Case No 413/98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter of

ANTONICA MOLOI 1st Appellant

DINAH GAMBU 2nd Appellant

EVELINAH NGWENYA 3rd Appellant

and

ROAD ACCIDENT FUND Respondent

CORAM: Smalberger, Vivier, Howie, Streicher JJA *et* Farlam AJA

DATE OF HEARING: 12 September 2000

DATE OF JUDGMENT: 29 September 2000

Multilateral Motor Vehicle Accidents Regulations, 1989 - Regulation 3(2)(a)(i) - Validity of

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J U D G M E N T

/FARLAM AJA:. . .

FARLAM AJA:

[1] This is an appeal from a judgment of Claassen J sitting in the Witwatersrand Local Division of the High Court, who upheld a special plea by the defendant (respondent) to the particulars of claim of the plaintiffs (appellants) and dismissed their claims with costs. In what follows I shall refer to the parties as they were described in the Court *a quo*.

[2] The question for decision in this case is whether a minor's claim arising under article 40 of the Agreement establishing a Multilateral Motor Vehicle Accidents Fund (which is set out in the Schedule to the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 (as amended) prescribes on the expiry of a two year period after the claim arose in a case where the motor vehicle concerned was unidentified and no claim for compensation for loss or damage suffered by the minor was delivered to the Multilateral Motor Vehicle Accidents Fund within such period. (In what follows I shall refer to the Agreement set out in the Schedule to Act 93 of 1989 as "the Agreement" and to the Multilateral Motor Vehicle Accidents Fund as "the Fund".)

[3] Each of the three plaintiffs in this matter instituted action against the Fund in her capacity as mother and natural guardian of her minor child, who was allegedly injured in a collision with an unidentified motor vehicle which was negligently driven by some person unknown.

[4] The defendant filed a special plea essentially raising the defence that the plaintiffs' claims had prescribed, as well as a plea on the merits.

[5] Prior to the hearing of the matter in the Court *a quo* the parties agreed that the issues raised by the defendant's special plea and the plaintiffs' replication thereto should be dealt with pursuant to a stated case in terms of Rule 33(1) of the Uniform Rules of Court.

[6] The case stated by them reads as follows:

"1. The three Plaintiffs act in this matter in their representative capacity as mothers and guardians of three minor children who Plaintiffs allege were injured in a motor vehicle collision which occurred on 30 September 1994.

2. The Plaintiffs claim compensation in terms of the provisions of the Multilateral Motor Vehicle Accidents Fund Act No. 93 of 1989.

3. The Plaintiffs' minor children were injured as a result of a collision with a motor vehicle in respect of which neither the identity of the owner nor driver can be established.

4. The Plaintiffs' claims for compensation were delivered to the Defendant in October, alternatively November 1996.

5. Defendant maintains that by virtue of the provisions of Regulation 3(2)(a)(i) Plaintiffs' claims for compensation had to be delivered to the Defendant within two years from the date on which the claim arose and furthermore that by virtue of the provisions of Regulation 3(2)(a)(ii) the provisions of Regulation 3(2)(a)(i) apply to all third parties and Claimants irrespective of whether they are subject to any legal disability.

6. Plaintiffs admit that the claim forms were delivered to the Defendant outside the two year time period from which the claims arose.

7. Plaintiffs maintain, however, that insofar as the provisions of Regulation 3 provide that prescription runs against minors, the provisions of the regulation are *ultra vires*.

8. Plaintiffs contend furthermore that the provisions of the Prescription Act No. 68 of 1969 and in particular Section 13 and Section 16 thereof are applicable to the present case, their effect being that prescription does not run against the minors.

