IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 449/2018

In the matter between:

PHOZISA TOSHOLO **Plaintiff**

And

THE ROAD ACCIDENT FUND **Defendant**

JUDGMENT DELIVERED 4 MAY 2023

WATHEN-FALKEN, AJ

1. This matter finds its roots in a delictual action for damages in which the plaintiff sought to hold the defendant liable for injuries she sustained as a result of a motor vehicle collision in which she was a passenger on 9 July 2012.

2. This court is called upon to determine the two of the special pleas raised by the defendant;

   i. That the claim had been settled in full on 18 November 2013, and

ii. That the current claim against the defendant had prescribed.

3. A chronology of the relevant facts are important to reflect light on the issues raised which are largely common cause.

4. On the 6th May 2013, the Plaintiff signed a consultation letter prepared by a representative of the Road Accident Fund, (hereinafter referred to as RAF) when she attended at Tygerberg Hospital as an out-patient. A RAF claim form was completed including medical information relating to the Plaintiff, her personal information, details relating to the accident and compensation claimed.[1]

5. The compensation claimed is reflected as R38 012,70.

6. The claim form was lodged with RAF by its representative on 7 August 2013 which further included circumstances of the accident and information confirming plaintiff's remuneration.

7. An offer to settle the claim which was prepared by RAF representative, Kulsoem Govender on 23 September 2013 which was signed by the Plaintiff on 21 November 2013. The offer reflected a nil value in respect of general damages.

8. The accepted the offer was in the amount of R17 121.40.[2]

[1] Exhibit 'A' at pages 1-13
[2] Exhibit 'A' at pages 29-31

9. Subsequent thereto, and on 27 March 2014, the Plaintiff instructed attorneys Kruger to institute a third party clam against the defendant in respect of the same accident.

10. Kruger attorneys proceeded to lodge the claim on behalf of the plaintiff on 10 June 2014.

11. On 30 June 2014, RAF then informed Kruger Attorneys per letter that they had already received a claim of the plaintiff and that a new claim/second claim could not be registered. The claim number under which the direct claim was registered was furnished to Kruger Attorneys in the same correspondence.

12. The attorney was invited to contact Koelsum Govender at their direct claims department to clarify the position.

13. RAF further, requests Kruger Attorneys to furnish them with the written confirmation regarding the previous claim.[3]

14. Kruger Attorneys conceded that they did not respond or react to the letter dated 30 June 2014.

[3] Exhibit 'A' at page 90

15. On 2 September 2014, plaintiff's attorneys issued summons against RAF, a claim which was later amended on 17 February 2016, and was pleaded to.

16. The plaintiff submitted herself for examination by several medical practitioners and at behest of her own attorney and RAF.

17. After an inordinate lapse of time and much correspondence from Kruger attorney, the RAF claims handler, Waseema Kumandan penned an email dated 25 August 2017, stating that RAF was seeking condonation from the COO and their corporate legal department for the re-opening of the file. It is common cause that this condonation was never obtained.

18. Kruger Attorneys requested assistance from RAF to expedite the re-opening of the file, indicating specifically that,

> "the claim was settled via direct claims – and grossly under-settled,"

in an email dated 29 August 2017?

19. The plaintiff then launched an application for the payment in terms of Rule 34A. It was at this point that the defendant in its opposition to the application stated that the plaintiff's claim had been settled in full and final settlement as a direct claim and that the claim is a duplication.[4]

[4] Exhibit 'A' at page 178

20. On 16 January 2018, some two months later, Kruger Attorneys informs RAF legal representative that the plaintiff has no knowledge that the matter was settled and that they had no information regarding the alleged settlement.

21. On 17 January 2018, the application for provisional payment was withdrawn as well as a Notice of Withdrawal of the summons under case number 15685/2014, tendering wasted costs.[5]

The Present Action

22. The present action was instituted by summons on 17 January 2018 in which it is alleged that the Plaintiff's original direct claim constitutes an "under settlement". It is in respect of this action that the first two special pleas must be determined.

