

SOUTH AFRICA / JUDGMENT

Apdol v Road Accident Fund (5011/2011) [2012] ZAGPPHC 363 (3 August 2012)

[2012] ZAGPPHC 363**COURT**

North Gauteng High Court, Pretoria

BEFORE

Prinsloo

CASE / FILE NUMBER

5011/2011

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Source record**IN****THE NORTH GAUTENG HIGH COURT. PRETORIA /ES****(REPUBLIC****OF SOUTH AFRICA)****CASE NO:**

5011/2011

DATE: 3 August

2012

REPORTABLE

IN THE MATTER

BETWEEN

U D

APDOL.....

PLAINTIFF

AND

ROAD ACCIDENT

FUND.....DEFENDANT

JUDGMENT**PRINSLOO. J**

- [1] This case involves the question whether the reduction of the age of majority, in terms of section 17 of the Children's Act, Act 38 of 2005, ("the Children's Act") from 21 years to 18 years, with effect from 1 July 2007, can have an impact, from the point of view of prescription, on the damages claim of a minor in terms of the Road Accident Fund Act, Act 56 of 1996 ("the RAF Act").

[2] What came before me for decision, was whether or not to uphold the defendant's special plea of prescription. Because of the legal issue involved, and because the facts are common cause, no evidence was led.

[3] Before me, Mr Bergenthuin SC appeared for the plaintiff and Mr Maritz for the defendant.

The background and brief remarks about the pleadings

[4] The plaintiff, now an adult female, instituted a damages action against the defendant, in terms of the provisions of the RAF Act, to be compensated for loss of support as a result of the death of her late breadwinner who was knocked over and killed, when a pedestrian, by the insured vehicle in a collision which occurred in Mossel Bay.

The plaintiff alleges in her particulars of claim that the deceased breadwinner supported her during her lifetime and had a legal duty to do so in terms of a maintenance order. Because of the death of the breadwinner, the plaintiff lost the support altogether.

The plaintiff alleges that the sole cause of the collision between the insured vehicle and the deceased breadwinner, was the negligence of the driver of the insured vehicle. This allegation is in dispute, but it is a dispute which does not require any further attention for purposes of deciding the merits of the special plea of prescription.

[5] The special plea of prescription reads as follows:

“1.

The plaintiffs claim arose from bodily injuries allegedly sustained by the plaintiff in a motor vehicle collision, which allegedly occurred on 19 June 2004 (my note: this allegation is defective, in the sense that the bodily injuries were sustained by the breadwinner and not by the plaintiff and the claim is one for loss of support. Nothing turns on this for present purposes.)

2.

The plaintiffs claim was lodged with the defendant on 25 August 2010.

3.

The plaintiff turned 18 on 16 February 2006 and therefore became a major on the 1 July 2007 in terms of section 17 of the Children's Act, Act no 38 of 2005. Prescription therefore started to run against the plaintiff on the 1 July 2007.

4.

The plaintiff failed to lodge her claim with the defendant on or before 30 June 2010. The defendant thus pleads that a period of more than three years has elapsed from the date upon which the claim arose until the plaintiffs claim was lodged.

5.

In the premises, the defendant pleads that it does not incur any liability in respect of the plaintiffs claim in that same has become prescribed in terms of the provisions of section 23(1) of the Road Accident Fund Act, Act 56 of 1996, as amended.

Wherefore the defendant prays that the plaintiffs claim be dismissed with costs."

[6] The plaintiff filed a replication to this special plea, the relevant portions of which read as follows:

"2.

Ad paragraph 3 thereof:

The plaintiff will allege that prescription only started running on 16 February 2009. In this regard the plaintiff will allege that she was already 19 years old when the New Act came into being and that the New Act was not implemented retrospectively (my note: the 'New Act' must be the Children's Act).

Ad paragraph 4 thereof:

The contents of this paragraph is denied. The plaintiff will allege that she would have had opportunity until 15 February 2012 to lodge her claim. The plaintiff will aver that her claim had not prescribed."

Relevant dates in chronological order

[7] I list what I consider to be the relevant dates for purposes of deciding this dispute.

[8] The plaintiff was bom on 16 February 1988.

[9] The collision (arising of the cause of action) occurred on 19 June 2004.

