THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 170/09
No precedential significance

ROAD ACCIDENT FUND **Appellant**

and

PODBIELSKI MHLAMBI ATTORNEYS **First Respondent**
THE SHERIFF, PRETORIA EAST **Second Respondent**

Neutral citation: ***RAF v Podbielski Mhlambi and another*** **(170/09) [2010] ZASCA 33 (29 March 2010)**

CORAM: MPATI P, SHONGWE JA and HURT, GRIESEL and MAJIEDT AJJA

HEARD: **26 FEBRUARY 2010**

DELIVERED: **29 MARCH 2010**

SUMMARY: Road Accident Fund – whether the Fund can pursue an appeal to the SCA which would require this court to express an opinion on a hypothetical question.

ORDER

On appeal from: Gauteng High Court (Pretoria) (Claassen J sitting as court of first instance).

The appeal is dismissed, with costs.

JUDGMENT

Shongwe JA (Mpati P, Hurt, Griesel and Majiedt AJJA concurring):

[1] This appeal comes to this court, ostensibly, for an interpretation of s 17(5) of the Road Accident Fund Act.[1] The subsection reads:

'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 or 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, notwithstanding section 19 (c) or (d), claim an amount in accordance with the tariff contemplated in subsection (4B) direct from the Fund or an agent on a prescribed form, and 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.'

The question to which the appellant (Fund) seeks an answer is whether a supplier can validly institute and prosecute a claim against it without the third party having done so.

[2] The first respondent, a firm of attorneys acting on behalf of various suppliers, had obtained default and summary judgments against the Fund in various matters in the magistrate's court. In execution of these judgments, and on 11 April 2008, the Sheriff attached certain of the Fund's property. To avoid any removal of the attached property the Fund issued a cheque in the sum of R1 560 527.80 in satisfaction of the Sheriff's demand. The fund purported to do this under protest. Upon investigation thereafter the Fund discovered that in some matters payments had already been made by it. Some payments had been made prior to, and others subsequent to, judgment having been granted. In respect of other matters, the Fund had not been able to allocate the payments to specific cases.

[3] This situation necessitated a proper reconciliation. Apparently negotiations aimed at reconciling the figures and the judgments failed. Consequently, the Fund

[1] Act 56 of 1996.

brought an urgent application to restrain the Sheriff from paying the proceeds of the cheque over to the first respondent and for the return of the cheque. The following order was sought:

'1. That the Second Respondent be interdicted and restrained from paying over the proceeds of the cheque in the sum of R 1,560,527.80 to the First Respondent, pending finalization of this application.

2. That a rule *nisi*, returnable on Tuesday, 22 April 2008 be issued, calling upon the Respondents to show cause, if any, why the following order should not be granted:

2.1 That the cheque issued on 11 April 2008 under protest by the Applicant to the Second Respondent be returned to the Applicant.

2.2 That the First Respondent be ordered to pay the costs of the application.'

The court a quo (Claassen J) dismissed the application, but subsequently granted leave to the Fund to appeal to this court.

[4] It is not disputed that during April and May 2008 all the Fund's applications for rescission of the judgments, except eight, were dismissed with costs. Four of the outstanding applications were removed from the roll by the Fund and the remaining four have never been set down for hearing. It is also not disputed that the remaining eight applications are similar in nature to those which had been dismissed. In its replying affidavit the Fund concedes that in certain cases, where rescission applications were dismissed the magistrates accepted the Fund's interpretation of the judgment of this court in *Van der Merwe.*[2] In that case Cachalia JA, at para 7, said:

'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. Put another way the right arises only if the third party has a valid and enforceable claim

[2] *Van der Merwe v Road Accident Fund* 2007 (6) SA 283 (SCA).

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. In this sense it may aptly be described as an accessory claim.'

[5] The essential question is whether the Fund can, after acknowledging that it owed some money to the first respondent's clients (suppliers), seek a return of the cheque or a refund of the whole amount of the cheque. The court below embarked on an arithmetic exercise and concluded that an amount of R287 349.15 should be deducted from the value of the cheque as money that was not due to the suppliers. But the more important question, in my view, is whether the Fund is entitled to the return of the cheque, which was paid on the strength of valid judgments and writs of execution.

[6] From the argument by counsel for the Fund it is plain that the Fund seeks a pronouncement from this court confirming the meaning ascribed to s 17(5) of the Act in the *Van der Merwe* judgment. Counsel submitted that in dismissing the Fund's application the court a quo departed from the judgment of this court in *Van der Merwe.* In effect, the Fund seeks advice from this court on the meaning of the subsection, something which the facts of this case, in any event, do not allow. As I have mentioned, the cheque was paid by the Fund on the strength of valid judgments and writs of execution. Those judgments and writs have not been set aside. The moneys due in terms of those judgments were therefore due and payable at the time the cheque was paid. There is thus no basis upon which a court can order the return of the cheque as claimed. And the interpretation of s 17(5) of the Act will not alter that reality.

[7] In my view, it was not necessary for the court a quo even to have considered the *Van der Merwe* decision and it is not necessary for this court to do so.

[8] The appeal is dismissed, with costs.

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J SHONGWE

JUDGE OF APPEAL

APPEARANCES:

For Appellant:	B P Geach SC F Bezuidenhout
	Instructed by: Maponya Inc Pretoria Honey Attorneys Bloemfontein
For 1st Respondent:	D S Fourie SC
	Instructed by: Podbielski Mhlambi Inc Pretoria Vermaak & Dennis Bloemfontein