9. The sole question for decision therefore is whether the minors' claims have become prescribed."

[7] In the Agreement the Multilateral Motor Vehicle Accidents Fund is called

the "MMF". Chapter XII of the Agreement, which is headed "LIABILITY OF MMF AND APPOINTED AGENTS" commences with article 40, which reads as follows:

> "The MMF or its appointed agent, as the case may be, shall subject to the provisions of this Agreement be obliged to compensate any person whomsoever (in this Agreement called the third party) for any loss or damage which the third party has suffered as a result of –
>
> (a) any bodily injury to himself;
>
> (b) the death of or any bodily injury to any person,
>
> in either case caused by or arising out of the driving of a motor vehicle by any person whomsoever at any place within the area of jurisdiction of the members of the MMF, if the injury or death is due to the negligence or other unlawful act of the person who drove the motor vehicle (in this Agreement called the driver) or of the owner of the motor vehicle or his servant in the execution of his duty."

[8] Section 6(1) of Act 93 of 1989 empowers the Minister of Transport Affairs to make regulations to give effect to any provision of the Agreement. The regulations made by the Minister are referred to in the definition of "this Act" which is contained in section 1 of the Act and which reads as follows:

> "In this Act, unless the context otherwise indicates –
>
> . . .
>
> 'this Act' includes the regulations made under section 6."

[9] Regulation 3(2)(a)(i) and (ii), to which reference is made in the stated case, reads as follows:

> "(2) The liability of the MMF in respect of claims which arise in terms of this regulation shall be subject to the following further conditions:
>
> (a) (i) A claim for compensation for loss or damage suffered by the claimant shall be delivered to the MMF within two years from the date upon which the claim arose *mutatis mutandis* in accordance with the

provisions of article 62 of the Agreement.

(ii) The provisions of subparagraph (i) shall also apply to all third parties and claimants, irrespective of whether they are subject to any legal disability."

[10] As can be seen from paragraph 8 of the stated case the plaintiffs rely on the provisions of sections 13 and 16 of the Prescription Act 68 of 1969 in order to repel the defendant's special plea. These sections read as follows, as far as is material:

"13 (1) If –

(a) the creditor is a minor . . . and

(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a) . . . has ceased to exist,

the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)."

"16 (1). . .[T]he provisions of this chapter [i e, Chapter III, which deals with prescription of debts and which contains section 13] shall, 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, apply to any debt arising after the commencement of this Act."

[11] In his judgment upholding the special plea Claassen J dismissed the plaintiffs' contention that regulation 3, in so far as it provided that prescription runs against minors, was ultra vires. He did so, largely on the basis that the ratio in the decision of this Court in *Mbatha v Multilateral Motor Vehicle Accidents Fund*, 1997 (3) SA 713 (SCA), in which it was held that regulation 3 (2) (a) (i) is *intra vires* section 6 of Act 93 of 1989, must apply with equal force

in relation to regulation 3 (2) (a) (ii).

[12] Claassen J dealt with the plaintiffs' contention that sections 13 and 16 of the Prescription Act apply (with the result that prescription does not run in respect of a minor's claim in a case involving an unidentified vehicle) as follows:

> "The short answer to Mr Smith's argument [Mr Smith appeared for the plaintiffs in the court *a quo*] is that the regulations form part of the Act by virtue of the definition in Section 1 of the Act where the words 'this Act' are defined as including 'the regulations made under Section 6'. It is common cause that the particular regulations concerned, are made under Section 6 and thus form part of the Act. In such instance, it is, in my view, futile to argue that the Prescription Act applies because the 'Act and the Agreement' do not stipulate anything in regard to prescription periods applicable to claimants under legal disabilities in respect of unidentified vehicle cases. The fact of the matter is that the 'regulations' do stipulate such periods and these regulations are by definition deemed to be part of the Act. As such, the provisions of the Prescription Act are ousted. Furthermore, the provisions in the Prescription Act providing for prescription not to run against minors, are directly in conflict with the provisions of Regulation 3 (2) (a) (ii) and (c) (ii) of the MMF Act. For the above reasons the arguments of Mr Smith cannot be entertained."

