IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 2467/2010

DATE HEARD: 07/03/2019

DATE DELIVERED: 23/04/2019

REPORTABLE

In the matter between

BONGANI MAGOSWANA **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

ROBERSON J:-

[1] The plaintiff instituted action against the defendant for payment of damages arising from injuries he sustained in a motor vehicle accident which occurred on 22 August 2007. In his particulars of claim he alleged that he was a passenger in a Mercedes Benz motor vehicle which collided with a Man truck, and that the sole cause of the collision was the negligent driving of the driver of the Man truck. The plaintiff now seeks to amend his particulars of claim to the effect that the sole cause of the collision was the negligent driving of the driver of the Mercedes Benz. Other amendments sought relate to the quantum of the claim. The amendment is opposed by the defendant on the grounds that it will introduce a new cause of action and consequently the plaintiff's claim arising from this new cause of action has prescribed.

[2] The plaintiff was also obliged to apply for condonation for an extension of the time within which he should have brought his application. The notice of intention to amend was filed on 11 April 2018 and the defendant's notice of objection was filed on 4 May 2018. The application was only launched on 26 October 2018, long after the expiry of the prescribed ten days.

[3] I shall deal firstly with the extension of the time limit. In his founding affidavit the plaintiff said that during March 2018 he relocated to Centane Administrative Area without informing his attorneys, and prior to his departure he had changed his cellphone number. His attorneys told him that they tried to find him in order to bring this application timeously. The plaintiff's attorney deposed to a confirmatory affidavit.

[4] The given reason for the delay is very poor and unpersuasive. The plaintiff does not explain how, if he was untraceable as from March 2018, the notice of intention to amend was filed during April 2018. One would be entitled to assume that the notice of intention to amend came about on the instructions of the plaintiff. Neither the plaintiff nor his attorney explain how they eventually did make contact. The plaintiff's address given in his affidavit is in East London. He does not say for how long he was in Centane and when he returned to East London. He also does not say what efforts he made to contact his attorney during the period he was in Centane for the purpose of following up progress in his claim.

[5] In *Van Wyk v Unitas Hospital and Another* 2008 (2) SA 472 (CC) at para [20] the following was said (footnotes omitted):

> "This Court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success."

[6] The nature of the relief sought by the plaintiff is of extreme importance to him. The amendment is pivotal to his claim for damages in that he must establish the causal connection between the negligent driving of the Mercedes Benz and his injuries. According to the particulars of claim he suffered a head injury, abrasion and bruises over the scalp and face, and leg injuries, including a deep venous thrombosis of the left leg. Included in the expert reports is one from a neurosurgeon who said it is conceivable that his memory has been affected by the head injury. Another report is from a clinical psychologist in which it is said that his performance in visual memory tests indicates impaired memory. The industrial psychologist's report concludes that the plaintiff presents with sequelae of the injuries which will have a negative effect on his private and vocational life. At this stage, subject of course to a final assessment of his damages when all the expert evidence is available and tested, the accident appears to have been, at least to a certain extent, life-changing.

[7] In the defendant's answering affidavit the deponent agrees that the sole cause of the collision was the negligence of the driver of the Mercedes Benz, as pleaded in its plea. The delay therefore has not had a prejudicial effect on the defendant in that the circumstances of the collision are known to it and have been for some time.

[8] With regard to the prospects of success in the application, I am of the view that there are good prospects which will emerge later in this judgment. I am therefore of the view that despite the poor explanation for the delay, the other factors persuade me that it is in the interests of justice to grant condonation.

[9] Does the proposed amendment introduce a new cause of action? Counsel for the defendant referred to the judgment in *Septoo obo Septoo and Another* [2017] ZASCA 164 where the following was said at para [3]:

> "The underlying basis for the [Road Accident Fund Act 56 of 1996] is the common law principles of the law of delict. A claimant must therefore prove all the elements of a delict before it can succeed with its claim in terms of the Act."

