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LEGAL PRACTITIONERS' FIDELITY FUND
SOUTH AFRICA

RISK MANAGEMENT COLUMN

Update on the review of the RAF Board Notices

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The updates below reflect the position as at the date on which this Bulletin is written (16 August 2024). There may be developments in the matters covered by the time the Bulletin is published.

Board Notice 271 of 2022

Following the decision of the full bench in *Legal Practitioners Indemnity Insurance Fund NPC and Others v Road Accident Fund and Others* 2024 (4) SA 594 (GP) in respect of Board Notice 271 of 2022 and the related RAF1 form, the Road Accident Fund (RAF) has launched an application for leave to appeal. The application for leave to appeal was argued on 8 August 2024. The RAF's Chief Executive Officer (CEO) was requested to file an affidavit by the 16 August 2024 explaining:

(i) why the order handed down on 10 March 2024 had not been complied with;

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(ii) what interim regime could be put in place pending the finalisation of matter if leave to appeal to the Supreme Court of Appeal (SCA) was granted; and

(iii) the RAF's position in respect of a possible consolidation of the various related matters.

The CEO's affidavit was filed.

Judgment in the application for leave to appeal has been reserved.

Practitioners are also urged to consider the judgment in *Mlamli v Johnstone NO and Another* 2024 (4) SA 611 (ECMk).

Board Notice 58 of 2021

On 14 June 2024 the SCA:

1. Granted the condonation sought by the RAF;
2. Ordered that the decision by the full bench on 15 March 2024 dismissing, with costs, the RAF's application for leave to appeal be referred to that court (the SCA) for reconsideration and, if necessary, variation;
3. Referred the leave to appeal for oral argument; and
4. Directed that the parties must be prepared, if called upon to do so, to address the court on the merits of the matter.

The record in the *Mautla* matter is due to be filed by 20 September 2024.

We will keep the profession and other stakeholders appraised of developments in the various tranches of litigation against the RAF.

Claims for past medical expenses

Several recent judgments have considered the question whether the RAF is liable to compensate road accident victims for past medical expenses that have been settled by a medical aid scheme.

In *Bezuidenhout v Road Accident Fund* (1284/2012) [2024] ZAFSHC 224 (1 August 2024), the court found that the RAF liable to pay the plaintiff's past medical expenses that had been paid by a medical aid scheme she belonged to. The plaintiff's counsel relied on the *res inter alios acta* principle. In response, counsel for the RAF argued that, in terms of the Road Accident Fund Act 56 of 1996 (RAF Act), it is obliged to reimburse third parties who suffer a loss because of a motor vehicle collision. It was further submitted on behalf of the RAF that a medical aid scheme is neither a third party nor a supplier as contemplated in the RAF Act and thus has no right to reimbursement after honouring its statutory obligation arising from the Medical Schemes Act 131 of 1998.

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The court considered the applicable law starting with section 17 of the RAF Act. It then also considered how previous decisions have upheld the *res inter alios acta* principle as well as those judgments where it had been found against the RAF on this point.

Mgudlwa AJ concluded that:

"[11] In my view, on consideration of all the authorities set out above, as well as on a proper interpretation of s 17 of RAF Act, it is apparent that the [RAF's] liability to a claim for past medical expenses is not affected by the fact that the Plaintiff's medical aid has already paid those expenses. It is clear from the [decisions] referred to …, that the *res inter alios acta* principle does not permit the [RAF] to deduct the amounts paid by [the plaintiff's medical aid] from the quantum payable to the Plaintiff in respect of past medical expenses. I interpose to mention that the counsel for the Defendant, in her legal arguments, was unable to refer this court to any court decision and or authority which supports rejection of a claim for past medical expenses by RAF."

The court went on to make the following observations in respect of costs:

"[14] With regard to costs, I deem it necessary to mention that, notwithstanding the dismissal of the application for leave to appeal by the Constitutional Court, the RAF has nonetheless persisted in refusing to pay the Plaintiff her past medical expenses. In my view, ***this conduct deserves to be deprecated. It is clutching at straws and in the process depriving deserving claimants of their lawful entitlement. In the process, it is shamefully wasting yet more public funds which should be directed at settlement of worthy claims***. *In casu*, I do take note of the fact that counsel for the Defendant was acting on instructions of the letter dated 2 March 2023 from RAF litigation officer. In the circumstances I am persuaded that the punitive costs award sought on behalf of the Plaintiff is warranted" (footnote omitted, emphasis added).

