IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED No
DATE: 18 AUGUST 2022
SIGNATURE:.....

Case No. 44543/2020

In the matter between:

MDUNJANA, SE **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

MILLAR J

1. The present matter was set down for hearing for trial on 12 August 2022. When the matter was called, I was informed by counsel that the parties had agreed that the defendant's special plea of prescription should be heard first and subject to my finding on the special plea, the issues of liability and the quantum of damages separated[1] in terms of Rule 33(4) of the uniform rules of Court with the issue of liability to then proceed.

2. After hearing the arguments, in regard to the special plea, I dismissed the special plea with costs. I then sought clarity from counsel for the defendant in regard to whether the defendant would be leading any evidence in regard to the issue of liability or wished to test the version of the plaintiff, as contained in the affidavit that he had already submitted to the defendant when the claim had been filed. I was informed by counsel that the defendant had no evidence whatsoever and did not intend to test the evidence of the plaintiff at all in regard to how the collision had occurred.

3. After a short adjournment, counsel for the parties then presented me with 2 draft orders, the 1st relating to the dismissal of the special plea and the 2nd relating to an agreement that had been reached between the parties inter alia in regard to the separation of issues as well as a concession of liability. Both orders were made orders of court and marked "X1" and "X2" respectively.

4. At the conclusion of the matter, counsel for the plaintiff indicated that the issues surrounding the special plea of prescription were of importance and requested reasons for my decision. These then are the reasons.

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[1] The Defendant in fact raised 3 separate special pleas, 2 in regard to the plaintiff's entitlement to claim general damages and 1 of prescription. The pleas in regard to the claim for general damages fall to be decided when the quantum of damages is heard.

5. The facts upon which the special plea is based are common cause and not contentious. The special plea in regard to prescription was framed as follows:

> *'1. The plaintiff's claim against the defendant is governed by the provisions of the Road Accident Fund Act, Act 56 of 1996, as amended by Act 19 of 2005 and its Regulations.*
>
> *2. The alleged accident occurred on 4 April 2018. The claim was lodged on 3 June 2020.*
>
> *3. The alleged insured driver is unidentified. Hence the claim should have been lodged on or before 3 April 2020, within the required two-year period.*
>
> *4. Under the circumstances as mentioned above, the Plaintiff's claim has become prescribed'.*

6. It is a matter of public record and common cause between the parties that from midnight on 26 March 2020 and in terms of the Disaster Management Act 57 of 2002 and its Regulations, the Republic was placed in national lockdown in terms of which all non-essential services were required to be suspended and a curfew imposed. The initial level of the lockdown was on alert level 5. This level of the lockdown persisted until 30 April 2020.

7. The alert level was adjusted to level 4 from 1 May 2020, and this persisted until 31 May 2020. It is further common cause that the offices of the defendant, as well as other non-essential services, were closed to the public throughout the entirety of alert level 5 and alert level 4 for the period 27 March 2020 until 31 May 2020.

8. The argument advanced in support of the special plea was that since the provisions of the Road Accident Fund Act did not permit the granting of an extension of the prescriptive period for lodging of claims, any claim not lodged timeously, and in particular the plaintiff's claim in the present matter, had become

prescribed and unenforceable. This was predicated upon Section 17(1)(b) read together with Regulation 2(1)(a) which provides that a claim in respect of an unidentified owner or driver of a motor vehicle must be sent or delivered within two years from the date upon which the cause of action arose.

9. This was the sole argument advanced by the Defendant.

10. Two factors prevented the plaintiff from delivering his claim timeously, at the latest by 3 April 2020. The first was as a result of the operation of law and the second, a consequence of the first, that the defendants' offices were closed throughout the period to members of the public.

11. The effect of these two factors impacted not only persons in the position of the plaintiff but also those wishing to file claims in respect of which the drivers or owners of the offending vehicles were identified – claims in terms of section 17(1)(a) of the Act and also those who wished to serve summonses within the 5 year period as provided for in section 23(3)[2].

12. It was not argued and there was no evidence put before me to indicate that the Defendant implemented or attempted to implement any mitigatory measure which would have facilitated its continued ability to receive claims, whether by electronic or other means which would not have resulted in a breach of the applicable lock down level and its Regulations[3].

13. While ordinarily and in circumstances such as occurred during the period of lockdown levels 4 and 5, the provisions of the Prescription Act 68 of 1969 would operate to extend the applicable time periods generally in respect of the

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[2] The section provides that once a claim has been lodged within the 2- or 3-year period for identified or unidentified claims respectively then a further period of 3 or 2 years respectively is afforded for the issue and service of summons before the claim will become prescribed. The total period in both instances amounts to 5 years from the date the cause of action arose.

[3] Section 11(1)(d) of the Road Accident Fund Act 56 of 1996 specifically empowers the board to *'approve internal rules and directions in respect of the management of the Fund'*.

enforcement of debts. This however offers no succour to persons with claims against the RAF.

14. It was held in Road Accident Fund v Mdeyide[4]:

> *'[50] There is therefore a clear reason for the difference between the Prescription Act and the RAF Act. The Prescription Act regulates the prescription of claims in general, and the RAF Act is tailored for the specific area it deals with, namely claims for compensation against the Fund for those injured in road accidents. The legislature enacted the RAF Act – and included provisions dealing with prescription in it – for the very reason that the Prescription Act was not regarded as appropriate for this area.'*

15. However, the fact that the Prescription Act finds no application in respect of claims against the RAF is not dispositive of the matter. The Constitutional Court was confronted with such a situation in Van Zyl NO v Road Accident Fund[5].

