



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Not Reportable
CASE NO. 566/2017

In the matter between:

AYANDA NB MANTANGA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

LAING J

[1] This is an application for default judgment in relation to the plaintiff's claim for damages arising from a motor vehicle accident that occurred on 31 August 2008 in the vicinity of Komani (Queenstown).

Background

[2] In her particulars of claim, the plaintiff alleges that she had been a passenger in a Toyota Hi-Ace motor vehicle. She pleads that the driver had been negligent because he, *inter alia*, failed to keep the motor vehicle under proper control and failed to avoid the accident when he could have done so by exercising reasonable care and skill. The plaintiff was severely injured and claims R 3,000,000 for damages suffered.

[3] At the hearing of the application, the plaintiff testified that she had attended a church service in Komani (Queenstown) on the date in question. She later caught a taxi to Lady Frere. The route had led through a mountainous area, with many curves, and it had been raining at the time. The plaintiff had been asleep when the accident occurred and had woken up to find herself lying on the ground, outside the taxi. She had been taken to hospital and informed by a doctor that she had been involved in an accident.

[4] To questions put to her by the court, the plaintiff said that the driver had told her that the taxi had collided with another motor vehicle. She never saw the other vehicle, however, and could not say what damage had been caused to the taxi. She could not say how the accident occurred, where the taxi had come to a rest, and whether it had remained in an upright position. She could also not explain why she had pleaded that the driver of the taxi had been negligent, intimating only that this had been done based on the police investigation and the advice of her attorneys. She had no witnesses to corroborate her version of what had happened.

[5] In relation to the nature of her injuries, the plaintiff testified that she had sustained serious injuries to her shoulder, arm, and hip, which had limited her mobility. She had also sustained a cut on her head. The accident had confined her to hospital, after which she had spent three months at home, unable to work. She is presently employed as a secretary in the Eastern Cape Department of Education.

[6] The plaintiff indicated that she, personally, had submitted a claim, which the defendant had acknowledged on 10 March 2010. She later received an offer from the defendant on 3 March 2015, which she rejected. Her attorneys instituted action on her behalf on 7 February 2017. The defendant's attorneys entered an appearance to defend on 28 February 2017 and simultaneously requested copies of the plaintiff's medical records, accident report, witness statements, claim forms, and related documents, under rules 35(14) and 36(4) of the Uniform Rules of Court ('URC'), to which the plaintiff's attorneys replied on 15 March 2018. Thereafter followed a hiatus of some four years where no further steps were taken by either side to advance the matter.

[7] On 18 May 2022, the plaintiff's attorneys withdrew, and new attorneys took over the instruction, requesting that the matter be enrolled for trial. From the court file, it is apparent that the plaintiff's new attorneys arranged for the referral of the plaintiff to various experts for assessment and the preparation of medical-legal reports. On 11 January 2023, the defendant's attorneys withdrew, which led to the delivery of a notice of bar. No plea was forthcoming. The plaintiff's attorneys filed an application for default judgment on 27 February 2023 and complied with the necessary case management requirements, indicating that they had received no cooperation from the defendant. On 14 April 2023, the registrar was directed to allocate a date for the hearing of oral evidence in support of the plaintiff's application. The matter came before court on 10 August 2023.

Issues to be decided

[8] The main issue to be decided is whether to grant default judgment in favour of the plaintiff. Before doing so, however, it is necessary to deal with two issues that arose during the hearing: (a) the application or otherwise of the principles pertaining to the possible superannuation of the plaintiff's summons; and (b) the defendant's liability considering the evidence presented.

[9] The issues require closer examination within the relevant legal framework, as set out below.

Legal framework

[10] The issues in question will be addressed separately, in accordance with their respective sub-headings.

Superannuation

[11] The superannuation of a summons could be said to occur when it becomes too outdated or stale to be effective. The relevant principles can be summarised as follows: if the plaintiff institutes action which the defendant simply ignores, then the plaintiff must nevertheless proceed with the action within a reasonable time, to be determined by all the relevant facts of the matter.¹ There is, currently, no rule of court or practice which provides that any summons or procedural step lapses merely because the plaintiff fails to proceed with the action.²

[12] There is old authority for the contention that it is unreasonable to delay beyond the period of prescription of the debt on which an action is based. A court is entitled to refuse to grant judgment in such circumstances and may grant leave to the plaintiff to issue a fresh summons.³ No consistent approach is evident from earlier case law. For example, a court granted default judgment despite the lapse of 21 months between the date of issue of summons and the application itself;⁴ however, a court in a different matter ordered fresh service of the summons where five years had lapsed.⁵

¹ AC Cilliers (*et al*), *Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (Jutastat e-publications, 5ed 2009 ch15), at 506.

