on the pleadings and the various court bundles.

[6] At the commencement of the trial before me both counsel agreed and informed myself that the court will only have to decide the extent of the defendant's duty of care towards the plaintiff and whether the plaintiff's claim has become prescribed.

[7] In view of the plaintiffs particulars of claim this duty can at best be de-

scribed as that the defendant needs to do the necessary to assist the plain- tiff in the process of receiving the claim and the processing thereof. Without going into much detail of the particulars of claim, with specific reference to par 8 thereof, is it safe to summarize the pleadings as follows:

7.1 The defendant, either expressly or implied, made certain oral representations towards the plaintiff that the defendant's personnel would accept such direct lodged claim, investigate the claim and to " *do all things necessary so as to ensure that the claim would be timeously handled in every procedural respect and to prosecute the claim timeously to ensure that the claim does not become prescribed.* "

7.2 The defendant denied these allegations but conceded at the commencement of the trial that there was a legal duty on the defendant, but nothing more was forthcoming from counsel on behalf of the defendant as to what the precise contents of such legal duty entailed.

[8] The plaintiff lodged the claim directly at the offices of the defendant as a result of an ongoing advertising campaign by the defendant then to encourage the public in general to lodge claims directly and not via an attorney's office. This campaign was ongoing over radio and television broadcasts as well as in the printed media.

[9] The plaintiff avers that, in view of the advertising campaign, he lodged his completed claim form (RAF-1) with the defendant. See p 77 in the plain- tiff' s court bundle of notices.

[10] Although no evidence was adduced by either parties, it can be accepted that the defendant, represented to the plaintiff in particular and the public in general, it will assist in such direct submitted claims in settling the matters without external legal advice. This in my view creates a greater duty of care on the defendant also to take reasonable steps to prevent claims prescribing in its hands. See **J Ralph v RAF ZAGPJHC 94, Case no 2014/03112** par [15].

"Such reasonable steps entail but are not limited to positively responding to the claimant's inquiries, bringing the matter to finality, but also advising a claimant of the date when a claim would prescribe".

[11] When perusing the RAF-1 form in the bundle, I could not find any notification thereon to inform the plaintiff of any possible prescription date or other deadlines of importance. This is similar to the **Ralph case** above where the prescription date was left blank on the form. See [3] in **Ralph's** case. There was however an inscription that ***"It is your responsibility to notify the RAF 1 month be/ore, should prescription or lapsing of your claim looming, and seek legal advice if necessary at you own costs".*** Such inscription was not made in the matter before this court.

[12] The only communications by the defendant to the plaintiff in this matter was the two letters, the first on 5 March 2010 when forwarding a RAF-4 form to the plaintiff without any time line or other requirements to adhere to or any form of warning about possible prescription and secondly the letter of 30 September 2014 informing the plaintiff that his claim was repudiated due to non-compliance. At no stage did the defendant inform the plaintiff of prescription at all. In my view and in the light of the **Ralph- case** above, the defendant's failure to in any way assist the plaintiff's direct lodged claim, did not comply with the necessary care as required from the defendant.

[13] The question is when did prescription start to run against the plaintiff? Put in a different way, when was the plaintiff deemed to have the necessary *knowledge* of when prescription starts to run. Was it when the accident occurred or at a later stage when informed by the defendant his claim was repudiated ? If the former, then the following becomes important namely how was the plaintiff informed of possible prescription of his claim and what does the legal duty of care comprise of placing certain obligations on the defendant?

[14] The letter addressed to the plaintiff by the Bloemfontein office of the defendant on 5 March 2010 was to acknowledge receipt of the plaintiff s claim and informing the plaintiff of a short coming with regard to the claim. There is no notification or warning to forewarn the plaintiff of any lurking prescription at all. This failure by the defendant, in view of the system by the defendant to entertain claims directly from the public, and not informing direct claimants of the prescription danger looming in the foreseeable future, constitutes a non-compliance of its duty of care by the defendant. The plaintiff was only informed, to possibly qualify for general damages, to complete the annexed RAF-4 form and to inform him and of the required 30% bodily impairment required in terms of the new act. No further information or any guidance was given to the plaintiff by the defendant to possibly alert him in any way as to time frames as to filemthe completed RAF-4 etc. The importance of this will be discussed below. This is also contrary as to what in the **Ralph-case** supra, the duty of care entails.

[15] This was the only communication between the defendant and the plaintiff during the whole period until the letter from the defendant on 30 September 2014 informing the plaintiff that his claim was repudiated.

[16] The whole aim of the initiative by the defendant to invite direct claims from plaintiffs could only be to speed up the process and to curtail possible legal costs by excluding legal representation of plaintiffs.

[17] The reverse side of the coin is that the greater majority of plaintiffs are from the larger illiterate or semi-literate communities and in many in-stances from far off rural areas, people needing assistance to proceed with their claims when lodging their claims directly to the Fund.

[18] The legislation regulating so-called third party claims (under the Road Accident Fund Act, Act 56 Of 1990 as amended) is by it's nature, if I may use the general term, not straight forward. For the majority of possible claimants the provisions will be a labyrinth and many claims will become prescribed or otherwise unenforceable for lack of compliance with the provisions of the Act. The law reports are rife with examples of cases where many cases failed due to the non-compliance with technicalities.

