THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

1.1 Cases 471~~64~~ & 472/2003

1.2 REPORTABLE

In the appeal between:

GELDENHUYS & JOUBERT~~i~~ Appellant

~~**MINISTER OF JUSTICE & CONSTITUTIONAL DEVELOPMENT**~~

~~Third Appellant~~

and

ZENDRA VAN WYK First Respondent

ROAD ACCIDENT FUND~~Thomas Frederick van ROOYEN~~

~~R~~Second Respondent

(*First appeal*)

and

ZENDRA VAN WYK Appellant

and

GELDENHUYS & JOUBERT~~i~~ First respondent

ROAD ACCIDENT FUND~~Thomas Frederick van ROOYEN~~

~~R~~Second Respondent

(*Second appeal*)

Before: Scott JA, ~~Howie P, Scott~~Cameron JA, Brand JA, Nugent JA, and Erasmus AJA~~CloetePonnan~~
Appeal: ~~5~~Monday 8 November 2004
Judgment: Tuesday 30 November 2004

Road Accident Fund – Regulation requiring claims for compensation involving injury caused by unidentified vehicles to be lodged within two years – Regulation valid

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JUDGMENT

CAMERON JA:

[1] The appeal turns on the validity of a regulation that requires claims for compensation from the Road Accident Fund involving loss or damage caused by unidentified vehicles to be lodged within two years.

[2] On 25 February 1998 Gabriel Jozua van der Gryp died on the road between Duiwelskloof and Mooketsi, Limpopo province, when the car in which he was travelling collided with an unidentified truck. His wife and two young sons (14 and 11) survived him. In these proceedings she alleges that in December 1999 she instructed an attorneys' firm to lodge a third-party claim for her and the minor children against the Road Accident Fund (the Fund). She claims they negligently failed to do this. Her current attorneys lodged the claim in December 2000 – nearly three years after the collision. But the Fund repudiated her

claim on the ground that it 'became prescribed' after two years. She then instituted action for negligence against the first attorneys. They denied her allegations, but also pleaded that the two-year period the Fund invoked in repudiating her claim was invalid. They pleaded that the plaintiff was entitled to the three-year prescription period under the Prescription Act 68 of 1969,[1] and the minor sons to even longer: their claim against the Fund would prescribe, the attorneys argued, only one year after they attained their majority.[2]

[3] Faced with this plea, the plaintiff joined the Fund as second defendant. I refer to Mrs van der Gryp, who has since remarried, as the plaintiff, and to the attorneys she claims were negligent as 'the attorneys'. The plaintiff and her sons seek compensation for her husband's death from either the attorneys because they culpably failed to lodge her claim in time, should the two-year period apply; or from the Fund, should it not.

[4] The matter came to trial in the Pretoria High Court, where the parties agreed that the validity of the regulation should be determined as a preliminary issue under rule 33(4). Mynhardt J upheld the regulation. He dismissed the plaintiff's claim against the Fund, and ordered her

[1] Prescription Act 68 of 1969 s 11: 'The period of prescription of debts shall be' –
'(c) save where an Act of Parliament provides otherwise, three years in respect of any other debt'.
[2] Prescription Act 68 of 1969 s 13(1) provides that if the creditor is a minor and prescription would be completed before or on, within one year after, the day he or she ceases to be a minor, 'the period of prescription shall not be completed before a year has elapsed' after attainment of majority.

to pay its costs. He directed that her trial action against the attorneys should proceed, and ordered them to pay her costs regarding the preliminary point.

[5] Against this order the plaintiff and the attorneys lodged separate appeals, each with the leave of the trial court. These we heard together. The plaintiff contests the finding that the regulation is valid. If that contention fails, and the trial court's judgment is confirmed, she says it was in any event unfair to saddle her with the Fund's costs in the court below – the attorneys who put the regulation in issue should pay them. For their part the attorneys also contest the regulation. Should they fail they support the trial judge's costs order.