[13] It is convenient to deal with this latter point first. Although section 16 of the Prescription Act is not drafted as clearly as it might be it is reasonably plain that what is intended is that the provisions of Chapter III will apply to all debts save where they are ousted by the provisions of an Act of Parliament which is inconsistent and then only to the extent of the inconsistency. The inconsistent provisions which have to be included in an Act of Parliament and which will oust some or all of the provisions of Chapter III are provisions which (a) prescribe a specified period within which a claim is to be made; (b) prescribe a

specified period within which an action is to be instituted in respect of a debt or (c) impose conditions on the institution of an action for the recovery of a debt. Regulation 3(2)(a) is a provision falling under (c) above because it purports to impose conditions on the institution of an action. It follows from the plain terms of section 16 that unless such provision has the status of an Act of Parliament it is invalid.

[14] I do not agree that the provisions of the Prescription Act are ousted because of the fact that in section 1 of Act 93 of 1989 the words "this Act" are defined so as to include the regulations made under section 6. It is clear from the introductory words to section 1 that the statutory definition of "this Act" applies in the interpretation of Act 93 of 1989 itself. There is no substantive elevation of the regulations to the status of an Act of Parliament. It is instructive in this regard to compare how the regulations are dealt with in section 1 with what is said in section 2(1) about the Agreement, *viz*:

> "The Agreement . . . shall, subject to the provisions of this Act, have the force of law and apply in the Republic of South Africa, *as if it were an Act of Parliament of the Republic of South Africa*." (The emphasis is mine.)

[15] In other words it is clear that the Agreement has been expressly given the status of an Act of Parliament and it was accordingly accepted by this Court in *Road Accident Fund v Smith N O* 1999 (1) SA 92 (SCA) that provisions in the Agreement dealing with prescription oust inconsistent provisions of the Prescription Act in terms of section 16 thereof.

[16] If Parliament had intended the regulations made under section 6 of Act 93 of 1989 also to have that status so as to oust inconsistent provisions of the Prescription Act, I would have expected a similar provision to that contained in section 2 to have been included as regards the regulations.

[17] In the absence of such a provision it cannot be held in my view that the regulations are to be regarded as included in Act 93 of 1989 for any purpose

other than interpreting the expression "this Act" therein and they do not have the status of an Act of Parliament for any other purpose. The result is that they cannot oust the provisions of Chapter III of the Prescription Act in the case of a minor's claim in terms of the Agreement where such claim arises out of the driving of a motor vehicle of which the identity of neither the owner nor the driver can be ascertained. It follows that the plaintiffs' contention as set out in paragraph 8 of the stated case should in my view have been upheld.

[18] Mr *Wessels*, who appeared with Mr *van Vuuren* on behalf of the respondent, submitted that even if the regulations did not amount to an Act of Parliament for the purposes of section 16 of the Prescription Act, the plaintiffs' appeal should still fail. This argument rested on the premise that the condition contained in regulation 3(2)(a)(i) was a condition in the proper sense of that word. He contended that as the rights conferred on the minors in this case were conditional rights only, no debts, within the meaning of the Prescription Act, arose in respect of which prescription could run until the condition to which they were subject had been fulfilled. After the expiry of the two year period referred to in regulation 3 (2) (a) (i), he submitted, no claims for compensation having been delivered to the Fund on behalf of the minors concerned and the condition having thus failed, the conditional rights which the minors had against the Fund fell away.

[19] The reason these rights fell away was not, he contended, because they had prescribed but because, no unconditional debt having arisen, prescription never ran at all and the extinction of the minors' conditional rights simply occurred when the condition on which they were dependent failed on the expiry of the two year period.

[20] In order for this contention to succeed one has to be satisfied as to two things: (1) that the "condition" referred to in regulation 3(2)(a)(i) is a suspensive condition properly so-called: *i e*, an uncertain future event pending the happening of which the minors concerned have no enforceable rights against the

Fund, and (2) that the Minister had the power under section 6 of the Act to impose the condition contended for.