The following judgments can also be considered in response to a refusal by the RAF to pay for past medical expenses that had been covered by a medical aid scheme:

- *Road Accident Fund v Sheriff of High Court for District of Centurion East and Another* (122825/ 2023) [2024] ZAGPPHC 183 (19 February 2024)
- *Van Tonder v Road Accident Fund* (1736/2020; 9773/2021) [2023] ZAWCHC 305 (1 December 2023)
- *S.J.J.W v Road Accident Fund* (19574/ 2017) [2023] ZAWCHC 25 (8 February 2023)
- *Discovery Health (Pty) Limited v Road Accident Fund and Another* (2022/ 016179) [2022] ZAGPPHC 768 (26 October 2022)

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- *Road Accident Fund v Sheriff of the High Court For the District of Centurion East and Others* (083710/ 2023) [2023] ZAGPPHC 1777 (11 October 2023)
- *Bane v D'Ambrosi* 2010 (2) SA 539 (SCA)
- *Road Accident Fund v Abdool-Carrim and Others* 2008 (3) SA 579 (SCA)
- *Rayi NO v Road Accident Fund* (9343/ 2000) [2010] ZAWCHC 30 (22 February 2010)
- *Watkins v Road Accident Fund (Reasons)* (19574/2017) [2023] ZAWCHC 14 (8 February 2023)
- *Van Tonder v Road Accident Fund* (1736/ 2020; 9773/2021) [2023] ZAWCHC 305 (1 December 2023)
- *Zysset and Others v Santam Ltd* 1996 (1) SA 273 (C)
- *Thomson v Thomson* 2002 (5) SA 541 (W)
- *D'Ambrosi v Bane and others* 2006 (5) SA 121 (C), and
- *Mooideen v The Road Accident Fund* (unreported judgment Western Cape High Court judgment under case number 17737/ 2015, delivered on 11 December 2020)

Prescription

Some recent judgments dealing with prescription are summarised below.

***Shoprite Checkers (Pty) Limited v Mafate N.O.* [2024] ZACC 16**

This matter arose from the injuries sustained by a worker at a retail store owned by the appellant. She sustained serious head injuries as a result of which she has been permanently mentally incapacitated.

The Constitutional Court dismissed an application for leave to appeal brought by the appellant. Relying on paragraph (i) read with paragraph (a) section 13(1) of the Prescription Act 68 of 1969, the appellant contended that the claim had prescribed because more than a year had elapsed between the appointment of the *curator ad litem* (1 February 2017) and the date of service of summons (19 October 2018). According to the Constitutional Court, "the appointment of a curator *ad litem* does not divest a person with mental incapacity of the protection afforded by section 13(1) [of the Prescription Act] for as long as mental incapacity exists" (paragraph [42]).

The court also made the following observation:

"[35] …Where the claim does prescribe in the hands of the curator *ad litem*, it would be cold comfort to say that the affected person with a mental incapacity has a claim against the curator *ad litem*. The person would be in as good a po-

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sition as where they were before, if not worse off. I would sooner continue to have a claim against an established, huge company like Shoprite Checkers than to have a new claim against, for example, an attorney from a small law firm or an individual advocate" (footnotes omitted).

***Maboyane v Basson* 2024 JDR 2805 (GP)**

For current purposes, the focus will only be on the prescription aspects of this judgment.

The plaintiff was injured in a motor vehicle collision that occurred on 14 January 2016. On 21 January 2006 he instructed the first firm of attorneys to pursue a claim against the RAF on his behalf. One 26 July 2006 the first firm of attorneys sent a letter to the plaintiff requesting him to visit their offices, failing which his file would be transferred to another firm of attorneys (the second firm, the defendant in the matter). On 11 August 2006 the plaintiff cancelled the mandate of the first firm and mandated the second firm to pursue his RAF claim.

More than ten years later, the plaintiff attended a RAF roadshow in 2017 where he was informed that his claim was lodged but never pursued. He was advised to go back to his attorneys. He then instructed his current attorneys.

