

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE:2/2/2018
CASE NO: 87223/14

In the matter between:

NKWATISENG MELITA BUTHELEZI

PLAINTIFF

And

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MOSOPA,AJ

- [1] The plaintiff Ms Nkwatiseng Melita Buthelezi an adult female person born on the 01st April 1951 was involved in a motor vehicle collision which occurred on or about the 31st January 2005 and she suffered bodily injuries.
- [2] At the time of the aforesaid collision the plaintiff was a passenger in the motor vehicle bearing registration number [...] driven by S.S NKABINDE which collided with the motor vehicle bearing registration number [...] driven by A.M GRUNDLIGH.

[3] The plaintiff alleges in her particulars of claim that the driver of the Second Insured motor vehicle was the sole cause of the collision in that;

- 3.1. He failed to keep a proper look out;
- 3.2. He travelled at a speed which was excessive under the circumstances;
- 3.3. He failed to exercise proper control over the Insured vehicle;
- 3.4. He failed to apply brakes of the second Insured vehicle timeously, adequately and/or at all.
- 3.5. He failed to take any and/or adequate action and/or steps to avoid the collision, when by the exercise of reasonable care, he could and should have done so;
- 3.6. He failed to keep the second Insured vehicle under proper control.
- 3.7. He failed to give any/or adequate warning of his approach;
- 3.8. He came to a sudden and abrupt stop without giving and and/or adequate prior notice and/or warning of his intention to do so, and
- 3.9. He changed his lane of travel at dangerous and/or inopportune moment without due regard to the presence and safety of other road users and none specifically the First Insured Vehicle in which the Plaintiff was a passenger.

[4] The Defendant in its plea raised a special plea wherein the following was recorded;

- 4.1. The Plaintiff's claim arises from a motor vehicle which occurred on 31 January 2005.
- 4.2. Summons was served on the Defendant on 8th April 2015
- 4.3. As such, the Defendant pleads that a period of more than 5 (five) years has lapsed from the date on which the claim arose before the summons was served on the Defendant.

- [5] The parties agreed to deal first with the special plea raised by the Defendant and if the Plaintiff is successful on issues relating to the special plea then the matter be postponed *sine die* , for determination of issues relating to the merits and quantum.

COMMON CAUSE FACTS

- [6] The following facts are common cause *in casu*;
- 5.1. The motor collision giving rise to the Plaintiffs claim for damages occurred on the 31st day of January 2005;
- [7] The Plaintiffs claim was a limited claim under *section 18 (1) and (2) of the Road Accident Fund Act 56 of 1996* ("The Old Act") before the Old Act was amended by the *Road Accident Fund Act 19 of 2005* which amendment came into effect on the 18th day of August 2008.
- [8] To avoid prescription in terms of the Old Act the Plaintiff had to lodge her claim with the Defendant on or before the 30th day of January 2008 and serve summons on the Defendant on or before the 30th day of January 2010.
- [9] The Plaintiff lodged her claim against the Defendant on the 29th October 2007. The Plaintiff issued summons against the Defendant in the Pretoria Magistrate Court under case number: 72/2009 on the 5th January 2009. The summons was eventually served on the Defendant on the 6th January 2009.
- [10] *Section 18 (1) (a) (i) ; 18 (1) (b) and 18 (20) of the Old Act* which limited the Plaintiffs' claim for damages was declared unconstitutional and invalid by the constitutional court on the 17th February 2011 in the case of *Mvumvu and Others v Minister of Transport and Another 2011 (2) SA 473*.
- [11] The declaration of the invalidity was suspended for a period of eighteen (18) months to allow Parliament to remedy the unconstitutionality of the impugned provisions.
- [12] Parliament eventually remedied the impugned provisions by passing the *Road Accident Fund (Transitional Provision) Act 15 of 2012 (The "Transitional Act")*

which came into effect on the 13th February 2013.