[19] Prescription of claims arising from motor vehicle accidents is governed by section 23 of the Act while section 24 deals with the procedure to institute a claim. In terms of section 23(1) a claim shall become prescribed upon the expiry of a period of three years from date upon which the cause of action arose. In terms of section 23(3) a claim lodged in terms of section 17(4)(a) or 24 shall only prescribe after 5 years from the date on which the cause of action arose.

[20] The provisions of section 12(1) of the Prescription Act, Act 68 of 1969, (hereafter referred to as the ' Prescription Act"), provides that prescription commence as soon as the debt is due. Section 12(3) of this act provides that:

"A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and the facts from which the debt arises. Provided that a creditor shall be deemed to have such knowledge if he could acquire it by exercising reasonable care".

[21] The question to answer is when should the plaintiff reasonably have had the so-called constructive notice that the defendant was doing nothing at all and that prescription was imminent ? Th e plaintiff only obtained actual knowledge when he consulted with his present attorney after his claim was repudiated and became prescribed. See **N D Kekana v Road Accident Fund Case No 57124/2013 GP on 9 November 2013** where, with reference to **Claasen v Bester 2012 (2) SA 404 SCA at para [15]** it was held that *"if* ***the applicant had not appreciated the legal consequences which*** *flow from the facts its failure to do so did not delay the running of prescription ".*

[22] It is therefore a legal conclusion whether the acknowledged duty of care was breached. The question, in the absence of any evidence but for the admissions in the pre-trial minutes and pleadings , simply put is the following namely whether the defendant, bearing the onus, did what was reason- ably expected from it in view of the circumstances , and whether it' s failure to do anything further than invite the plaintiff to complete the RAF-4 form was sufficient ?

[23] As stated above, nobody testified in this matter. Only oral arguments were presented. The burden of prove is on the defendant to proof (i) that it did comply with it ' s legal duty of care towards the plaintiff and (ii) that the plaintiffs claim has became prescribed.

[24] It is further clear that the plaintiff did file his claim form, except for the RAF-4 form, within the prescribed three years as required in section 23(1) of the Act. It often happens that the RAF-4 forms are filed later but that does not detract from the filing within the required time in section 23 (1). The claim did not prescribe at that stage. The plaintiff had five years from the accident in terms of section 23 (3) to stop prescription from extinguishing his claim.

[25] The plaintiffs claim would only prescribe after 5 years from the accident occurring, the date then 24 February 2014. Summons was issued on 31 March 2015 and served on the defendant on 13 April 2015, well beyond the 5 years as set out in section 23 (3) of the Act.

[26] Was the defendant' s breach of it's legal duty of care as set out in **Ralph supra** , (keeping in mind the route embarked upon by the defendant inviting the public to claim directly from the Fund with the implied obligations to ensure that it will assist the direct claimants to prosecute their claims and implied thereto, to warn these direct claimants of pitfalls in the procedure that could destroy a claimant's claim procedurally), the plaintiffs downfall or not and secondly was there any negligence on the part of the plaintiff not to inquire from time to time from the defendant as to the pro- cessing of his claim?

LEGAL DUTY OF CARE:

[27] The only facts before me to decide on this aspect are the admissions by the defendant in the pre-trial minutes and during oral arguments that the defendant under the prevailing circumstances had a legal duty of care to-wards the defendant.

[28] It is trite that the defendant bears the onus in proving actual or constructive

knowledge on the part of the plaintiff. Considering the provisions of section 12(1) of the Prescription Act, "a debt shall not be deemed due until the creditor has knowledge of the facts from which the debt arises, provided that a creditor shall be deemed to have such knowledge *if he could acquire it by exercising reasonable care".* (my emphasis). In the absence of any evidence from both parties I am bound by the pleadings and the admissions made during the pre-trial.

[29] Bearing in mind the onus resting on the defendant and with only the two letters sent to the plaintiff during the whole period, and in view of the ratio in the **Ralph case,** I am not convinced that the defendant did everything reasonably expected from it when dealing with direct *lodged* claims, by not indicating at any stage to the plaintiff of the danger of prescription. To just accept the claim without guiding the plaintiff in any way as to procedure or pitfalls in my view amounts to negligence on the part of the defendant. The defendant should reasonably advise these claimants when directly lodging claims at the Fund of the basic procedure and time lines. Im an in agreement with the reasoning by Modiba AJ in **AP NDLALA v ROAD ACCIDENT FUND** unreported under case number 34859/2011on 24 October 2014 in the Gauteng Division, Pretoria.

[30] The plaintiff averred in his par 10 of the particulars of claim that **he did *"enquire from time to time as to the progress and was advised to exercise patience".*** This was denied in the defendant's plea. No evidence was tendered by the plaintiff and there is nothing before me to either accept or reject both parties averments on this issue. The defendant, burdened with the onus on the prescription issue, failed to discharged this onus and must suffer the consequences.

[31] It is ordered that:

1 The special plea is dismissed with costs.

J HOLLAND-MUTER

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

APPEARANCES:

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