[21] As to the first point it is instructive to have regard to the decision of this Court in the *Mbatha* case *supra*. Although one has difficulty with the result of the case, for a reason which I shall set out below, it considered the "condition" referred to in regulation 3(2)(a)(ii) to be a prescriptive period and not a condition properly so-called (see 716C where reference is made to a so-called condition and 720A and E where the two year period imposed by regulation 3(2)(a)(i) is referred to in terms as a prescriptive period).

[22] I said earlier that one has difficulty with the result to which the Court came in the *Mbatha* case, *supra*. This is because counsel for the appellant in that case did not rely on section 16 of the Prescription Act and no consideration was given to the aspect of the matter dealt with above.

[23] As to the second point, an analogous argument was considered by this Court in *Padongelukkefonds (Voorheen Multilaterale Motorvoertuigongelukkefonds) v Prinsloo* 1999 (3) SA 569 (SCA), in which it was held that regulation 3(1)(a)(v), which provided that the Fund would not be liable, in a case involving an unidentified motor vehicle where there was no physical contact between the vehicle and the injured person or the deceased or anything which caused the injuries or death, was *ultra vires*.

[24] The Court's reasons for coming to this conclusion appear from the following passage (at 574 F - 575A):

> "Die bepaling in reg 3(1)(a)(v) dat, as voorvereiste vir aanspreeklikheid aan die kant van die MMF, daar in die geval van `n ongeïdentifiseerde voertuig fisiese kontak moet wees, vind, soos reeds aangedui, nie weerklank in òf die Wet òf die Ooreenkoms nie. Dit stel `n beperking op aanspreeklikhheid wat onbestaanbaar is met die wye betekenis van art 40 van die Ooreenkoms en wat die trefwydte daarvan verminder. Dit gee nie gevolg aan art 40 of enige ander bepaling van die Ooreenkoms nie; die

> teenoorgestelde is eerder waar (vgl *S v Grindrod Transport (Pty) Ltd and Others* 1980 (3) SA 978 (N) op 983F-G). Die Minister se bevoegdheid kragtens art 6(1) van die Wet is `n suiwer regulerende bevoegdheid. `n Verbod wat volgens so `n bevoegdheid opgelê word, is ongeldig (*R v Williams* 1914 AD 460 op 465 en 467; *S v Perumal* 1977 (1) SA 526 (N) ). Hierdie beginsel behoort eweneens te geld waar `n reg ontneem word as gevolg van `n ongemagtigde beperking van aanspreeklikheid, soos in die onderhawige geval. Ek stem ook saam met die Hof *a quo* dat '(a)rt 6 van die Wet dui nie die bedoeling aan tot die verleen van die bevoegdheid om aanspreeklikhheidsuitsluiting by wyse van regulasie neer te lê nie' (sien die gerapporteerde uitspraak op 314e-f). Die plaas van `n andersins ongemagtigde beperking op die MMF se aanspreeklikheid is ook nie redelikerwyse diensbaar ('reasonably incidental') aan die Minister se verleende bevoegdhede nie. Gevolglik het die Hof *a quo* myns insiens tereg bevind dat reg 3(1)(a)(v) *ultra vires* is."

[25] In my view, by parity of reasoning, it is clear that the Minister was not empowered by section 6 of Act 93 of 1989 to endeavour to convert the unconditional liability created by article 40 into a conditional liability.

[26] I do not think that the position is altered by the fact that section 2(1) of the 1989 Act provides that the Agreement has the force of law "subject to the provisions of this Act" (which includes the regulations). The purpose of the Agreement, which was an agreement between the Government of the Republic of South Africa and the Governments of the then independent (or quasi-independent) TBVC states, was clearly to introduce a uniform system in terms of which persons who had suffered loss arising out of the driving of motor vehicles in the Republic of South Africa or any of the TBVC states through personal injuries or the deaths of persons who owed them a duty of support would be able to recover compensation from the Fund or one of its appointed agents. To this end article 40 provided that the Fund or its agents would be liable to

persons who suffered such loss if the drivers or owners of the motor vehicles[11] in question were negligent.