[6] This Court upheld a similar two-year cut-off for unidentified vehicle claims under the now-repealed Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 in *Mbatha v Multilateral Motor Vehicle Accidents Fund*.[3] But three and half years later a different panel, considering a similar claim by a minor also under that legislation, held in *Moloi v Road Accident Fund*[4] that the two-year cut-off did not apply, and that the periods specified by the Prescription Act did. Though the cases differed in that *Moloi* concerned a minor's claim while *Mbatha* did not, the two decisions are at odds in their approach to the repealed

[3] 1997 (3) SA 713 (SCA), per Harms JA for the Court.
[4] 2001 (3) SA 546 (SCA), per Farlam AJA for the Court.

statute, and *Moloi* suggested that the Prescription Act may have been erroneously overlooked in *Mbatha*.[5]

[7] Both adults' and minors' claims are at issue in this appeal. Though as will emerge the validity of the two-year cut-off turns on the distinctive features of the current legislation, some of the considerations at issue in *Mbatha* and *Moloi* unavoidably recur.

[8] Section 17 is the critical provision that determines the Fund's liability. It distinguishes between cases where the owner or driver is identified, and those where neither is identified. Section 17(1) says that the Fund shall be obliged to compensate any person for specified loss or damage –

> '(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 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'.

[9] Section 26 gives the Minister of Transport the duty and the power to 'make regulations to prescribe any matter which in terms of this Act shall or may be prescribed or which may be necessary or expedient to prescribe in order to achieve or promote the object of this Act'. The contested regulation 2(3) was issued under this provision. It provides that an unidentified vehicle claim –

[5] 2001 (3) SA 546 paras 21 and 22.

> 'shall be sent or delivered to the Fund, in accordance with the provisions of section 24 of the Act [prescribing procedures for lodging a claim], within two years from the date upon which the claim arose, irrespective of any legal disability to which the third party concerned may be subject and notwithstanding anything to the contrary in any law'.[6]

Its companion is reg 2(4), which provides that once a claim has been sent or delivered to the Fund within the two-year cut-off, the liability of the Fund –

> 'shall be extinguished upon the expiry of a period of five years from the date on which the claim arose, irrespective of any legal disability to which the third party concerned may be subject and notwithstanding anything to the contrary in any law, unless a summons to commence legal proceedings has been properly served on the Fund before the expiry of the said period'.

[10] The provisions of s 21 are important to understanding the impugned regulation. This provides that when a third party is entitled to claim compensation, he or she may not claim from the owner or driver or the driver's employer, unless the Fund is unable to pay. This has significant implications. In a case where the claimant can trace the vehicle or the driver, the provision means that the claimant loses a valid claim against an identifiable wrongdoer. 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 itself.

[11] In the case of an unidentified vehicle, this by definition is not so. There is no identifiable wrongdoer to sue, and the injured party is

[6] Regulations promulgated under s 26 of Road Accident Fund Act 56 0f 1996, Government Gazette 17939 of 25 April 1997, with effect from 1 May 1997.

remediless. The legislation instead creates a claim for compensation where otherwise there would have been none.[7] The Fund is not substituted for a wrongdoer in hand, but intervenes to offer recourse where none existed before.

[12] It is for this reason that the distinction the legislation makes between identified vehicle and unidentified vehicle cases is fundamental. This Court's decisions have repeatedly underscored its implications, most recently in *Bezuidenhout v Road Accident Fund*.[8] The legislation specifies that loss or damage involving identified vehicles must be compensated on terms expressly set out in the statute itself ('subject to this Act'). By contrast, with unidentified vehicle claims, the Minister is given power to subject payment of compensation to a regulatory scheme, and thus to determine the conditions subject to which compensation may be granted ('subject to any regulation made under s 26').