² *Morgan-Smith v Elektro Vroomen (Pty) Ltd en 'n ander*, NO 1977 (2) SA 191 (O), at 194A.

³ *Hunt v Engers* 1921 CPD 754.

⁴ *Chernotzsky & Lewis v Mulder* 1922 JDR 383.

⁵ *Commercial Bank of SA v Schneider* 1929 SWA

[13] In *Molala v Minister of Law and Order and another*,⁶ the plaintiff issued summons on 3 March 1987, to which the defendant filed a request for further particulars on 16 April 1987. Besides a change of attorneys, nothing further happened until 23 September 1991, when the plaintiff furnished such further particulars. The defendant subsequently applied for the dismissal of the action on the ground of abuse of process, caused by the plaintiff's unreasonable delay in taking further steps. The court remarked that it seemed to be generally accepted that, in the absence of any express provision, there was no principle that a High Court summons loses its validity merely because a period of time has passed.⁷ Flemming DJP went on to hold that:

'The approach which I am bound to apply is therefore not simply whether more than a reasonable time has elapsed. It should be assessed whether a facility which is undoubtedly available to a party was used, not as an aid to the airing of disputes and in that sense moving towards the administration of justice, but knowingly in such a fashion that the manner of exercise of that right would cause injustice. The issue is whether there is behaviour which oversteps the threshold of legitimacy. Nor, in the premises, can plaintiff be barred simply because defendants were prejudiced. The increasingly difficult position of the defendants is a factor which may or may not assist in justifying an inference that plaintiff's intentions were directed to causing or to increasing such difficulties. But the enquiry must remain directed towards what plaintiff intended, albeit in part by way of *dolus eventualis*. The increase in defendants' problems is, secondly, a factor insofar as the Court, on an overall view of the case, is to exercise a discretion about how to deal with a proven abuse of process.'⁸

[14] The above approach emphasises the conduct of the plaintiff. If a court finds that it was not *bona fide* then it should exercise its discretion accordingly.

[15] Subsequently, in *Gopaul v Subbamah*,⁹ Richings AJ found that the proper approach entailed weighing up the delay and the reasons therefor, on the one hand,

⁶ 1993 (1) SA 673 (W).

⁷ At 676C.

⁸ At 677C-E.

⁹ 2002 (6) SA 551 (D).

and the prejudice caused to the defendant, if any, on the other.¹⁰ The learned judge also found that the reasons for the defendant's inactivity had to be taken into account, especially considering the many procedural devices available to force a dilatory plaintiff to bring his or her action to finality.¹¹

[16] Counsel for the plaintiff in the present matter also drew attention to the decision in *Cassimjee v Minister of Finance*,¹² involving a period of some 20 years where neither party took steps to advance the matter. Boruchowitz AJA observed as follows:

'There are no hard-and-fast rules as to the manner in which the discretion to dismiss an action for want of prosecution is to be exercised. But the following requirements have been recognised. First, there should be a delay in the prosecution of the action; second, the delay must be inexcusable; and, third, the defendant must be seriously prejudiced thereby. Ultimately, the enquiry will involve a close and careful examination of all the relevant circumstances, including the period of the delay, the reasons therefor and the prejudice, if any, caused to the defendant.'¹³

[17] The principles that have emerged in relation to the superannuation of a summons must, finally, be applied subject to a litigant's right of access to the courts. In that regard, section 34 of the Constitution provides that everyone has the right to have a dispute that can be resolved by application of the law to be decided in a fair public hearing before a court or before another independent and impartial tribunal or forum.

Liability of the defendant

[18] In terms of the Road Accident Fund Act 56 of 1996, the liability of the defendant is addressed under section 17(1), which provides that:

'(1) The Fund or an agent shall–

¹⁰ At 558A.

¹¹ At 558F-G.

¹² 2014 (3) SA 198 (SCA).

¹³ At paragraph [11].

(a) ...

(b) ...

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...'

[19] A claimant is required to demonstrate that the injury or death that forms the subject of his or her claim for compensation was because of negligence or another wrongful act. The law of delict applies.

[20] In *Septoo v The Road Accident Fund*,¹⁴ the Supreme Court of Appeal confirmed, per Mbatha AJA, that:

'The underlying basis for the Act¹⁵ 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.¹⁶

[21] Mindful of the rudimentary framework set out above, it is necessary to deal with the issues insofar as they pertain to the facts of this matter.

Discussion

¹⁴ 2017 JDR 1913 (SCA).

¹⁵ Road Accident Fund Act 56 of 1996.

¹⁶ *Septoo, supra*, at paragraph [3].