[27] The purpose of creating a uniform system of liability throughout the Republic of South Africa and the TBVC states would be defeated if the Minister were able by regulations applicable only in the territory of one of the participating states to cut down or render conditional the unconditional liability provided for in article 40 of the Agreement. This provides a further reason for holding that it could never have been the intention of Parliament when it passed the 1989 Act to empower the Minister to render the unconditional liability created by article 40 of the Agreement conditional.

[28] It follows for the reasons I have given that Mr *Wessels*'s alternative submission must also be rejected.

The following order is made:

1. The appeal is upheld with costs, including those occasioned by the employment of two counsel.
2. The order of the Court *a quo* is altered to read:

   "Defendant's special plea is dismissed with costs".

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I G FARLAM

SMALBERGER JA): **Concur**

VIVIER JA): **Concur**

HOWIE JA): **Concur**

STREICHER JA): **Concur**

In this regard the question arises whether it cannot be argued that the *Mbatha*

case *supra* established that the Minister did have the power contended for and that he accordingly validly imposed the condition on the non-fulfilment of which Mr Wessels relies. The difficulty one has with the *Mbatha* decision is that counsel for the appellant in that case did not rely on section 16 of the Prescription Act and no consideration was given to the aspect of the matter dealt with above. The court was concerned with the question as to whether the Minister had the power under section 6 of Act 93 of 1989 to prescribe time limits within which procedural acts had to be done. Although it is said (at 716 C) that in cases involving unidentified vehicles "the regulation subjects the liability of the Fund to a so-called condition", later in the judgment the two year period imposed by regulation 3 (2) (a) (i) is referred to as a prescriptive period (see 720 A and E). The *Mbatha* decision can accordingly afford no support for the contention that section 6 of the 1989 Act empowered the Minister to reduce the ambit of Article 40 of the Agreement by making the rights conferred thereby on injured persons conditional on their filing a claim in the period laid down in regulation 3 (2) (a) (i).

In *Padongelukkefonds (voorheen Multilaterale Motorvoertuig- ongelukkefonds) v Prinsloo* 1999 (3) SA 569 (SCA) this Court held that regulation 3 (1)(a) (v) which provided that the Fund would not be liable in an unidentified vehicle case, where there was no physical contact between the unidentified vehicle and the injured person was *ultra vires*.

The Court's reasons for coming to this conclusion appear from the following passage (at 573 I - 575 A:

> "Artikel 40 is baie wyd in omvang. Dit dek alle gevalle van verlies of skade soos beoog wat gely is as gevolg van die nalatige bestuur van `n voertuig op enige plek in die regsgebied van die lede van die MMF, ongeag of die bestuurder of eienaar van die betrokke voertuig geïdentifiseer kan word al dan nie (*SA Eagle Insurance Co Ltd v Pretorius* 1998 (2) SA 656 (HHA) op 660H - 661B). Dit skep dus aanspreeklikheid selfs in

gevalle waar daar andersins weens die onvermoë van `n eiser om `n verweerder te identifiseer geen praktiese remedie sou wees nie. Die artikel is dus volkome in ooreenstemming met wat nog altyd beskou is as die algemene oogmerk van die Wetgewer in wetgewing van hierdie aard, naamlik om die wydste moontlike beskerming aan persone te verleen wat verlies of skade gely het soos in die artikel beoog (*Aetna Insurance Co v Minister of Justice* 1960 (3) SA 273 (A) op 286E-F). Die artikel stel geen vereiste van fisiese kontak as `n voorwaarde vir aanspreeklikheid nie. Dit is trouens gemene saak dat nêrens in die Wet of die Ooreenkoms so `n vereiste voorkom nie, ondanks die feit dat art 48 van die Ooreenkoms uitdruklik voorsiening maak vir die uitsluiting van aanspreeklikheid in sekere gevalle. Artikel 40 sluit dus nie aanspreeklikheid uit in die geval waar `n ongeïdentifiseerde voertuig nie in fisiese kontak was met `n beseerde of `n oorledene, of die voertuig waarin hy of sy gereis het nie.