23. The onus to prove is with the defendant in respect of both the special pleas raised. The defendant elected not to lead evidence.

24. The plaintiff called three witnesses to testify in its resistance to the special pleas raised namely, Alimullah Mohamed, Nicola Haupt and the plaintiff herself.

PLAINTIFF'S CASE:

a. The Plaintiff: Phozisa Tosholo

[5] Exhibit 'A' at pages 237 to 238 and 260

The plaintiff testified that she had been approached by a representative from RAF when she attended the Tygerberg Hospital for follow up treatments flowing from injuries she sustained as a result of the motor vehicle accident. She confirmed that she was a passenger in the accident and that she was entitled to claim against RAF for her injuries. The plaintiff completed her Grade 11 at the Mathew Goniwe High School in Langa with subjects: English; Xhosa, Mathematics, Accounting, Business Economics and Economics. She worked at a Fisheries from her high school years to beyond i.e. until after she had finished school.

Later she took up employment at a nursing agency called Charisma which is where she was employed as at the time of the accident. She worked at both Kingsbury and Vincent Palotti hospitals.

The plaintiff also registered for a home base nursing course which she had to fund herself. She testified that during the time preceding the accident in 2012 she earned R1322 per week. Her employer, Charisma paid her an amount of R952,84 sick leave for the period she could not work vis a vis 9 July 2012 to 12 October 2012.

After consulting with the RAF official, she was told to advised on the RAF office in Cape Town to attend on the claim.

She confirms that she submitted proof of her loss of earnings to the RAF official and that she signed acceptance of offer on 18 November 2013.

She testified that she did not read the contents of the acceptance she signed and did not realise that it finally settled her claim. The plaintiff testified that the RAF official informed her that RAF would not pay for further medical examinations, and if she wanted to pursue a greater claim that she would have to pay for the medical

reports herself. She was not in a position to, so she signed the offer. The identity of the RAF official was not known to the plaintiff.

Subsequent hereto, so the plaintiff testified, she met a woman named Phumeza who assisted people with claims in her community. She accompanied Phumeza to her office in Parow where she signed a Power of Attorney and a mandate with her current attorneys of record.

She testified that she thought it was the RAF office. She could not remember if the person with whom she consulted had explained the content of the mandate and Power of Attorney to her.

She testified that she thought that her claim would then be dealt with by RAF. She also confirms that she did not inform anyone at the offices of the attorneys that she had previously received any monies or compensation from RAF. No explanation of her failure to do so was offered.

The plaintiff testified that the RAF office had signage identifying their business. The RAF official at the hospital who approached her wore a “golf” t-shirt with RAF identification on it. Her attorney’s office which she attended on had not RAF signage.

She was not able to explain why she thought that her attorneys were somehow a RAF office. She simply went on the word of Phumeza who gave assistance to community members.

The plaintiff confirmed that she had attested to the affidavits at various periods after the accident, purportedly on the request of her employer and/or the hospital and/or RAF.

The plaintiff denies that she understood the settlement offer she signed to have been in full and final settlement.

b. Plaintiff's attorney: Nicola Haupt:

Ms Haupt testified that she is an attorney with 21 years' experience as at the time of her evidence.

She confirmed that she had taken over the plaintiff's claim from her colleague, Mr Kekana in August 2014.

She testified that the claim was lodged with RAF on 4 June 2014. She acknowledged the existence of correspondence transmitted to her firm dated 30 June 2014 wherein, RAF specifically requested them to confirm their mandate since a file already existed for plaintiff. She was specifically requested to confirm instructions regarding the direct claim in writing.

Ms Haupt denies that she saw the letter in the file. She testifies that she was made aware of the letter in the file by Mr Hindley from RAF at a much later stage. She confirmed that the plaintiff had not informed her of the previous claim. It was not a concern for her at the time since it was a common occurrence that claimant's approach RAF directly.