[22] As a starting point, it is important to remark that the accident that forms the subject of the plaintiff's claim happened on 31 August 2008, some 15 years ago. It was not clear from either the plaintiff's evidence or the court file why it took eight-and-a-half years before summons was issued and why the matter was then allowed to lie dormant for a further four years after the plaintiff's delivery of medical records and related documents to the defendant. Whereas the plaintiff was previously unrepresented, which could have made the pursuit of her claim more difficult, it is inexplicable why she did not take steps to ensure that the matter was brought to finality once she was properly represented. The ensuing inactivity cannot be attributed entirely to her erstwhile attorneys, the plaintiff must share some of the blame. There is simply no explanation for the delay.

[23] The prejudice to the defendant is patent. It would be extremely difficult for the defendant to identify and locate witnesses who would be able to testify about what caused the accident, assuming that they could, at this stage, still remember the details. Whereas the defendant has failed to oppose the plaintiff's application, it remains responsible for the management of public funds. To allow the plaintiff to proceed, notwithstanding her delay, compels the defendant to incur unnecessary costs in the continued defence of the claim, as poorly as this may have been done to date, and in possible rescission or appeal proceedings.

[24] Of more concern, however, is the paucity of evidence upon which the plaintiff bases her claim. She relies, essentially, on the following facts: she had been a passenger in a taxi that was involved in an accident which led to her sustaining serious injuries. She presented absolutely no evidence regarding the negligence of the driver, as pleaded.

[25] Counsel invoked the maxim, *res ipsa loquitur*, as discussed in *Road Accident Fund v Mehlomakulu*,¹⁷ and applied in *Janse van Vuuren NO v Road Accident Fund*,¹⁸ to contend that it found application in the present matter. The maxim, loosely translated as ‘the thing speaks for itself’, has been summarised as:

‘a convenient Latin phrase used to describe the proof of facts which are sufficient to support an inference that a defendant was negligent and thereby to establish a *prima facie* case against him.’¹⁹

[26] It may be applied when the occurrence itself is the only known fact from which a conclusion of negligence can be drawn.²⁰ The occurrence, moreover, must not ordinarily take place in the absence of negligent conduct.²¹ The maxim must be used with caution, and does not remove in any way the burden of proof that rests on a plaintiff. In *Mehlomakulu*, Jones J remarked:

‘The case illustrates the difficulty in applying the maxim correctly in the correct circumstances. The first collision was not a case where the plaintiff can establish a *prima facie* case of negligence by merely proving the occurrence of the first collision. It is neither proper nor logical to infer negligence merely because two motor vehicles collided on a national road, and certainly not by invoking the *res ipsa loquitur* maxim. This is one of “the many classes of occurrence where the mere happening of an accident is not relevant to infer negligence” ...²² Applying the maxim in a case such as this would in effect be giving it general application, which is contrary to principle; to use again the language of Erasmus J in *Macleod v Rens*...²³ “the maxim *res ipsa loquitur* has no general application to highway collisions” although it may, “in a restrictive class of cases, sometimes apply”²⁴

¹⁷ 2009 (5) SA 390 (E).

¹⁸ (A525/2015) [2017] ZAGPPHC 838 (28 March 2017).

¹⁹ *Goliath v MEC for Health, Eastern Cape* 2015 (2) SA 97 (SCA), at paragraph [10].

²⁰ *Groenewald v Conradie; Groenewald v Auto Protection Insurance Co Ltd* 1965 (1) SA 184 (A), at 187.

²¹ *Mostert v Cape Town City Council* 2001 (1) SA 105 (SCA), at paragraph [40].

²² *Groenewald*, *supra*, at 187D.

²³ 1997 (3) SA 1039 (E).

²⁴ At 1046D.

[27] The court went on to quote, at some length, the decision in *Macleod*,²⁵ where Erasmus J held as follows:

'Proof by a plaintiff of an event properly falling within the maxim- that is to say, proof of an event which, in the absence of anything to the contrary, tells its own story- may justify an inference of negligence against the defendant. That inference may be displaced by the remainder of the story: if it does not do so, then the inference remains- *res ipsa loquitur*.'²⁶

The learned judge continued:

'As a particular form of inferential reasoning, *res ipsa loquitur* requires careful handling. It is not a doctrine, as it is sometimes referred to. It propounds no principle and is therefore strictly speaking not even a maxim. What it does do is pithily state a method of reasoning for the particular circumstance where the only available evidence is that of the accident. It boils down to the notion that in a proper case it can be self-evident that the accident was caused by the negligence of the person in control of the object involved in the accident. As such it is not a magic formula. It does not permit the Court to side-step or gloss over a deficiency in the plaintiff's evidence; it is no short cut to a finding of negligence: these are real dangers in the application of the expression. It seems to tempt Courts into speculation. Expressions such as in ordinary human experience, common sense dictates, and obviously, which are regularly employed in reasoning along the lines of the maxim, sometimes only serve to disguise conjecture. Moreover, there is a risk of false syllogism inherent in reasoning that, as the accident would ordinarily not have occurred without negligence on the part of the driver of the vehicle, the defendant, having been the driver, was therefore negligent. Finally, reasoning along the lines of *res ipsa loquitur* leads to the somewhat unsatisfactory finding that the defendant was negligent in some general or unspecific manner.'²⁷

[28] In the present matter, the plaintiff's case depends strongly on the mere fact that she was injured in a motor vehicle accident, as a passenger. This triggered the

²⁵ *Supra*.