[13] In accordance with this distinction, s 23, which deals with prescription of claims, provides that the right to claim compensation in identified vehicle cases prescribes after three years (s 23(1)). This matches the ordinary period of prescription for debts under the Prescription Act (s 11(d)). It reflects the fact that the claimant in an

[7] *Mbatha* 1997 (3) SA 713 (SCA) 718I-J.
[8] 2003 (6) SA 61 (SCA) para 6, per Vivier JA on behalf of the Court.

identified vehicle case forfeits a claim against a known wrongdoer and is obliged to seek recourse from the Fund instead. The three-year prescription period against the known perpetrator is replaced with an equivalent period against the Fund.

[14] In consonance with this, s 23(2) provides that in identified vehicle cases prescription shall not run against a minor, a person detained as a patient in terms of any mental health legislation or a person under curatorship. Again, this reflects the ordinary regime under the Prescription Act, because the minor (or person under other disability) forfeits a claim against a known perpetrator.

[15] In unidentified vehicle cases, by contrast, the Minister has determined that, to be valid, claims of adults and minors alike must be sent or delivered to the Fund within two years. Once so lodged, claimants have a five-year period from the incident within which to issue summons (regs 2(3) and 2(4)). The regulatory scheme thus differs in two ways from the periods the statute determines for the prescription of identified vehicle claims. First, the two-year period for lodging a claim is one year shorter than the prescription period the statute specifies for identified vehicle claims; and, second, the regulatory scheme makes no special allowance for minors. In both cases, however, once a claim is lodged in terms of s 24, there is a

five-year period from the date of the accident within which summons must be issued (s 23(3) in the case of identified vehicles; reg 2(4) in the case of unidentified vehicles).

[16] The reason for the sharp difference in treatment between identified and unidentified vehicle claims is plain. In *Mbatha*, Harms JA pointed out that 'there are good reasons for having stricter requirements for unidentified vehicle cases':

> 'In these cases, the possibility of fraud is greater; it is usually impossible for the Fund to find evidence to controvert the claimant's allegations; [and] the later the claim the greater the Fund's problems'.[9]

[17] This is not to suggest that fraud does not occur in identified vehicle cases – it does – nor that unidentified vehicle claims are necessarily false: as pointed out in *Bezuidenhout*,[10] this is obviously not so. Yet the evidentiary considerations mentioned in *Mbatha* have equal force under the current statutory regime, and they are relevant to understanding the intent of the Act and hence the validity of the contested regulation. Notable here is that s 22(1)(a) places an obligation on the owner and the driver (if the driver is not the owner) to furnish to the Fund if reasonably possible within fourteen days particulars of an occurrence in which any person other than the driver has been injured or killed: the effect of this requirement is that in identified vehicle cases the Fund or its agent has early notice of an

[9] 1997 (3) SA 713 (SCA) 718H-I.
[10] 2003 (6) SA 61 (SCA) para 17 at 68D.

impending claim. It underscores the evidentiary difficulties the Fund faces in unidentified vehicle cases.

[18] In the Rule 33(4) proceedings, the plaintiff and the attorneys formally admitted that the Fund 'relies preponderantly on documentation from the South African Police Services in order to verify [unidentified vehicle] claims in an effort to eliminate fraudulent claims, and also to determine whether there was negligence on the part of the driver of an unidentified vehicle' (my translation).

[19] After this admission was recorded, the Fund called Superintendent Askew, of South African Police Services headquarters, who is the SAPS representative on the national traffic legislation technical committee. He explained police station procedures for reports of motor vehicle accidents: these, he observed, caused more than 9 000 deaths on South African roads every year. He testified that a report that an unidentified vehicle had been negligently driven would be investigated to determine whether the suspect vehicle could be traced. If a criminal investigation was warranted, the police docket – containing statements, a copy of the accident report, and the police plan, if any – would be referred to a senior public prosecutor for a decision as to prosecution. If – as is inevitable where the driver is not traced – there is no prosecution, the case docket is sent back to

the police station. There, like other unprosecuted dockets, it is preserved for three years. Then it is destroyed.