Summons was issued in October 2014.

She testified that she only became aware of the settlement in August 2017, by a RAF official, i.e. approximately 5 years after the accident and 4 years after the settlement was signed by the plaintiff.

Her evidence is further that from the date that the first summons was served the matter progressed up to pre-trial without any mention of the settlement in the

matter. This progress included RAF sending the plaintiff for medical examination toward the end of 2016. Essentially both herself and the attorney Mr Mohamed representing RAF were “operating” in the “dark” i.e. without giving any attention to the previous settlement in 2013.

Just prior to gaining knowledge of the settlement, she applied for interim payment given the lengthy delays in the matter, as she had anticipated an offer. This, it is said, was the precursor to RAFs reliance on the settlement which was signed by the plaintiff in 2013.

Ms Haupt however, says she was still optimistic since she had received email correspondence from a RAF official, Ms Kumandan who had assured her that the file would be re-opened.[6]

Ms Haupt further advises that RAF had conceded that the plaintiff was entitled to a greater settlement. She referenced communication between herself and Mr Mohamed to the effect that she should withdraw the interim payment application because an offer of settlement was imminent.

It is common cause that the interim payment application was met with opposition from RAF.

Ms Haupt then withdrew the original summons and the request of interim payment and within a day thereof launched the current summons with the cause of action rooted in the alleged under settlement.

Ms Haupt is of the view that prescription on the current action started running from the date she gained knowledge of the under settlement being, August 2017.

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[6]Email dated 25 August 2017 at page 177

It must be noted that in the course of Ms Haupt's evidence, she testified about her telephonic conversation with Ms Kumandan, a RAF representative who attended on the settlement dated 18 November 2014. Her evidence in this regard was objected to on the basis that it constituted hearsay evidence.

It is common cause that Mrs Kumandan was not called and would not be called to confirm or deny any submissions made by Ms Haupt. This aspect was argued, this court ruled it to be hearsay and was not admitted into evidence. Counsel for the plaintiff disagreed and on special note was entered on the record.

Ms Haupt conceded that it was her firm's practice to explain all documents for signature to clients and that the practice would in all likelihood have been followed in the case of the plaintiff when their mandate was confirmed.

She also conceded that the letter from RAF indicating the issue about the duplicate claim was on her file all along. She also conceded that RAFs request was clear and was not followed. The question as to why the contents of the letter did not raise a red flag or why it was simply never responded to could not be answered by Ms Haupt.

She testified that the current summons was signed by her and was issued. In the Particulars of Claim, it was pleaded that RAF had conceded liability. She confirmed in court that this was factually not correct, however, her understanding was that liability was conceded given the circumstances of this case *vis a vis* that the plaintiff was a passenger. Her reasoning was further fuelled by the fact that RAF had requested an executive summary.

This was also the submission made on affidavit by plaintiff in the application for interim payment, which she essentially conceded as not factually correct.

c. Erstwhile attorney for RAF: Allimullah Mohamed

At the time when the previous summons (the 2014 summons) was due, he was employed at Rahman Attorneys and dealt with the plaintiff's file on behalf of RAF.

He confirmed that a direct claim was lodged by the plaintiff, that a full and final settlement was reached and paid to the plaintiff. He further confirmed the itemised value of the claim which related to past loss of earnings without an allowance for

general damages.

Mr Mohamed testified that although he had become aware of the settlement, Ms Haut had informed him that she awaited a re-opening of the original file (at the direct claims department).

Unlike Ms Haupt's evidence, Mr Mohamed's evidence was that executive summaries were requested by RAF in all matters.

Mr Mohamed could not explain why *res indicata* was not raised sooner, but he was aware of an impending offer at some stage prior to RAF terminating their mandate with him in 2019. He could not bring any clarification to what the procedure would be to facilitate the re-opening of a file even though he had worked for the RAF at Cape Town from 1999 to 2005, and as a RAF panel attorney for 17 years from 2007 to 2019.