[10] The plaintiff turned 18 on 16 February 2006.

[11] The date of commencement of section 17 of the Children's Act is 1 July 2007.

This provision reduces the age of majority from 21 to 18 and reads as follows:

"A child, whether male or female, becomes a major upon reaching the age of 18 years."

[12] The plaintiff turned 21 on 16 February 2009.

[13] The claim was lodged with the defendant on 25 August 2010 (when the plaintiff was approximately 22 years and 6 months old).

[14] The action was instituted on 27 January 2011 and the summons was served on the defendant on 7 February 2011.

The relevant statutory provisions

[15] It is convenient to quote some statutory provisions which are relevant for purposes of deciding this issue.

[16] In terms of section 1 of the Age of Majority Act, Act 57 of 1972 ("the Age of Majority Act") a person reached the age of majority at 21 years.

In terms of section 313 of the Children's Act, read with schedule 4 thereof, the whole of the Age of Majority Act was repealed with effect from 1 July 2007.

[17] The relevant portions of section 23 of the RAF Act read as follows:

"23. Prescription of claim. -

- (1) Notwithstanding anything to the contrary in any law contained, but subject to subsections (2) and (3), the right to claim compensation under section 17 from the Fund or an agent in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity of either the driver or the owner thereof has been established, shall become prescribed upon the expiry of a period of three years from the date upon which the cause of action arose.
- (2) Prescription of a claim for compensation referred to in subsection (1) shall not run against-
 - (a) a minor;
 - (b) ...
 - (c) ..."

The date of commencement of the RAF Act was 1 May 1997.

In his argument, Mr Bergenthuin also pointed out that these provisions regarding prescription, to be found in section 23 of the RAF Act, differ from, and are not subject to, the prescription provisions relating to minors (and others) to be found in, for example, sections 3 and 13 of the Prescription Act, Act 68 of 1969 ("the Prescription Act").

Mr Bergenthuin referred me to the following passage from *RAF v Mdeyide* 2011 2 SA 26 (CC) at 41H:

"There is therefore a clear reason for the difference between the Prescription Act and the RAF Act. The Prescription Act regulates the prescription of claims in general, and the RAF Act is tailored for the specific area it deals with, namely claims for compensation against the fund for those injured in road accidents. The legislature enacted the RAF Act - and included provisions dealing with prescription in it - for the very reason that the Prescription Act was not regarded as appropriate for this area."

Before me, it was common cause that the three year prescription period provided for in section 23 of the RAF Act will only start running once the minor claimant attains the age of majority.

[18] In my view, one of the most important statutory provisions, for present purposes, is to be found in section 12 of the Interpretation Act, Act 33 of 1957, which reads as follows:

"12. Effect of repeal of a law. -

- (1) Where a law repeals and re-enacts with or without modifications, any provision of a former law, references in any other law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provision so re-enacted.
- (2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not-
 - (a) revive anything not in force or existing at the time at which the repeal takes effect; or
 - (b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or
 - (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or
 - (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or
 - (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed."

[19] In concluding these references to relevant statutory provisions, and where this case involves the rights of children or minors, certain stipulations to be found in the Constitution of the Republic of South Africa, Act 108 of 1996, ("the Constitution"), should also not be overlooked.

The date of commencement of the Constitution was 4 February 1997.

The rights of children are prescribed in section 28, to be found in the chapter 2 Bill of Rights. It is useful to quote the contents of subsections (2) and (3) of section 28:

"(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section 'child' means a person under the age of 18 years."

[20] Section 39(2) reads as follows:

"(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

Conclusionary remarks

[21] When the collision occurred on 19 June 2004, and the cause of action therefore arose as intended by the provisions of section 23(1) of the RAF Act, the plaintiff was only 16 years and 4 months old. Her position was then the following:

- (1) She would still remain a minor until she turned 21, as prescribed by the Age of Majority Act, which was then still in force.
- (2) Prescription of her intended claim against the Road Accident Fund would not start running against her until she would turn 21 on 16 February 2009. Thereafter, she would have three years within which to file her claim, which she only had to do by midnight on 15 February 2012.
- (3) In the event, she lodged her claim well before the anticipated prescription date, namely already on 25 August 2010 and instituted

action in January 2011.