- [13] The Plaintiff's claim is governed by the provisions of the Transitional Act.
- [14] The Plaintiff issued summons against the Defendant in the High Court on the 8th December 2014. Summons was served on the Defendant on the 8th April 2015.
- [15] The Plaintiff withdrew summons issued against the Defendant in the Pretoria Magistrates' court on the 5th January 2016 while the matter was pending in the High Court.

ISSUES TO DECIDE

- [16] The only issue to decide is whether the Plaintiffs' claim against the Defendant has prescribed for non-compliance with the Transitional Act.

LEGISLATIVE FRAMEWORK

- [17] Section 2 (1) of the Transitional Act provides that:

"Unless the third party expressly and unconditionally indicates to the Funds on the prescribed form, within one year of the Act taking effect, to have his or her claim remain subject to the Old Act, the claim of such third party is subject to the new Act under the following transitional regime;

(a)

(b) *The right of the third party to claim compensation for non-pecuniary loss is limited to a maximum of R25, 000, unless -*

(i) *the third party submits a serious injury assessment report as contemplated in Regulation 3 of the Road Accident Fund Regulation 2008, indicating a serious injury, within two years of this Act taking effect; and*

(ii) *it is determined in accordance with Regulation 3 of the Road Accident Fund Regulations, 2008, that the third party suffered a serious injury.*

(c)

(d)

(e) *A third party who has, prior to this Act coming into operation -*

(i)

(ii) *instituted on action against the Fund in a Magistrate 's court may withdraw the action and, within 60 days of such a withdrawal, institute an action in a High Court with appropriate jurisdiction over the matter: Provided that no special plea in respect of prescription may be raised during that period.*

18. The "third party" in the Transitional Act is defined as a person who has a right to claim compensation from the Fund (Road Accident Fund) in terms of *section 17 of the Old Act* whose claim is subject to the limitations imposed by *section 18 (1) or (2) of that Act*, and whose claim has upon this Act taking effect, not prescribed or been finally determined by settlement or judgment.

18.1 It can be safely assumed that any reference to the "third party" in the Transitional Act refers to the Plaintiff in this matter.

PREScription

[19] The Plaintiff's claim at the time of the Transitional Act taking effect on the 13th February 2013 was still in the Pretoria Magistrate's court as the withdrawal of the action was only done by the Plaintiff on the 5th January 2016 after the Plaintiff was so advised by the Defendant's attorneys by means of a letter. As such the Plaintiff's claim was at that stage not yet prescribed.

[20] It also appears that when the withdrawal of the matter was done at the Pretoria Magistrate's court the matter was not yet settled or judgment made in the matter. Thus as a consequence the matter falls squarely within the ambit of Transitional Act.

[21] The Defendant's argument relating to a special plea of prescription raised is two pronged;

21.1. Firstly that the Plaintiff issued summons outside the l(one) year period as provided by section 2 (1) of the Transitional Act as the Plaintiff was supposed to have issued summons on or before 12th February 2014;

21.2. Secondly that the Transitional Act requires the Plaintiff to first withdraw the action in the event it was first issued in the Magistrates' court within the appropriate jurisdiction and then issue summons in the High Court with the necessary jurisdiction.

[22] On the other hand Mr Shongwe on behalf of the Plaintiff argued that the Transitional Act does not make provisions as to when one must withdraw the action. He further contended that by issuing summons in the High Court without firstly withdrawing the action in the magistrate's court does not amount to an irregularity and based his argument on an unreported judgment of Manamela AJ in the matter of *Klaas v Road Accident Fund case number 25693/2013* in the Pretoria High Court. The Plaintiff in the Klaas matter issued summons in the magistrate's court and while the matter was still pending in the magistrate's court issued summons in the High Court on the 30th April 2013. The Plaintiff in that matter withdrew the Magistrates' court summons on the 28th May 2014.

[23] A distinction ought to be made between the current matter and the Klaas matter. Summons in the Klaas matter was issued i.e. in the High Court on the 30th April 2013 and that is within the period of a year from the time the Transitional Act took effect. In the current matter summons was issued on the 8th December 2014 which is outside the period of one year of the Transitional Act taking effect.