16. This case concerned a claim brought by a curator on behalf of a mentally incapacitated person who did not fall into one of the two exceptions which cater for the delay in the running of prescription against such persons in section 23(2)(b) and (c)[6] of the RAF Act. The majority found that the maxim *lex non cogit ad impossibilia* was of application in the circumstances.

17. In this regard, it was held[7] that:

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4 2011 (2) SA 26 (CC) at para 50

5 2022 (3) SA 45 (CC)

6 *"(2) Prescription of a claim for compensation referred to in subsection (1) shall not run against-*
(a)…
(b) any person detained as a patient in terms of any mental health legislation; or
(c) a person under curatorship."

7 By Justice Pillay AJ with whom Mogoeng CJ and Khampepe J concurred at paras [51] – [55] – footnotes omitted. The applicability of the maxim to circumstances involving prescription was also approved by the majority in the judgment of Justice Jafta at paras [114] – [115].

"[51] *The impossibility principle was recognised, in this court and others, as the route to take to excuse noncompliance with the impossible. Its acceptance in South Africa is not at issue, only its status and whether it can be successfully and implicitly excluded by s 23(1) of the RAF Act. Before we can delve any further, we are enjoined to consider whether the impossibility principle is distinguishable from 'any law'.*

[52] *The impossibility principle originates as a rule of natural law and justice. Of natural justice, Finnis writes:*

> *'Principles of this sort would hold good, as principles, however extensively they were overlooked, misapplied, or defied in practical thinking, and however little they were recognised by those who reflectively theorise about human thinking. That is to say, they would hold good just as mathematical principles of accounting hold good even when, as in the medieval banking community, they are unknown or misunderstood.'*

[53] *Grounded in nature, science and reality, the impossibility principle is an extension of logic. Like Einstein's laws of gravity and Pythagoras' theorem, the impossibility principle enjoys a natural durability. Fundamental to the impossibility principle is an awareness of the human condition, our capacities and, indeed, possibilities. The impossibility principle flourishes because it distinguishes rationality, logic and reasonableness from the opposite. It extricates what is always reasonable from what is reasonable in certain circumstances. Drawing on the writings of Aquinas, Davitt writes:*

> *'The construction that a judge will give to a piece of legislation should be guided by humane discretion, because the best of enactments cannot possibly include all the imaginable cases that could arise under it. Hence, where a literal construction of a statute would work harsh injustice in individual cases, the judge's decision should . . . be according to equity — the intention of the law.'*

[54] For a law to be applied as law, compliance must be possible. Conversely and by necessary implication, a law which is impossible to comply with cannot be applied as law. It is this which sets the impossibility principle apart from other principles of the common law. Finnis embraced the impossibility principle when he distinguished between 'acts that (always or in particular circumstances) are reasonable all things considered impossibility principle when he distinguished between 'acts that (always or in particular circumstances) are reasonable all things considered (and not merely relative to a particular purpose) and acts that are unreasonable all things considered'. The impossibility principle would apply not only to tasks 'which are absolutely impossible but tasks which, in the circumstances, are not reasonably capable of performance'.

[55] This case is much narrower. It concerns the absolute impossibility to perform tasks. The impossibility is determined by objective conditions, by science, nature and reality. Determining impossibility in this instance is not an exercise of discretion informed by subjective opinions and worldviews. It is this condition that distinguishes the impossibility principle from 'any law'. In turn, it is impossibility that informs incapacity in the context of this case."

18. It was further held[8] that:

"[125] As it appears in Nichols, the lex non cogit ad impossibilia maxim is part of the rule of law, one of the foundational values of our Constitution. In that way the principle forms part of the Constitution.

[126] By parity of reasoning, the maxim equally applies to this matter and, for as long as the disability arising from Mr Jacobs' mental condition persisted, prescription did not begin to run. Under s 23(1), prescription also did not begin to run against Mr Jacobs. This is because before the curatrix was appointed, it was impossible for him to comply with the section, and upon

[8] Van Zyl supra, The judgment of the majority at paras [125] – [126]

the appointment of the curatrix prescription could not run against him because he was then placed under curatorship in terms of s 23(2)."

19. The failure of the Defendant to take any steps to mitigate, for example by making arrangements for the electronic submission of claims or service upon them, the effects of lockdown levels 4 and 5 meant that for the Plaintiff and indeed anyone else whose claim would have become prescribed in the period starting at midnight on 26 March 2020 and ending on 31 May 2020, even if they had elected to breach the lockdown Regulations in order to ensure that their claim was timeously delivered, would in any event have found no one at the offices of the Defendant to receive the claim.

20. The plaintiff and indeed every person who wished to deliver or have documents served upon the RAF during the period in question was faced with a true situation of impossibility. This was not a situation of the plaintiff's own making, but an objectively impossible situation brought about by the confluence of both the law and the RAF's closure of its offices without having put in place any alternative to physical delivery or service.

21. It was impossible for the Plaintiff to have delivered his claim timeously for the reasons set out above. On the basis that the lockdown from 27 March 2020 shortened the time within which the Plaintiff could deliver his claim by 8 days, it is apposite that the same period, at the very least, was afforded to him once the offices of the RAF opened on 1 June 2020 and the impediment to delivery of his claim was removed. The claim was indeed delivered within this period.

22. It is for the reasons set out above that I granted the order dismissing the special plea of prescription with costs.

A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	12 AUGUST 2022
JUDGMENT DELIVERED ON:	12 AUGUST 2022
REASONS:	18 AUGUST 2022
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