- (4) But for the repeal of the Age of Majority Act in terms of section 17 of the Children's Act on 1 July 2007, the question of prescription of her claim would not have arisen and she would have had the benefit of exercising her constitutionally entrenched right to have her action decided in a fair public hearing before a court - see section 34 of the Constitution.

[22] It was argued by Mr Maritz on behalf of the defendant that the position is as follows:

- (1) When section 17 of the Children's Act came into effect on 1 July 2007, repealing the Age of Majority Act at the same time in terms of section 313 read with schedule 4 of the Children's Act, the plaintiff became a major on that date.
- (2) The three year prescription period, provided for by section 23 of the Road Accident Fund Act, then started running against the plaintiff on the same date, 1 July 2007, because she was no longer a minor enjoying the protection of section 23(2)(a) of the Road Accident Fund Act.
- (3) Consequently, the plaintiff had to lodge her claim by 30 June 2010 to avoid prescription thereof. In the event, she missed this deadline by less than two months, when her claim was lodged on 25 August 2010.
- (4) Consequently, so the defendant argues, the plaintiff's claim has become prescribed. There will be no access to a trial court as intended by section 34 of the Constitution.
- (5) Where the subject of retrospectivity of legislation is to be discussed hereunder, it may be observed, as an aside, that the argument that the plaintiff turned 18 on 1 July 2007 (when, in fact, she was already 19 years and 4 months old on that date) may amount to a concession that the Children's Act, despite providing by section 17 that a child becomes a major upon reaching the age of 18 years, does not have retrospective effect. On the defendant's argument, the plaintiff only became a major on 1 July 2007, despite the fact that she already turned 18 (as provided for in section 17 of the Children's Act) on 16 February 2006.

- [23] If the argument of the defendant were to be endorsed by this court, it would mean that the plaintiff, who had lodged her claim well within the prescription period which was provided for at the time when her cause of action arose, would lose a substantial claim, probably meaning a great deal to her from a maintenance point of view, directly as a result of the repeal, by section 313 of the Children's Act read with schedule 4 thereof, of the Age of Majority Act, together with the simultaneous reduction, by section 17 of the Children's Act, of the age of majority from 21 to 18 years.
- [24] In my view, such a finding by this court would fly in the face of the clear provisions of section 12(2) of the Interpretation Act, *supra*.

In particular, as quoted, this subsection provides that where a law repeals any other law, then unless the contrary intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed

- section 12(2)(c).

For the reasons mentioned, the repeal, in the present instance, would clearly affect the plaintiffs rights under the previous law, in this case the Age of Majority Act, which enabled the plaintiff to conduct her claim without any danger of it becoming prescribed under the circumstances now contended for by the defendant. As pointed out, section 12(2)(e) also provides that the repeal shall not affect any legal proceeding or remedy acquired by the plaintiff under the law repealed and such remedy may be enforced as if the repealing law had not been passed.

- [25] Returning to the proviso in section 12(2) of the Interpretation Act, namely that the provisions there enacted shall apply "unless the contrary intention appears" I point out that I am not aware of any provision in the Children's Act indicating that it will operate retrospectively. No such provision was brought to my attention during the proceedings before me. Indeed, I pointed out that the defendant appears to concede that there is no question of retrospectivity when arguing that the plaintiff became a major only on 1 July 2007 where, in fact, she already turned 18 about sixteen months earlier.
- [26] Moreover, it seems to me that a finding such as the one contended for by the defendant, would not be in harmony with the requirements of section 28 of the Constitution read with section 39(2) thereof. The plaintiff was still a "child" as defined in section 28(3), because she was well under the age of 18 when her cause of action arose. Consequently, to interpret the legislation before me for consideration on the basis contended for by the defendant, would not, in my opinion, promote the spirit, purport and objects of the Bill of Rights, as intended by the requirements of section 39(2) of the Constitution.
- [27] I turn briefly to another argument offered on behalf of the defendant which, if I understood it correctly, amounted to the following: the effect which the promulgation of section 17 of the Children's Act had on the plaintiffs existing right to claim compensation, was merely procedural in nature in the sense that it advanced the date before or on which the plaintiff had to lodge her claim without limiting the period of three years the plaintiff had after 1 July

2007 to lodge the claim. Consequently, this repealing law dealing with procedure is retrospective. Presumably the argument is then extended (although this was not stated in heads of argument or during the proceedings before me) to a submission that the plaintiff is not entitled to rely on the protection of the Age of Majority Act or, for that matter on the protection of section 12(2) of the Interpretation Act.