A document purporting to terminate the mandate of the second firm was generated on 10 September 2018 and he instructed his current attorneys on that date to pursue a claim either against the RAF or the defendant. Summons was served on the defendant on 21 June 2021. The defendant pleaded that his mandate had been terminated prior to the claim against the RAF prescribing and also that the professional indemnity claim against him had prescribed.

The issues of merits and prescription were separated from that of quantum.

The defendant's plea and argument were that the three year prescription period in respect of the professional liability claim started running on 30 April 2008 when a letter was sent to the plaintiff advising him he did not have a sustainable claim against the RAF as there was no loss of income or medical expenses and, furthermore, the taxi he was travelling in at the time of the accident did not have a permit. That letter also informed the plaintiff that the defendant was closing his file.

In upholding the special plea of prescription, the court considered that:

"[77] …, once the plaintiff had received the letter, he should have realised that when the defendant stated that he had no loss of income (or medical expenses) and that the vehicle was alleged to have been a taxi without a permit, that his attorney was terminating his mandate on totally incorrect facts. A reasonable person would then have been prompted to resort either to the attorney or to a new attorney. The plaintiff conceded that, had he made enquiries at the defendant's offices, he would have found out about this erroneous termination (and that he could then even have pursued his claim against the RAF).

[78] This brings one then to the question of receipt of the

letter. Even if one were to accept the plaintiff's evidence of not having received the letter, then a reasonable person in his position would have acquired knowledge of this termination of mandate by reverting to the attorney from time to time. This fact the plaintiff had conceded in cross-examination and this would have happened had he made any enquiries during 2008 or even 2009 (when the file had been archived). Even though the plaintiff testified that he had not done so due to the fact that he was waiting for the defendant to "come back" to him and that RAF claims took long to resolve, his failure to make any enquiries up to the time of prescription of his claim in 2011 is too unreasonable to satisfy the requirements of the Prescription Act. Before that time, he could by exercising reasonable care, have ascertained that his attorney was no longer acting according to the plaintiff's mandate. This failure is exacerbated by the fact that the plaintiff had not even attempted to find out any progress of his claim via Jacoline [the person who had referred him to his first and current attorneys] who had always previously assisted him.

[79] Even if by an untenable stretch of the limits of prescription, plaintiff is excused for his inaction for more than three years since his last contact with the defendant (which, on his version, was prior to March 2008), then at the very latest, he should have become aware of the lapsing of his claim against the RAF by the time he spoke to RAF employees during the roadshow of 2017.

[80] Summons was however only served on 3 June 2021, that is a period of more than three years since the above date and since the plaintiff would (at the very latest) have become aware of the facts which could have established any claim against the defendant. The plaintiff offered no explanation for this further lapse of time and I therefore find that his claim against the defendant had become prescribed."

The defendant's special plea of prescription was thus upheld.

Botha v Matthee **(unreported judgment by Janse van Nieuwenhuizen J delivered in the Gauteng Division (Pretoria), delivered on 31 July 2024**

The plaintiff's claim against the defendant, his erstwhile attorney, was based on an alleged breach of mandate. His case was that the defendant had consented, on his behalf, for an amount of R750 000 to be paid to a third party without ensuring that the required security was in place. Summons had been served on the defendant on 22 March 2018. The defendant raised a special plea of prescription contending that the claim had prescribed as more than three years had passed since the cause of action arose. The defendant also pleaded in response to the allegations made by the plaintiff in respect of the alleged breach mandate denying those.

The issue before the court on the prescription point was the date on which the plaintiff acquired knowledge of the identity of the debtor and of the facts from which the debt arose. The evidence showed that the plaintiff always knew the identity of the debtor.

The plaintiff's evidence was that he knew prior to 8 Au-

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gust 2014 that he had lost his money. He also conceded that he knew on 26 January 2015 that the defendant had failed to comply with the terms of the mandate. The court thus found that the plaintiff had knowledge, by 26 January 2015, of the facts from which the debt arose. The three year prescription period had thus expired on 27 January 2018, two months before summons was served on the defendant.

The defendant's special plea of prescription was upheld with costs and the plaintiff's claim was dismissed.