[20] Supt Askew testified without challenge that storage capacity at police stations was 'not good': they have limited space, and accumulated documentation, sometimes stacked in passages, creates not only fire but health hazards, since rodents start consuming the paper. Askew stated that a police station's occurrence book is preserved for ten years, but does not constitute a reliable source of detail on accidents, since only 'very basic information' is recorded (such as the accident register reference number).[11]

[21] Since by definition no prosecution can be brought where there is no identifiable offender, the effect of this evidence is that after three years the police file in an unidentified vehicle case would no longer exist. Its incontestable import is that the Fund has compelling practical reasons for requiring claims in unidentified vehicle cases to be lodged and dealt with promptly. Longer cut-off periods might make it impossible for the Fund to take any practicable steps to verify

[11] It is worth recording that Supt Askew, although the most senior official in police headquarters dealing with motor vehicle accidents, was unaware of reg 2(1)(c), which requires a claimant in an unidentified vehicle case to submit 'if reasonably possible, within 14 days after being in a position to do so an affidavit to the police in which particulars of the occurrence concerned were fully set out' (see *Road Accident Fund v Thugwana* 2004 (3) SA 169 (SCA) para 16).

such claims and may place the Fund at risk of frauds that would inhibit its capacity to fulfil its public purposes.

[22] It is against this background that the validity of reg 2(3) must be assessed. Counsel for the plaintiff and for the attorneys, at one on this point, contended that the regulation was invalid. They invoked the provisions of the Prescription Act, contending that these rendered the regulation stipulating the two-year cut-off invalid. The Prescription Act, they pointed out, provides in general for three years' prescription in respect of a 'debt', 'save where an Act of Parliament provides otherwise' (s 11(d)). In addition, its provisions apply (subject to exceptions not relevant) –

> 'save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt' (s 16(1)).

The Act's express prescription periods for identified vehicle claims, the plaintiff and the attorneys contended, are the sort of legislation this provision envisages. The regulations, by contrast, do not constitute and were not intended to have the force of a parliamentary enactment and therefore could not override the Prescription Act's periods.

[23] But to invoke the Prescription Act is to start from the wrong premise. It is to assume, a priori, that an unidentified vehicle

claimant is owed a ‘debt’, and that the debtor is the Fund. This is to treat the Fund as though it were a wrongdoer, and the claimant its victim. That is not correct. The source of the Fund’s liability to unidentified vehicle claimants is not a pre-existing legal right or its infringement. The Fund is liable because the legislation creates a public benefit, accessible on conditions that the Act itself expressly licenses the Minister to stipulate by regulation.

[24] The Act in other words does not make the Fund unconditionally liable to unidentified vehicle claimants. It expressly subordinates the Fund’s liability to them to ‘any regulation made under section 26’. This empowers the Minister to regulate the liability owed to this category of claimants: and, as Harms JA pointed out in *Mbatha*, the power to regulate necessarily includes the power ‘to prescribe time limits within which procedural acts must be done’.[12] The Act in this case expressly gives the Minister the power that in *Mbatha* was held to be implied.

[25] The regulation plainly makes the lodging of the claim within the two-year period a precondition to the existence of the debt under the Act.[13] If the claim is not lodged within this period, there is no ‘debt’, and the provisions of the Prescription Act do not come into play.

[12] 1997 (3) SA 713 (SCA) 718F.
[13] Compare the analysis in *Mbatha* 1997 (3) SA 713 (SCA) 716C (the regulation ‘subjects the liability of the Fund to a so-called condition’), 717E-F (Fund’s liability is ‘made subject to a number of conditions’), 719G (the claim ‘became “prescribed” … two years after the collision’).

