

SOUTH AFRICA / JUDGMENT

C.A.S obo B.H and Another v Road Accident Fund (22533/2009) [2014] ZAGPPHC 406 (4 June 2014) [2014] ZAGPPHC 406

COURT

North Gauteng High Court, Pretoria

BEFORE

M J Teffo

CASE / FILE NUMBER

22533/2009

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT

OF SOUTH AFRICA

GAUTENG LOCAL

DIVISION, PRETORIA

CASE NO:

22533/2009

DATE: 4 JUNE 2014

In the matter

between: C A S[...] SELF
 AND
 obo
 B[...] -H[...]
 First
 Plaintiff
 D[...]
 S[...]Sec
 ond
 Plaintiff
 and
 ROAD
 ACCIDENT FUND
Defendant

JUDGMENT

TEFFO, J:

INTRODUCTION

[1] The first plaintiff, Mrs C[...] A[...] S[...], instituted an action against the defendant in a personal and representative capacity as the mother and natural guardian of her two minor children, namely, D[...] S[...] and B[...] -H[...] (who were born on [...] and [...] respectively) wherein she sought compensation for loss of support arising from the death of her husband E[...] H[...] S[...] {“the deceased”} who was involved in a motor vehicle collision that occurred on 6 May 2005.

[2] The collision occurred on the Potchefstroom/Johannesburg road (N12) in the district of Fochville between motor vehicle bearing

registration letters and numbers C[...] (“the insured vehicle”) and motor vehicle bearing registration letters and numbers N[...] (“the deceased's vehicle”).

[3] At the time of the collision the insured vehicle, a mechanical horse and trailer was being driven by one R Morogo. Mr Lazarus Tshifiwa Masakona was a passenger in the insured vehicle and the deceased’s vehicle was being driven by Mr E[...] H[...] S[...] (“the deceased”).

[4] The Potchefstroom/Johannesburg road (N12) is a dual carriage way with a tarred surface. At the place where the collision occurred it runs in a northerly/southerly direction with:

4.1 traffic bound for Johannesburg travelling northwards and traffic bound for Potchefstroom travelling southwards;

4.2 two north bound lanes (one right and one left) and a single southbound lane;

4.3 the northbound lanes are separated by a broken line. There is a solid barrier line bordering the right hand northbound lane on the eastern side thereof and a broken line bordering the western side of the single southbound lane.

[5] Immediately prior to the collision:

5.1 the insured vehicle was travelling in the left northbound lane;

5.2 the deceased's vehicle was initially travelling in the southbound lane behind other traffic;

5.3 there was no traffic travelling in the right northbound lane;

5.4 the deceased's vehicle then commenced an overtaking manoeuvre of the vehicle travelling ahead of it by crossing into the right northbound lane whilst proceeding towards Potchefstroom;

5.5 before it could complete its overtaking of a vehicle in front of it ("the unidentified vehicle"), the unidentified vehicle also commenced to overtake the vehicle in front of it and it also started crossing into the right northbound

lane. In doing so it impeded the path of travel of the deceased;

5.6 in an attempt to avoid colliding with the unidentified vehicle, the deceased crossed further to his right hand side of the road into the left northbound lane where a head on collision occurred between the motor vehicle he was driving and the insured vehicle;

5.7 the collision occurred in the left northbound lane. The unidentified vehicle did not stop at the scene of the collision.

[6] In May 2010 the plaintiff amended paragraph 4 of her particulars of claim by introducing the unidentified vehicle alleging that in the alternative its driver's negligent driving caused the accident and in the further alternative that the negligent driving of both the insured and the unidentified vehicles are to blame for the accident that resulted in the deceased's death.

[7] The plaintiff further amended her particulars of claim in June 2010 by joining D[...] S[...] (who had attained the age of majority) as the second plaintiff in the action and the quantum of the claims were also amended.

[8] As a result of the plaintiffs amendment of the particulars of claim in May 2010, the defendant amended its plea in July 2010 by the insertion of a special plea of prescription.

[9] The parties prepared a statement of facts in terms of Rule 33(1) for the trial court and argued their case as a stated case on the basis of the admitted facts. Accordingly no viva voce evidence was led.