[10] The present action is one for damages for bodily injuries. In *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838H-839A Corbett JA stated as follows:

> "In the case of an Aquilian action for damages for bodily injury (and here I use the term Aquilian in an extended sense to include the *solatium* awarded for pain and suffering, loss of amenities of life, etc, which is *sui generis* and strictly does not fall under the umbrella of the *actio legis Aquiliae: Government of RSA v Ngubane*1972 (2) SA 601 (A) at 606E - H), the basic ingredients of the plaintiff's cause of action are *(a)* a wrongful act by the defendant causing bodily injury, *(b)* accompanied by fault, in the sense of *culpa* or *dolus*, on the part of the defendant, and *(c) damnum*, ie loss to plaintiff's patrimony, caused by the bodily injury. The material facts which must be proved in order to enable the plaintiff to sue (or *facta probanda*) would relate to these three basic ingredients and upon the concurrence of these facts the cause of action arises. In the usual case of bodily injury arising from a motor accident this concurrence would take place at the time of the accident."

[11] Counsel for the defendant submitted that the proposed amendment sought to introduce a new wrongdoer and was in effect pleading a different claim and cause of action. In considering the defendant's stance, it is apposite to refer to the judgment

in *Mazibuko v Singer* 1979 (3) SA 258 (W). In that matter the plaintiff, who had been injured in a motor collision, claimed damages from his attorney for breach of contract by failing to serve the MVA 13 form timeously on the insurer, thereby causing the plaintiff's claim to prescribe. In an alternative to the claim the plaintiff also relied on the failure by the attorney to serve form MVA 22 on the Motor Vehicle Insurance Fund. It was submitted on behalf of the defendant that this alternative breach by the attorney constituted a new cause of action and therefore the claim based on this breach had prescribed. Colman J dealt with this argument as follows at 265D-266F:

> "It seems to me that in an inquiry of this kind the expression "cause of action" can be misleading. Its most common use is as a technical term relating to pleading, and in that sense it carries a connotation which is inapposite when one is looking to see whether or not the running of prescription has been interrupted. It is true that TROLLIP J (as he then was) used the term "cause of action" when dealing with a question of prescription and its interruption in *Schnellen v Rondalia Assurance Corporation of SA Ltd* 1969 (1) SA 517 (W). But, he was not, I think, using the expression in its narrow technical sense; what he meant by it was, I think, something of a broader nature which is sometimes referred to as a plaintiff's "right of action" or as "the basis of his claim". It may be correct to say that, in a sense, the claim in which the plaintiff relies on a failure to serve form MVA 22 on the Fund embodies a different cause of action from the claim in which he relies on a failure to serve form MVA 13 on an insurer. Similarly, it may be said, in an ordinary running-down case, that a claim based on driving with defective brakes rests on a different cause of action (in one sense of that term) from a claim based on driving at an excessive speed. But "cause of action" in that sense cannot be the criterion here.
>
> That the test in relation to an interruption of prescription cannot be based on an identity between the cause of action (in the narrow sense) which was previously relied on by the plaintiff and the cause of action which he now seeks to rely upon, is perhaps best illustrated by the cases in which it was held that a summons may interrupt the running of prescription even if it discloses no cause of action. It was so held in *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A), in *Van Vuuren v Boshoff* 1964 (1) SA 395 (T) and in *Rooskrans v Minister van Polisie* 1973 (1) SA 273 (T).
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> The effect of those cases, as I understand them, was that in deciding whether prescription was interrupted, in relation to a particular claim, by prior process served during the prescriptive period, one looks to see whether in the earlier process the same *claim* was preferred, not whether the same cause of action (or any cause of action) was made out in the earlier process. As pointed out in one of the cases, it is inaction, not legal ineptitude, which the Prescription Act is designed to penalise. But, as none of those cases was decided under the current Prescription Act 68 of

1969, it will be appropriate to see what that Act lays down in respect of interruption. Section 15 (1) of the Act provides that:

> "The founding of prescription shall... be interrupted by the service on the debtor of any process whereby the creditor *claims payment of the debt"*.
> (Words not presently relevant omitted, and emphasis supplied by me).

The question to be asked, therefore, is this one: "Did the plaintiff, in the earlier process, claim payment of the same debt as now forms the subject-matter of the claim which is said to be prescribed?" If the answer is in the affirmative, prescription has been interrupted, even if one of the grounds upon which the claim is now based differs from the ground or grounds relied on at the earlier stage.

That approach is in conformity with the cases which I have cited. It is in conformity, also, with the test for *res judicata* propounded by Spencer-Bower and Turner *Res Judicata* 2nd ed at 160 para 197. The concept of *res judicata* is, if course, closely related to the concepts involved in the instant problem.