Upon closer examination of the offer and settlement, he commented that it was a standard document noted without prejudice.

Mr Mohamed testified that during his tenure at Rahman Attorneys, the law firm carried 800 to 1000 files at the time and that there were only approximately 10 law firms accepting RAF matters.

He further confirmed the content of his letter to Ms Haut dated 17 January 2018 wherein he confirmed that RAF had considered re-opening the file to limit litigation costs and that it would have considered a settlement (to the exclusion of past loss of earnings)[7].

Mr Mohamed testified that he was not aware of any matter as a claims handler or attorney where RAF had waived prescription. In fact, he testified that it could not be done, since RAF is a creature of statute.

He confirmed that by 2019, the recommendation to re-open the file was not acceded to and he was instructed to defend the action, which by then, issues of prescription had crept in and the matter could not be entertained.

Defendants case:

The defendant pleaded that the plaintiffs claim issued under the current summons had prescribed even though the plaintiff had lodged her claim directly with the defendant timeously. And in any event, that the claim was entertained and finally settled directly on 18 November 2013.

The plaintiff argued that she expected further engagement with RAF to settle her general damages which was forthcoming with the application of interim payment.

That the original claim was timeously lodged and that the current claim has not prescribed since it was lodged timeously from the date of knowledge of the under-settlement.

ANALYSIS

[7] Page 240 of the evidence bundle.

SECTION 23

"(1) Notwithstanding anything to the contrary in any law contained, but subject to subsection (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 or the owner thereof has been established, shall become prescribed upon expiry of a period of (3) three years from the date upon which the case of action arose.

(2) …

(3) Notwithstanding sub section (1) no claim which has been lodged in terms of section 24 shall prescribe before the expiry of a period of five (5) years from date on which the cause of action arose."

25. It is trite that the defendant bears the evidentiary burden on a balance of probability to prove its special plea. Insofar as the plea of prescription goes, the defendant must prove the date on which the plaintiff obtained actual or constructive knowledge of the debt. This burden shifts to the plaintiff only if the defendant has stabilised a prima facie case.[8]

26. The date on which the plaintiff obtained knowledge of this debt is at the crux of the matter. Evidently, and in terms of section 23(3) the RAF Act, the Plaintiff's claim has prescribed since the summons was served beyond the stipulated 5-year period.

[8] See Macleod v Kweyiya [2013] ZASCA 28; 2013(6) SA 1 (SCA) pa 10.

27. To put context into my reasoning it is important to sequentially reflect on the history of the matter.

28. The original cause of action, the motor accident occurred on 9 July 2012. The driver of the vehicle in which the plaintiff was a passenger, was known and not in issue. The plaintiff instituted a direct claim against RAF on 6 May 2013 which claim was lodged on 7 August 2013.

29. The plaintiff signed an offer an acceptance settlement “without prejudice” on 18 November 2013 in terms of which she was paid an amount of R17 121.40. The settlement was prepared by a RAF official and reflects loss of earnings only. Nil value were entered in respect of any other damages.

30. On the 27th March 2014, the plaintiff signed a mandate and power of attorney with her attorneys of record. The plaintiff confirms that she did not inform her attorney of the direct claim or that she received settlement in the matter. Ms Haupt confirms this fact.

31. Plaintiff’s attorney lodged a second claim with RAF on 4 June 2014. This claim included a claim for loss of damages in the amount of R24 000.00.[9]

32. On 30 June 2014 RAF caused a letter to be send to the attorneys informing them of the duplication of claim, furnished them with the claim number. They were

[9]Trial bundle A; Page 32 to 46 at page 41

informed that a second claim could not be registered and requested written confirmation from the claimant.[10]

33. Ms Haupt testified that this correspondence from RAF was in her file but that she “missed it”.

34. On 2 September 2014, summons was issued under case number 15685/2014 for damages.

35. Rahman Attorneys represented by Mr Mohamed defended the matter on behalf of RAF. Pleadings were exchanged and no mention was made of the previous direct claim. The correspondence between the parties which followed indicated a RAF case number which differed from the direct claim number. It must be deduced that contrary to RAFs communication that a file could not be opened; that it in fact did.