FACTS

[10] On 12 September 2006 the plaintiffs attorneys submitted a bundle of documents which consisted of the following to the defendant:

- 10.1 The statutory Form 1 claim for compensation;
 - 10.2 A copy of the affidavit by the claimant;
 - 10.3 A copy of the antenuptial contract between the deceased and the first plaintiff;
 - 10.4 Copies of the birth certificates of the two children of the deceased;
 - 10.5 A copy of the deceased's identity book;
 - 10.6 A copy of the deceased's death certificate;
 - 10.7 A copy of the Officer's Accident Report (OAR);
 - 10.8 Copies of the police docket;
 - 10.9 A copy of the letter of employment from the deceased's employer;
 - 10.10 Claimant's consent to access of police and medical documentation;
 - 10.11 The special power of attorney granted to claimant's attorneys.
- [11] Three claims were lodged and received by the defendant. One by the First plaintiff in her personal capacity as the wife and surviving spouse of the deceased and two in her representative capacity as the mother and natural guardian of the two minor children of the deceased.
- [12] Form 1 was signed by the first plaintiff on 14 February 2006. Paragraph 2 of form 1 requires the particulars of the motor vehicle from the driving of which the claim arises. It consists of subparagraphs
- (a) to (d). The particulars of the insured vehicle have been completed under subparagraphs (a) and (c) while subparagraphs (b) and (d) were not completed. Subparagraph (b) requires the name and address of the owner of the vehicle at the time of the accident and the words "not applicable" have been completed. Subparagraph (d) which states "if the identity of neither the owner nor the driver has been established", state "(i) any additional information about the motor vehicle; (ii) what steps were taken to establish the identity of the owner of the motor vehicle has been scratched out.
- [13] From the way paragraph 2 of form 1 was completed, it clearly indicates to the defendant that the accident was caused by the insured vehicle (the truck) identified in subparagraph (a). Although the particulars of the owner of the vehicle were not completed in subparagraph (b), the claimant was able to complete the particulars of its driver in subparagraph (c). The claimant therefore alleges on paragraph 2 of form 1 that the driver of the insured vehicle described in subparagraph (a)'s negligent driving caused the accident.
- [14] On 18 September 2006 the defendant acknowledged receipt of the claims.

[15] The entire contents of the SAPS Fochville docket under MAS49/05/2005 was amongst the supporting documents lodged with the defendant pertaining to the collision. Coupled with this, the docket also contained the affidavit of Mr Lazarus Tshifiwa Masakona who was a passenger in the insured vehicle.

[16] The affidavit of Mr Masakona reads as follows:

“On 6 May 2005 at approximately (time not recorded) I was with the driver of the truck travelling from Potchefstroom to Johannesburg. On the road (N12) we got involved in an accident. We were on the right lane on our way while we saw traffic in front of us on the other lanes. While busy driving there came an Isuzu van, tried to overtake the car in front of it He overtook and suddenly realised that the car in front of him also overtook. The van came to the wrong lane straight to the truck. The driver of the truck tried to get out of the road and it was already late. It hit the truck and the truck faced where it came from. The head of the truck got lost and it started to roll with us ...”

[17] The OAR gave a brief description of the accident as follows:

It is stated that the truck was travelling towards Johannesburg on the N12. The bakkie came from the opposite direction, tried to overtake and so it went into the truck head on.”

[18] Summons was issued against the defendant on 10 April 2009. It was served upon it and the action was defended.

[19] The matter was set down for trial on 29 July 2010.

[20] On 17 May 2010 the plaintiffs gave notice of their intention to amend paragraph 4 of their particulars of claim.

[21] The initial paragraph 4 of the first plaintiffs particulars of claim read as follows:

“On 6 May 2005 and at approximately 13h15 and at or near Fochville, a motor vehicle collision occurred between motor vehicle C[...], hereinafter referred to as the insured vehicle and driven by R Morogo, hereinafter referred to as the insured driver with motor vehicle N[...], driven by E Siepker, hereinafter referred to as the deceased.”

[22] In terms of the notice of amendment paragraph 4 of the particulars of claim was amended as follows:

“On 6 May 2005 and at approximately 13h15 and at or near Fochville, motor vehicle N[...], driven by E S[...], hereinafter referred to as the deceased, was forced into the lane of travel of vehicle C[...], hereinafter referred to as the insured vehicle, and driven by R Morogo, hereinafter referred to as the insured driver, by an unidentified vehicle, who executed an overtaking manoeuvre in the path of travel of vehicle N[...].”