***Makwala v Fluxmans Attorneys and Another* (37172/2021) [2024] ZAGPJHC 408 (25 April 2024)**

The plaintiff instituted action against the defendants, his erstwhile attorneys, alleging that they had breached a mandate that he had given to the firm, alternatively that they had breached a legal duty.

His case was that he had been involved in a motor vehicle accident in July 2004 and that there was an unidentified vehicle involved. He further alleged that:

- in 2004, he instructed the second defendant (an attorney and senior partner at the first defendant) in the parking lot of a golf club to pursue a claim against the RAF on his behalf;
- he gave the second defendant a case number and the medical documents relating to the accident;
- he visited the defendants' offices more than 15 times to enquire about the progress in his case (he did not, however, provide details of the visits);
- the second defendant informed him in 2009 that the documents had been misplaced and the RAF claim had thus not been lodged;
- on the advice of the second defendant, he sought assistance from the Wits Law Clinic but did not receive any assistance;
- he went to the RAF's offices in 2010 to enquire about the status of his claim and was informed that no claim had been lodged on his behalf; and
- in 2014 he lodged a complaint with the then law society that the second defendant has misplaced his documents and failed to lodge his claim with the RAF.

Summons was only served on the defendants on 12 August 2021. The defendants raised a special plea of prescription.

In respect of the prescription point, the court stated the following:

"[10] The plaintiff has not pleaded or testified that the defendants prevented him from coming to know of the existence of the debt. Therefore, section 12(2) [of the Prescription Act] does not apply in this case. In his replication the plaintiff contended that he only became aware of the debt after consulting with [his current] attorneys on 1 August 2019, and prescription did not commence to run against him until that date.

[11] The words 'debt', 'debt is due' and 'knowledge of … the facts from which the debt arises' contained in section 12(1) and (3) are not defined in the Prescription Act. The Constitutional Court in [the] *Mtokonya v Minister*

of Police majority judgment stated as follows:

"Section 12(3) does not require the creditor to have knowledge of any right to sue the debtor nor does it require him or her to have knowledge of legal conclusions that may be drawn from "the facts from which the debt arises". Case law is to the effect that the facts from which the debt arises are the facts which a creditor would need to prove in order to establish the liability of the debtor."

[12] The plaintiff testified that he was involved in the accident in 2004. During the same year he mandated the second defendant to lodge the RAF claim on his behalf. In 2009 he was informed by the second defendant that his documents were misplaced, and the RAF claim had not been lodged on his behalf. These are the minimum facts that are necessary to institute action against the defendants. He is not required to have knowledge of any right to sue the defendants nor to have knowledge of legal conclusions that may be drawn from the minimum facts. The running of prescription is not postponed until a creditor becomes aware of the full extent of his or her legal rights.

[13] The plaintiff also testified that in 2009 he was advised by the second defendant to go to Wits Law Clinic to seek legal assistance. He went to Wits Law Clinic to seek legal assistance. He furnished his contact details. He did not receive a call from Wits Law Clinic, and he also did not make a follow up on his request. From that time, he did nothing about his matter until 2014 when he lodged a complaint with the Law Society against the second respondent. The Law Society advised him to seek legal assistance and he did not, until 2019 when he mandated [his current] attorneys to handle his matter.

[14] It is clear from his evidence that his failure to institute action timeously against the defendants was caused by his inaction and not by the lack of knowledge of the identity of the debtor and the facts from which the debt arises.

Conclusion

[15] In terms of section 12(1) read together with section 12(3) prescription starts to run as soon as the creditor has or ought to have knowledge of the identity of the debtor and the facts from which the debt arises. The plaintiff›s evidence reveals that he became aware of the debtors' identity and the facts from which the debt arises in 2009 when the second defendant informed him that his documents were misplaced, and the RAF claim had not been lodged on his behalf. The facts from which the debt arises had been confirmed by RAF in 2010 before his claim against the defendants prescribed.

[16] I find that the debt against the defendants became due in 2009 when he acquired actual knowledge of the identity of the debtor and the facts from which the debt arises. More than three years has elapsed since the debt became due before summons was issued and served. In the result, the debt has been extinguished by prescription. In the light of the conclusion that I have reached, it is unnecessary to consider the alternative dates the debt became due pleaded by the defendants in the special plea" (footnotes omitted).

The defendants' special plea of prescription was upheld with costs and the plaintiff's claim was dismissed.