36. The matter progressed slowly and several medical reports were obtained from both parties setting out the plaintiff’s injuries, loss and substantiation for the general damages portion of the claim totalling R1 507,507.00.

37. Ms Haupt lodged several complaints with RAF regarding the delays in the matter and their lack in correspondence.

[10] Trial bundle A page 90

38. By 27 June 2017, Ms Haupt specifically expressed her dissatisfaction that RAF had not made any concessions on the merits of the matter.[11]

39. On 6 July 2017 the plaintiff launched an application of interim payment in terms of Rule 34A of the Uniform Rules of Court.[12] The averment had made in paragraph 4 of the application that liability had been conceded by RAF, which was denied by RAF in its opposition.

40. Ms Haupt during her evidence, also conceded that RAF had not specifically accepted liability on the merits at the time.

41. RAF filed their opposition on 16 November 2017.

42. Ms Haupt testified that it was only at this stage that she became aware of the direct claim lodged by the plaintiff on 7 March 2013.

43. As a result of this knowledge, the summons and the Rule 34A application was withdrawn in January 2018.

44. On 17 January 2018, plaintiff caused a summons to be issued under case number 449/2018, the matter instant.

[11] Trial bundle A at page 171
[12] Trial bundle A page 187 to 193

45. The cause of action is based on the defendant's breach of agreement, attentively, defendant's breach of duty of care which caused plaintiff to suffer damages in the amount of R2 110 000,00.

46. It is therefore accepted that in the ordinary course and having consideration for section 23 of the RAF Act, a claim in terms of section 17 would have prescribed on 8 July 2017, calculating 5 years from the date of the accident.

47. In this matter this court must be satisfied as to the date on which plaintiff became aware of the debt as described in the current action.

48. In the Mdeyide[13] case, the court found that:

> "in terms of s 23(1) of the RAF Act, on the other hand, prescription runs from the date upon which the cause of action arose. The term cause of action has been defined as "every fact which …. would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the Court. In case the case of claims under RAF Act, the elements of a cause of action are established in terms of s17 and include bodily injury or death, caused by or arising out of negligent driving of a motor vehicle, or a wrongful act on behalf of the driver or owner of the motor vehicle."

49. It is accepted that all claims under section 17 of RAF is regulated exclusively by section 23 of the Act.

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[13] Supra para 19

50. The significance of this is trite, that prescription is triggered from the date of the accident which would have allowed the plaintiff to have issued summons by 8 July 2017. In the present circumstances, the claim brought in terms of s17 has lapsed.

51. The alternate claim under the present summons as it relates to a breach of duty or care, I consider that prescription would start running from the date that the plaintiff became aware of the debt. (In this case the debt being the difference between the settlement of past loss of income and the claim for general damages.

52. This is essentially a credibility finding based on all the evidence available. It is common cause that the plaintiff signed accepted monies from RAF of her past loss of income and that she did not declare that to her attorney. In fact, her evidence is that she only declared it to her attorneys after she was confronted with it at the late stage of the Rule 34A application. By then nearly 5 years had passed and she had attested to at least three further affidavits where pertinent information relating to her claim was detailed. It included her further claim for past loss of income.

53. The plaintiff left the court with the impression that she was reasonably intelligent and was able to articulate herself with and without the services of an interpreter.

54. Her evidence was rigorously challenged by the defendant's counsel and she was able to stand her ground.

55. However, on questions which specifically related to issues of knowledge of process including her consultation with her attorneys she was vague and indicated that she could not remember detail.

56. She could not satisfactorily explain why she had failed to inform her attorney of the direct claim she had lodged. Further, she could not satisfactorily explain why she had not felt it necessary to inform her attorney that she received money from RAF of her loss of earnings.