[23] Further to the above a new paragraph numbered 6 was inserted to rely in the alternative on the negligence of the driver of the unidentified vehicle. The paragraph reads as follows:

“6. In the alternative, the collision was caused due to the negligent driving of the driver of the unidentified insured vehicle, by the unidentified insured vehicle, who was negligent in one, more or all of the following respects:

6.1 He/she failed to keep a proper look-out;

6.2 He/she failed to avoid the collision when, by the exercise of reasonable care and skill, he/she could and should have done so;

6.3 He/she failed to take into account the rights of other users of the road, and in particular those of the plaintiff;

6.4 He/she travelled at a dangerous and excessive speed in the prevailing traffic circumstances;

6.5 He/she failed to apply the brakes of his/her vehicle at all, alternatively properly and/or timeously, further in the alternative, he/she drove a vehicle the brakes whereof were defective, whilst he/she could and should have reasonably have been aware of such defects;

6.6 He/she failed to exercise and/or maintain any, alternatively proper control over his/her vehicle;

6.7 He/she failed to adjust his/her driving sufficiently or at all to cater for the conditions on the surface of the road;

6.8 He/she omitted to drive with due skill/diligence, caution and/or circumspection;

6.9 He/she executed an overtaking manoeuvre at a time when it was unsafe to do so;

6.10 He/she forced the deceased's vehicle into the lane of travel of motor vehicle CPZ 295 FS;

6.11 He/she drove in close proximity to the deceased's vehicle;

6.12 He/she failed to take into account the right of way of the deceased's vehicle;

6.13 He/she drove too close to the middle of the road thereby causing an obstruction to the deceased's vehicle ”

[24] A new paragraph numbered 7 was inserted to rely further in the alternative on the combined negligence of the insured driver and the unidentified insured driver.

The paragraph reads:

“7. In the further alternative, the collision was caused due to the combined, joint and/or simultaneous negligence of the identified insured driver and/or the unidentified insured driver, each of whom was negligent in one, more or all of the respects mentioned above.”

[25] The defendant denied all the allegations made in the initial paragraph 4 of the plaintiffs particulars of claim and put the plaintiff to the proof thereof.

[26] It further pleaded in the alternative that in the event of it being held by the above Honourable Court that a collision occurred as alleged by the plaintiff and that the driver of the insured vehicle was negligent (which is denied) then the defendant pleads that such negligence was not the cause of the collision. It pleaded that the collision was caused by the sole negligence of the deceased, he being negligent in one or more or all of the following respects:

“3.2.1 he failed to keep a proper look-out;

3.2.2 he failed to avoid the collision when, by taking reasonable or proper care when he both could, and should, have done so;

3.2.3 he failed to take sufficient account of the presence and/or alternatively visibly intended actions of the insured vehicle;

3.2.4 he failed to take due regard of the other road users, in particular, the insured vehicle;

3.2.5 he failed to exercise proper or adequate control over his vehicle;

3.2.6 he failed to apply the brakes of his vehicle timeously, or at all;

3.2.7 he drove at an excessive speed under the prevailing traffic conditions.

3.3 Further alternatively, and in the event of the above Honourable Court finding that the driver of the insured vehicle acted negligently as alleged (which is denied) and that such negligence contributed to the cause of the collision (which is denied) then, and in that event, the Defendant avers that the deceased was also negligent and that his negligence contributed to the cause of the collision."

[27] After receipt of the plaintiffs notice of amendment of her particulars of claim as referred to supra, the defendant also filed its notice of amendment of its plea by filing a special plea which reads:

“1. SPECIAL PLEA

1.1 In terms of the notice of amendment dated the 14 May 2010, Plaintiff alleges in the alternative that a certain unidentified motor vehicle caused/or contributed to the accident on 6 May 2005.

1.2 The defendant submits that such claims are submitted in terms of Section 17(1)(b) of the Road Accident Fund Act 56 of 1996 in terms whereof according to the Regulations made in terms of Section 26 of the Act (regulation 2(3) thereof), all claims submitted in terms of Section 17(1)(b) of the Act shall irrespective of all legal disability become prescribed within a period of two (2) years;

1.3 The defendant pleads that, in the event that the court finds that the alleged unidentified motor vehicle was the sole cause of the accident, in that event, Plaintiffs claim would have become prescribed as against the unidentified motor vehicle at the date of the amendment.

WHEREFORE the defendant prays that the Plaintiffs claim be dismissed with costs.