The authority relied on by the defendant for this argument, such as it is, is *Curtis v Johannesburg Municipality* 1906 TS 308 at 312 where the following was said by the learned Chief Justice:

"Every law regulating legal procedure must, in the absence of express provision to the contrary, necessarily govern, so far as it is applicable, the procedure in every suit which comes to trial after the date of its promulgation. Its prospective operation would not be complete if this were not so, and it must regulate all such procedure even though the cause of action arose before the date of promulgation, and even though the suit may have been then pending. To the extent to which it does that, but to no greater extent, a law dealing with procedure is said to be retrospective."

[28] This subject is dealt with in *Minister of Public Works v Haffeejee* NO [1996] ZASCA 17; 1996 3 SA 745 (AD) where the learned judge, at 752F-753A, quotes the comment by BOTHA, JA in *Transnet Ltd v Ngcezula*

[1994] ZASCA 192; 1995 3 SA 538 (A) at 549C-D on the above-quoted passage from *Curtis*:

"Of even greater significance, for present purposes, is his statement that, to the extent which the law must regulate the procedure even though the cause of action arose before the date of promulgation, 'but to no greater extent', the law is said to be retrospective. It is implicit in the words I have emphasised that in a situation where more is involved than the straight forward application of the new procedure to a cause of action which arose before promulgation, the convenient way of saying that the law is retrospective is no longer appropriate, and that other considerations must come into play."

In *Haffeejee*, at 753B-C, the learned Judge of Appeal, MARAIS, JA, then goes on to say:

"In other words, it does not follow that once an amending statute is characterised as regulating procedure it will always be interpreted as having retrospective effect. It will depend upon its impact upon existing substantive rights and obligations. If those substantive rights and obligations remain unimpaired and capable of enforcement by the invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply. Aliter if they are not."

[29] In the present case, in my opinion, the substantive rights of the plaintiff to pursue her claim under the protection of the Age of Majority Act, which was still in force when the cause of action arose, were substantially impaired by the repealing legislation because, as illustrated, and on the argument presented by the defendant, it directly led to the claim becoming prescribed.

In the result, and on the authority of Haffejee, supra, I am of the view that the dictum in Curtis cannot be applied to this case.

[30] In any event, it seems to me to be too simplistic to regard the provisions of section 17 of the Children's Act as merely "regulating

legal procedure". It is a drastic measure with potentially wide ranging implications involving, inter alia, the capacity to enter into contracts, to get married without the assistance of a guardian and other issues. To that extent, it seems to me that the reliance on the dictum in Curtis is in any event misplaced.

[31] In Protea International (Pty) Ltd v Peat Marwick Mitchell & Co

[1990] ZASCA 16; 1990 2 SA 566 (AD) it was also held, at 568I-J, that the extinction of a contractual right of action by prescription is a matter of substantive law and not a procedural matter.

[32] It is trite that there is a presumption, when it comes to interpretation, that the legislature does not intend statutes to be retrospective in their operation - see the discussion on the subject by J R de Ville Constitutional and Statutory Interpretation p204-215 and the authorities there quoted, including Adampol (Pty) Ltd v Administrator, Transvaal 1989 3 SA 800 (AD) at 805E-808C.

[33] In all the circumstances, and particularly in view of the provisions of section 12(2) of the Interpretation Act, I have come to the conclusion that the plaintiffs claim has not become prescribed, and that the special plea of prescription should be dismissed.

The order

[34] I make the following order. The defendant's special plea of prescription is dismissed with costs which will include the costs flowing from the employment of senior counsel.

W R C PRINSLOO

JUDGE OF THE NORTH GAUTENG HIGH COURT

5011-2011

HEARD ON: 28 MARCH 2012

FOR THE PLAINTIFF: J G BERGENTHUIJN SC

INSTRUCTED BY: VAN ZYL LE ROUX INC

FOR THE DEFENDANT: N MARITZ

INSTRUCTED BY: DYASON INC

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