[26] In exercising the power to regulate the Fund's liability to unidentified vehicle claimants, the Minister must of course act lawfully, and the regulations issued must survive scrutiny for conformity with the usual requirements of legality and reasonableness (bearing in mind that it is funded by the public from a fuel levy: s 5(1)(a)). As this Court stated in *Bezuidenhout*, section 26(1) –

> 'cannot empower the making of regulations which widen the purpose and object of the present Act or which are in conflict therewith. … … [U]nderlying the concept of delegated legislation is the basic principle that the Legislature delegates because it cannot directly exert its will in every detail. All it can in practice do is to lay down the outline. This means that the intention of the Legislature, as indicated in the enabling Act, must be the prime guide to the meaning of delegated legislation and the extent of the power to make it'.[14]

[27] In *Bezuidenhout*, it was also suggested (though it was unnecessary to decide), that the regulation at issue (which required physical contact with the offending vehicle in unidentified vehicle cases) might be unreasonable in the classic sense of not having been authorised by the legislation.[15] This underscores the ample constitutional and common law safeguards that hem the Minister's power in exercising the authority the statute creates.

[28] None of these safeguards suggest that the power was exercised improperly here. On the contrary, the imposition of a two-year period for lodging claims in unidentified vehicle cases is in my view an

[14] 2003 (6) SA 61 (SCA) para 10, per Vivier JA for the Court.
[15] 2003 (6) SA 61 para 17.

unimpeachable exercise of the Minister's regulatory power. It gives claimants a reasonable time within which to lodge their claims in accordance with the procedures the statute prescribes, while giving the Fund the opportunity to undertake investigations necessary to safeguard its resources against fraud.

[29] Although the test for invalidity is objective, I should point out that the minor children in the present case had the plaintiff as their guardian. On the facts she pleaded, she was able to and indeed tried to comply with the two-year period in her own and their behalf, but was thwarted by the attorneys' culpable conduct. We were not asked to determine either the application or the validity of the regulation where the interests of a minor claimant are not so protected (as for instance when a minor has no guardian). I express no view on such a case, where different considerations may apply (see *Gassner NO v Minister of Law and Order*).[16]

[30] In conclusion I emphasise that the current legislation expressly empowers the Minister to subordinate the Fund's liability to unidentified vehicle claimants to condition. In *Moloi* it was held, by contrast, that the now-repealed statute did not empower the Minister by regulation 'to endeavour to convert' the Fund's 'unconditional

[16]1995 (1) SA 322 (C) (van Zyl J).

liability' into a conditional liability.[17] That as shown differs from the position here: s 17(1)(b) clearly subjects the Fund's liability to unidentified vehicle claimants to regulatory condition, which was validly imposed.

Costs

[31] As pointed out, the trial judge ordered the plaintiff to pay the Fund's costs in the court below. That order was unfair, since the plaintiff joined the Fund only because the attorneys sought to impugn the regulation. The appropriate order would have been for the attorneys to pay the costs of both the plaintiff and the Fund in regard to the preliminary point.

[32] As for the costs on appeal, counsel for the attorneys sought to contend that the plaintiff should not have incurred costs by launching her own appeal; but as her counsel pointed out, once the attorneys appealed she was obliged to enter the fray since if the attorneys' appeal succeeded, but the judgment dismissing her claim against the Fund stood, she might have been remediless. The appropriate order is in my view that the attorneys should pay the costs of both appeals.

ORDER:

[17] 2001 (3) SA 546 (SCA) para 25.

1. Except to the extent indicated in para 3 below, both appeals are dismissed with costs.

2. The first defendant in the court below (appellant in the first appeal; first respondent in the second appeal) is to pay the costs of appeal of the second respondent in both appeals and of the plaintiff (first respondent in the first appeal; appellant in the second appeal).

3. Para 4 of the order of the court below is set aside. In its place there is substituted:
   'The first defendant is ordered to pay the second defendant's costs in regard to the preliminary proceedings.'

E CAMERON
JUDGE OF APPEAL

CONCUR:
SCOTT JA
BRAND JA
NUGENT JA
A R ERASMUS AJA