If I turn now to the case before me, I find that the amendment did not introduce a claim for payment of a debt other than the debt in respect of which payment was claimed when the summons was issued. What the amendment did was to introduce a reference to an additional default, just as a person who claims damages arising from a motor collision does when he introduces, at a later stage, a further head of negligence in support of his claim. An amendment of that sort can, in my view, be allowed and relied upon even if it is sought at a time when the claim would have been prescribed but for the service of the summons sought to be amended.

I am of the view, therefore, that the plaintiff's alternative contention is not ruled out of Court by the Prescription Act."

[12] If one applies the same reasoning to the present matter, I am of the view that the amendment will not introduce a claim for payment of a debt other than the debt which was claimed when summons was issued. The debt is the damages suffered by the plaintiff when he sustained bodily injuries in the same collision caused by the negligent driving of a motor vehicle. In his particulars of claim the plaintiff has pleaded that the collision occurred, that it was caused by the negligence of the driver of the Man truck, that he sustained bodily injuries, and as a consequence suffered damages under various heads. He has pleaded the "basic ingredients" of his

delictual claim. The ground on which the claim is now sought to be based differs from the ground currently pleaded but the debt is the same. Whoever the driver was whose negligence caused those injuries, the defendant would still be liable as the statutory wrongdoer. The defendant's liability arises from the provisions of the Road Accident Fund Act 56 of 1996 (the Act).[1]

[13] Section 3 of the Act provides:

> **"Object of Fund**
>
> The object of the Fund shall be the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles."

Section 17 (1) of the Act provides:

> **"Liability of Fund and agents**
>
> (1) The Fund or an agent shall-
>
> (a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;
>
> (b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,
>
> be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee: Provided that the obligation of the Fund to

[1] It is not claimed that this matter is one of those contemplated in s 19 of the Act in respect of which liability of the defendant is excluded.

> compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.

[14] In *Geldenhuys & Joubert v Van Wyk and Another; Van Wyk v Geldenhuys & Joubert and Another* 2005 (2) SA 512 (SCA) Cameron JA (as he then was), in dealing with a claim where the wrongdoer is identifiable, said at para [10]:

> "In effect, the Act substitutes the fund as surrogate for a known wrongdoer, and replaces an enforceable common-law claim with a statutory claim against the fund."

[15] A similar situation occurred in the matter of *Setlhaku v Road Accident Fund* 2011 JDR 0213 (FB). The plaintiff sought an amendment to his particulars of claim which would have had the effect of alleging that the negligent driving of a different vehicle involved in the same collision other than that pleaded, was the cause of the collision. Rampai J granted the amendment. At para [41] he said the following:

> "The real elementary hallmark of a victim's cause of action in a third party claim are: that the victim must show that he or she was involved in a vehicular accident; that such accident occurred at a particular time and place in the RSA; that the vehicle(s) in question was negligently driven; that he or she sustained certain bodily injuries; and lastly that he or she suffered damages. The identity of the driver, though important, is not an absolutely essential element of such a cause of action which is why victims of unidentified drivers and vehicles can claim compensation. However the procedures are different."

I am in respectful agreement with this passage.

[16] I am therefore of the view that the amendment will not introduce a claim for a debt which has prescribed. In general I am also of the view that the amendment will not prejudice the defendant. As already mentioned, it has pleaded that the negligence of the driver of the Mercedes Benz caused the collision. The defendant is not taken by surprise and is familiar with the circumstances of the collision.

[17] The parties were in agreement that if the application was granted, the plaintiff should bear the costs. I think this is a fair costs order. The plaintiff sought an indulgence in seeking condonation, as well as the amendment itself. The amendment has been sought at a very late stage. Summons was issued in 2010. The explanation for the delay in bringing this application was weak. The plaintiff did not explain why he initially alleged that the negligence of the driver of the Man truck caused the collision. The defendant was not vexatious in opposing the application, either on the issue of condonation or the merits of the amendment.

[18] The following order will issue:

[18.1] The plaintiff's application to amend his particulars of claim in the form as contained in the notice of intention to amend delivered on 11 April 2018 is granted.

[18.2] The plaintiff is to pay the costs of the application.

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J M ROBERSON
JUDGE OF THE HIGH COURT

Appearances

Plaintiff: Adv S Mkhahluli instructed by Yokwana Attorneys, Grahamstown
Defendant: Adv L Ellis, instructed by Huxtable Attorneys, Grahamstown