THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 179/06
REPORTABLE

In the matter between:

DR CJ VAN DER MERWE **APPELLANT**

and

ROAD ACCIDENT FUND **RESPONDENT**

Coram: Harms ADP, Lewis, Heher, Cachalia JJA et Hancke AJA

Heard: 14 May 2007

Delivered: 29 May 2007

Summary: In terms of s 17 (5) of the Road Accident Fund Act 56 of 1996 the supplier may claim directly from the Fund the third party's costs of accommodation or treatment or service rendered or goods supplied by the supplier. The supplier's claim is dependent upon the third party's claim and may thus aptly be described as an accessory claim. Such a claim cannot become prescribed in terms of s 23 of the Act where the third party's has not.

Neutral citation: This judgment may be referred to as *Van der Merwe v Road Accident Fund* [2007] SCA 64 (RSA).

JUDGMENT

CACHALIA JA

[1] The appellant is an anaesthetist. He rendered medical treatment to a Mr Grundlingh following injuries Grundlingh sustained in a motor vehicle collision on 2 October 1998. The treatment was administered on 20 February 2002, more than three years after the collision, at a cost of R 1 319. 82. The appellant sought to recover this amount directly from the Road Accident Fund (the respondent) and submitted a claim to it in terms of s 24(3) of the Road Accident Fund Act 56 of 1996 on 27 June 2002. The Fund did not respond and on 11 February 2003 the appellant caused a magistrates' court summons to be served on the Fund for payment of this amount. The Fund raised a special plea of prescription averring that the claim had become prescribed because it had been submitted to the Fund more than three years after the accident. At the hearing, the parties requested the magistrate to decide this question on the basis of a stated case. He upheld the plea and dismissed the claim. The Pretoria High Court (Hartzenberg J with whom De Vos J concurred) dismissed the appellant's appeal[1] but granted leave to appeal to this court.

[2] For the purposes of this appeal the parties placed further facts, which have a material bearing on its outcome, before this court. These were that Grundling submitted his claim for bodily injuries, which did not include the appellant's claim, to the Fund on 1 September 2000, that is, before the appellant had treated him; that when the appellant submitted his claim on 27 June 2002, the Fund had not yet finalised Grundlingh's claim; and that the Fund settled Grundlingh's claim on 27 November 2002 without taking the appellant's claim into account in the settlement.

[3] Prescription is dealt with in s 23 of the Act. Section 23(1) states that the right to claim compensation from the Fund 'shall become prescribed upon

[1]**The case is reported as *Van der Merwe v Road Accident Fund* 2006 (3) SA 88 (T).**

expiry of a period of three years from the date upon which the cause of action arose'. Section 23(3) provides that '(n)otwithstanding subsection (1), no claim which has been lodged in terms of section 24 shall prescribe before the expiry of a period of five years from the date on which the cause of action arose.' Thus where a third party submits a claim to the Fund in the prescribed form[2] within the three-year period the claim prescribes only after a period of five years. Conversely, if the claim is submitted after the three-year period specified in s 23(1) has elapsed, it will have prescribed. This is so even if it was submitted before the five-year period specified in s 23(3) has passed. [3]

[4] On the facts before us Grundlingh's third party claim had not become prescribed at the time the appellant had submitted his claim as the five-year period specified in s 23(3) had not run its course. And even though Grundlingh had not yet been treated by the appellant at the time he submitted his claim to the Fund, and could thus not have included the appellant's part of the claim at that stage, there was no impediment to his amending the claim to include the appellant's claim at any stage before the claim had been finalised. By doing so he merely would have augmented his existing claim for damages.

[5] Counsel for the Fund contends that the appellant's claim, based as it is on the same cause of action as Grundlingh's, must also comply with the prescription requirements in the Act. Thus, so it is contended, just as Grundlingh was required to submit his claim to the Fund within three years of the cause of action having arisen, so too was the appellant as a supplier of medical services. And, the contention continues, because the appellant had not done so his claim had become prescribed.

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[2] **Section 24 of the Act.**

[3]***Krischke v Road Accident Fund* 2004 (4) SA 338 (W) para 19.**

[6] The issue before us is whether the appellant's claim could have become prescribed even though Grundlingh's had not. The answer requires a brief examination of s 17(5). It provides as follows:

'Where a third party is entitled to compensation in terms of this section and has incurred costs in respect of accommodation of himself or herself or any other person in a hospital or nursing home or the treatment of any service rendered or goods supplied to himself or herself or any other person, the person who provided the accommodation or treatment or rendered the service or supplied the goods (the supplier) may claim the amount direct from the Fund or an agent on a prescribed form, and any such claim shall be subject, *mutatis mutandis*, to the provisions applicable to the claim of the third party concerned, and may not exceed the amount which the third party could, but for this subsection, have recovered.'

[7] The section confers on a supplier a statutory right to recover, directly from the Fund, the costs of accommodation, treatment, services or goods instead of claiming such costs from the third party. It was enacted for the benefit of suppliers to ensure that they receive payments made to injured persons who incur hospital and medical expenses in respect of their injuries. But this right arises only if the third party is entitled to claim the amount as part of his or her compensation from the Fund.[4] Put another way the right arises only if the third party has a valid and enforceable claim against the Fund and has complied with the necessary formalities such as submitting a claim in compliance with the prescribed procedure. The supplier's claim is therefore dependent upon the third party being able to establish his or her claim.[5] In this sense it may aptly be described as an accessory claim.

[8] I revert to the facts in this case. Grundlingh submitted his claim to the Fund within the prescribed three-year period. As such this claim could have become prescribed only five years after the collision. And as I have mentioned,

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[4]**See Daniels *MMF-RAF The Practitioner's Guide* (Updated 2006) E33.**
[5]**Cf *AA Mutual Insurance Association Ltd v Administrateur, Transvaal* 1961 (2) SA 796 (A) at 805 B-C.**

when the appellant submitted his claim to the Fund Grundlingh's had not yet been finalised (by judgment or settlement) or become prescribed. It is not disputed that Grundlingh had incurred the costs of the treatment and that he would have been entitled to include these costs as part of the claim, as s 17(5) envisages. The only issue thus is whether the claim had become prescribed.

[9] In my view once it is accepted that Grundlingh's claim had not become prescribed at the time the appellant submitted his, the appellant's accessory claim, being part and parcel of Grundlingh's, similarly could not have. Moreover, it is illogical to interpret the section in the way the Fund would have it, as this would effectively negate the supplier's right to claim directly from the Fund.

[10] The following order is made. The appeal is upheld with costs including the costs of two counsel. The order of the court below is amended to read:

'The appeal is upheld with costs.'

A CACHALIA
JUDGE OF APPEAL

CONCUR:

HARMS ADP
LEWIS JA
HEHER JA
HANCKE AJA