57. Her persistent silence placed her attorney in a precarious position when confronted with the information in the Rule 34A application. Her conduct in this regard cannot be rewarded with any merit. Her evidence as a whole did not impress of truth insofar as it related to her non-disclosure. This non-disclosure is the first "devil" in the detail.

58. The evidence of plaintiff's attorney, Ms Haupt cannot really be faulted. Her version is supported by the Plaintiff as it relates to the non-disclosure of the direct claim.

59. However, she was not able to satisfy the court with an explanation as to why she overlooked the correspondence from RAF informing her of the direct claim.

60. Surely, as an attorney, there is a duty to represent the interest of her client and to have an intimate knowledge of her file. Had she taken cognisance of the letter dated 30 June 2014 as referred to above, she would have had sufficient time to amend the summons or re-institute a fresh claim based on the alleged under-settlement. Arguably, 30 June 2014 is the date on which Ms Haupt was given the relevant information and the date on which she is deemed to have had knowledge of the direct claim. She owed the plaintiff a duty of care in this regard. It is inconceivable that an attorney would allow a matter to progress for three years before apprising him or herself of all the facts required to prove its clients case.

61. It is further inconceivable that the defendant would persist in litigation and only realise at such a late stage that the matter had been settled in 2014. Mr Mohamed's conduct of the matter certainly did not impress either. He engaged with the plaintiff's attorney, incurring extensive costs without apprising himself of all the facts either.

62. He too ought to have exercised his mandate with greater care given the extensive costs which were incurred, and this matter could have been resolved sooner.

63. Here Mr Mohamed's explanations was that he handled hundreds of files at that time, an explanation which is understandable but not excusable.

64. The conduct of both Ms Haupt and Mr Mohamed was that of the “blind leading the blind”, both to the ultimate prejudice of their respective clients and must regrettably to the detriment of the plaintiff.

65. Ms Haupt spent an excessive amount of time in correspondence with the defendant in attempts to expedite the matter, this is evident from the barrage of email communication placed before this court.

66. If it is accepted that Ms Haupt only became aware of the direct claims on 14 November 2017, the question is then whether prescription insofar as it relates to the “under settlement” should progress from that date and if so, whether it can be said that the defendant tacitly (by its conduct) extended prescription insofar as it relates to the claim.

67. This scenario is not sustainable since it is the plaintiff’s attorney’s duty to ensure that a claim is instituted correctly and timeously to avoid the negative impact of prescription.

68. The defendant cannot and could not have extended the statutory limitations even if it wanted to.

69. The RAF Act makes no provision for condonation of a late claim, either based on the ignorance of the claimant, or for any other reason.[14]

[14]Para 20 of Mdeyide

70. The plaintiff and her attorney are deemed to have had knowledge of the direct settlement and its effect by at least 30 June 2014. This summons was served on 17 January 2018 and is well out of time.

71. I am satisfied that the special plea of prescription must be upheld.

72. On the issue of the claim being settled by the direct claims department, less needs to be said.

73. It is common cause that the plaintiff was only paid out her passed loss of income and that no consideration was had for general damages. In the course of their correspondence between the parties and the nature of the injuries, one could expect that in the ordinary course, that the defendants may have considered a claim based on the “under settlement”. However, it could not in the current circumstances because of two reasons:

i. the plaintiff was not frank and open with her attorney;

ii. the plaintiff’s attorney was not mindful of the plaintiff’s file contents;

resulting in an inordinate lapse of time for which the defendant cannot be wholly responsible. Given the lateness in the day the claim is deemed to have been settled and the special plea must succeed.

74. Even though, much sympathy can be had for the plaintiff, as the law stands the matter has prescribed.

75. As a general rule, costs follow the successful party and I cannot find a reason to order otherwise.

Order:

a. The defendant's Special Plea of prescription is upheld;

b. The defendant's special plea based on the claim being settled is upheld;

c. Costs to follow the result

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WATHEN-FALKEN, AJ

Acting Judge of the High Court