²⁶ At 1046E-F.

²⁷ At 1048E-I.

application of the maxim, argues the plaintiff. To that effect, counsel referred to *Janse van Vuuren NO*,²⁸ where, on appeal, Tolmay J held:

'The court *a quo* misdirected itself in postulating that one cannot by the mere conduct of the overturning of a vehicle draw an inference of negligence against a driver. A vehicle which is driven properly and without negligence does not normally overturn whilst travelling along a roadway. The principle of *res ipsa loquitur* finds application. The evidence points to an inference of negligence on the part of the first insured driver. There exists no evidence on which it could be held that the deceased was negligent even if he might not have made the right decision in the agony of the moment.'²⁹

[29] As already stated, however, the plaintiff is still required to discharge the onus. She must, in the end, demonstrate that the driver of the taxi was negligent. She cannot rely on the maxim alone.

[30] The *locus classicus* for negligence (*culpa*) remains the decision in *Kruger v Coetzee*,³⁰ where Holmes JA held:

'For the purposes of liability *culpa* arises if–

(a) a *diligens paterfamilias* in the position of the defendant–

- (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
- (ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.'³¹

²⁸ *Supra*.

²⁹ At paragraph [10].

³⁰ 1966 (2) SA 428 (A).

³¹ At 430E-F.

[31] The plaintiff testified that she boarded the taxi on 31 August 2008. The accident happened at about 18h00 in a mountainous area, with many curves in the road, and it had been raining. She presented no evidence regarding the driver's conduct, how it would have given rise to the reasonable possibility of causing injury to her, what steps could have been taken to avoid this, and whether the driver had failed to do so. The plaintiff merely points to the accident and asserts that the driver was negligent based on inferential reasoning, *res ipsa loquitur*.

[32] There are, however, any number of other inferences that can be drawn. It is probable that driving conditions were far from ideal since it would have been dark, and the road would have been wet. Nevertheless, the taxi could have been in perfect working order and the driver could have been immensely skilful and vigilant, yet still collided with another vehicle approaching from the wrong side of the road at a corner or on a blind rise. A child could have dashed across the road in the gloom. The taxi could have struck a flock of sheep huddled together, motionless, in the cold. The driver could have suffered a sudden and unexpected heart attack. A speeding vehicle, without lights, could have clipped the side of the taxi as it overtook. The paucity of facts draws the matter, ineluctably, into a wide sea of conjecture.

[33] It is of no assistance to the plaintiff to contend that she only needs to prove 'the proverbial 1% negligence'³² on the part of the driver to be successful in her claim. Whereas this is a useful ratio that expresses the practical effect of section 17(1) of the Road Accident Fund Act 56 of 1996, it also reflects the extent of the driver's negligence only in proportion to the sum of the negligence involved overall. It may, relatively speaking, be a small share of the *culpa* attached to the delictual action in question, it may be a large share. But even if it is only 0.01% of the whole, the plaintiff must still prove this.

³² Counsel referred to *Prins v Road Accident Fund* 2013 JDR 0358 (GSJ), at paragraph [4].

Relief and order

[34] The court has authority, in terms of section 173 of the Constitution, to protect and regulate its own process. With reference to the principles set out in *Cassimjee*, the court is satisfied that it can, and should, dismiss the plaintiff's application because of the superannuation of her summons. This is so, notwithstanding the right of access to court afforded to the plaintiff under section 34 of the Constitution. A delay of four years, following a period of some eight-and-a-half years since the date of the accident, is inexcusable and seriously prejudices the defendant.

[35] The more formidable obstacle in the way of the plaintiff's claim, however, is her lack of evidence in relation to the alleged negligence of the driver. There were simply not enough facts presented to the court to permit the invocation of *res ipsa loquitur* and to find that the negligent conduct of the driver had been the cause of the accident and the resulting injuries suffered by the plaintiff.

[36] The following order is made:

- (a) the application for default judgment is dismissed; and
- (b) the plaintiff is directed to bear her own costs.

JGA LAING

JUDGE OF THE HIGH COURT

APPEARANCE

For the plaintiff:

Adv Mlalandle

Instructed by:

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For the defendant:

No appearance

Date of submission of

heads of argument:

29 September 2023.

Date of delivery of judgment:

05 December 2023.