[24] As already indicated section 2 (1) of the Transitional Act requires a third party to

express and unconditionally indicate to the Fund within one year of the Act taking effect whether he/she wants his/her claim to remain with the Old Act or not, failing which his/her claim will automatically be subject to the Transitional Act. In the current matter the Plaintiff failed to express and unconditionally indicate to the Fund what are her wishes meaning that her_ claim automatically became the subject of the Transitional Act. As a consequence section 2 (1) gives the Third parties option to choose whether their claim should be dealt with in terms of the Road Accident Fund Act or in terms of the Transitional Act, subject to the Amendment Act.

[25] Section 2 (1) spells out the duration of operation of the Transitional Act which provides for a period of one year. The Act came into effect on the 13th February 2013 and ceased to operate by midnight on the 12th February 2014. Meaning that the plaintiff should have issued her summons against the Defendant on or before the 12th February 2014. The Plaintiff failed to comply with the provisions of section 2 (1) of the Transitional Act. I cannot agree with Mr Shongwe's contention that the Act does not provide as to when the action can be withdrawn in the Magistrate's court.

[26] Furthermore *section 2 (1) (e) (ii)* of the Transitional Act provides that, a third party who has prior, to the Transitional Act coming into operation has instituted an action against the Fund in a Magistrate's court may withdraw the action and within 60 days of such withdrawal institute an action in a High court with appropriate jurisdiction provided that no special plea of prescription may be raised during that period. In the current matter the Plaintiff did not comply with the provisions of the Act, a point which was correctly conceded to by Mr Shongwe on behalf of the Plaintiff. The Act makes provision for the action to be first withdrawn in the Magistrate's court and subsequent to that summons be issued in the High Court. The Plaintiff instituted summons in the High Court while the Plaintiff's claim was still pending in the Magistrate's court. It must be further noted that the section uses the word "may" which means that the third party is not compelled to withdraw the action, but may only withdraw the action in the Magistrate's court if he/she has the intention of instituting the action in the High Court

- [27] Manamela AJ in the Klaas matter opined as follows; Therefore; when this approach is taken, it can never serve the purpose of the TPA that a claim validly instituted in the magistrates' court can be extinguished by a somewhat inadvertent issuing of new summons in the High Court and the withdrawal of summons. That would be a far cry from purposive interpretation of legislative provisions. The Plaintiff may have not followed the language and form contemplated in TPA, but has purported to achieve the purpose of the TPA. The steps may have been muddled up and even confused, but at the end of the Plaintiff aims to pursue action initially issued in the magistrates' court in this court. This is what was intended by the TPA and cannot be denied by a methodical interpretation of the provisions of the TPA to bring about equality to the claimants who had their claims previously limited by the unconstitutional statutory provision."
- [28] I am in full agreement with the above passage and the Plaintiff cannot be punished based on the oversight of her attorneys as a valid claim was already instituted in the Magistrates' court. However as already indicated the facts of the current matter are not the same as that of Klaas and a distinction of the two ought to be made. I am therefore in agreement with Mr Knoetze on behalf of the Defendant that the Plaintiff's claim against the Fund has prescribed.
- [29] Moreover the date of the motor collision is recorded as the 31st January 2005 and the summons in this court was issued on the 08th December 2014 and the period of more than 5 (five) years has elapsed from the date on which the claim arose before the summons was served on the Defendant.
- [30] I therefore, make the following order,
1. The Defendants' special plea is hereby upheld with costs;
 2. The Plaintiff's claim is hereby dismissed with costs.

M.J.MOSOPA
ACTING JUDGE OF THE GAUTENG DIVISION,
PRETORIA

For the Plaintiff:

Mr. S.S. Shongwe

Instructed by:

Rontgen & Rontgen Inc

For the Defendant:

Adv Knoetze

Instructed by:

Diale Mogashoa Inc

Date of Judgment:

02 February 2018