Artikel 6 van die Wet magtig die Minister om regulasies uit te vaardig *'ten einde gevolg te gee aan `n bepaling van die Ooreenkoms* soos in die Republiek van toepassing' (my beklemtoning). Dit magtig nie die Minister om regulasies uit te vaardig buite die omvang en bestek van die Ooreenkoms wat nie redelikerwys nodig is om die doel van art 6(1) te bereik nie. Regulasies is ondergeskikte wetgewing voortvloeiend uit `n gedelegeerde voorskrif. `n Regulasie moet in die lig van die magtigende Wet uitgelê word, nie andersom nie (*Sekretaris van Binnelandse Sake v Jawoodien* 1969 (3) SA 413 (A) op 423E). `n Regulasie wat dus nie gevolg gee aan `n bepaling van die Ooreenkoms nie, is *ultra vires* (*Mbatha v Multilateral Motor Vehicle Accidents Fund* 1997 (3) SA 713 (HHA) op 718 C).

"Die bepaling in reg 3(1)(a)(v) dat, as voorvereiste vir aanspreekilikheid aan die kant van die MMF, daar in die geval van 'n ongeïdentifiseerde voertuig fisiese kontak moet wees, vind, soos reeds aangedui, nie

weerklank in of die Wet of die Ooreenkoms nie. Dit stel `n beperking op aanspreeklikheid wat onbestaanbaar is met die wye betekenis van Art 40 van die Ooreenkoms en wat die trefwydte daarvan verminder. Dit gee nie gevolg aan art 40 of enige ander bepaling van die Ooreenkoms nie; die teenoorgestelde is eerder waar (vgl *S v Grindrod Transport (Pty) Ltd and Others* 1980 (3) SA 978 (N) op 983F-G). Die Minister se bevoegdheid kragtens art 6(1) van die Wet is `n suiwer regulerende bevoegdheid. `n Verbod wat volgens so `n bevoegdheid opgelê word, is ongeldig *R v Williams* 1914 AD 460 op 465 en 467; *S v Perumal* 1977 (1) SA 526 (N) ). Hierdie beginsel behoort eweneens te geld waar `n reg ontneem word as gevolg van `n ongemagtigde beperking van aanspreeklikheid, soos in die onderhawige geval. Ek stem ook saam met die Hof *a quo* dat '(a)rt 6 van die Wet dui nie die bedoeling aan tot die verleen van die bevoegheid om aanspreeklikhheidsuitsluiting by wyse van regulasie neer te lê nie' (sien die gerapporteerde uitspraak op 314e-f). Die plaas van `n andersins ongemagtigde beperking op die MMJF se aanspreeklikheid is ook nie redelikerwyse diensbaar (`reasonably incidental`) aan die Minister se verlende bevoeghede nie. Gevolglik het die Hof *a quo* myns insiens tereg bevind dat reg 3(1)(a)(v) *ultra vires* is."

In my view it is clear that from the passage which I have quoted from the *Prinsloo* case that the Minister was not empowered by section 6 of Act 93 of 1989 to render the unconditional rights conferred by Article 40 conditional. It follows that *Mr Wessels's* alternative submission cannot be upheld.

The following order is made:

1. The appeal is upheld with costs, including those occasioned by the employment of two counsel;
2. The order of the Court *a quo* is set aside and substituted therefor is the following:

   "Defendant's special plea is dismissed with costs."

_____

I G Farlam.