2. MAIN PLEA

2.1 By amending paragraph 3 thereof and in particular deleting paragraph 3.1 in toto and replacing same with the contents that read:

The defendant admits that a motor vehicle with registration letters and numbers C[...] and driven by R Morogo as alleged was involved in an accident with a motor vehicle with registration letters and numbers N[...] driven by the deceased, however negligence is denied, Plaintiff is put to the proof thereof

- [28] The issue for determination is whether a claim for compensation lodged with the Road Accident Fund (the Fund) established in terms of the Road Accident Fund Act 56 of 1996 (the Act) is rendered invalid because the claim form conveys that it is a claim under section 17(1) (a) of the Act whereas it is evident from the accompanying documents that such a claim is in terms of section 17(1)(b) of the Act.
- [29] The defendant contends that the failure by the plaintiffs to properly complete all the particularity required in the claim forms is fatal to all 3 (three) claims lodged with it and the additional information furnished with the claim forms is incapable of remedying the shortcomings.
- [30] It also contends that the claims as lodged do not constitute claims in terms of section 17(1) (b) of the Act read with section 24(1) (a) of the Act.
- [31] By so saying the defendant contends that in so far as reliance is placed on the role which the unidentified motor vehicle played in the collision, the plaintiffs' claims prescribed after the expiry of two years of the death of the deceased.
- [32] Although the plaintiffs concede that paragraphs 2 and 4 of the claim form are incomplete and silent as to the unidentified vehicle which was involved in the collision, they contend that the information supplied in the claim form must constitute a claim in terms of section 17 read with section 24 and must be sufficient to enable the defendant to decide whether to resist or settle the claim or enter into settlement negotiations.
- [33] Counsel for the plaintiffs submitted that the particulars not furnished in paragraphs 2 and 4 of each claim form concerning the unidentified vehicle are not fatal to the plaintiffs' case in that all supporting documents submitted with the claim form should be taken into account in deciding whether or not there has been substantial compliance. It was contended that the information contained in the police docket, and particularly the affidavit of Mr Lazarus Masakona was sufficient to invite the attention of the defendant to the involvement of the unidentified insured vehicle in the collision and to enable the defendant to properly investigate the claims.

- [34] Whereas the plaintiffs agree that in terms of section 24(1)(a) of the Act a claim for compensation and the accompanying medical report shall be set out in the prescribed form, which shall be completed in all its particulars, they contend that the purpose of the claim form is to enable the defendant to enquire into the claim and investigate it.
- [35] After arguing the matter both counsels advised me that the issue raised in this matter were also raised in the case of Pithey v Road Accident Fund (A375/2010)
- [2012] ZAGPPHC 158 (10 August 2012) which matter came before the full bench of this division. I was further advised that an appeal of the full bench decision was pending in the Supreme Court of Appeal (SCA). I was then requested not to decide on the matter until the SCA had pronounced its judgment. I reserved judgment on 7 November 2012 and after the SCA judgment was handed down in April 2014 I then finalized my judgment.
- [36] The full bench of this division heard the matter after Sapire AJ upheld the defendant's special plea to the effect that no claim for compensation in terms of section 17(1) (b) of the Act was lodged with the defendant on the plaintiffs behalf prior to summons being issued. The facts in this matter are briefly summarised as follows: Ms Pithey (the appellant) instituted an action against the Fund in the South Gauteng High Court, Johannesburg, for damages she suffered as a result of a motor vehicle collision which occurred on 29 November
2004. She alleged in her particulars of claim that on 29 November 2004 on the N12 national road between Westonaria and Albertyn, a collision occurred between a motor vehicle of which she was the driver and a truck driven by a Mr M Ntshangase. She further alleged that the sole cause of the said collision was the negligence of the driver of an unidentified blue minibus which was itself not directly involved in the collision. She was unable to establish the identity of either the owner or the driver of the blue minibus at the material time. The claim fell under section 17(1) (b) of the Act. The Fund defended the action and filed a special plea and a main plea disputing liability. In the special plea the Fund averred that the appellant's claim was unenforceable because the appellant had not lodged a claim in respect of an unidentified vehicle within a period of two years from the date on which her claim arose, as required in terms of Regulation 2(3) of the regulations in terms of section 26 of the Act.
- [36] At the trial before the court of first instance (Sapire AJ) the issue for determination was whether the appellant's claim as set out in her claim form read with the documents she lodged with the Fund, constituted a valid claim in terms of the Act and the regulations promulgated thereafter.
- [37] The appeal was dismissed with the full bench holding that the appellant failed to appreciate that her claim form conveyed the incorrect information to the respondent. It also held that even if the most lenient approach was to be adopted to the manner in which the claim was submitted, the special plea was and remains unanswerable. The full bench held that the delivery of the form, duly completed, has always been a peremptory requirement. It was

further held that the distinction between claims submitted in terms of section 17(1)(a) on the one hand, and section 17(1)(b) on the other has always been regarded as fundamental and therefore the correct identification of the claim to be instituted either as one in which the insured vehicle is identified, or as one in which the opposite is the case, must be regarded as peremptory. Accordingly the court held that the unambiguous identification of a claim as one that arose as a result of an identified vehicle cannot be substituted by the filing of a contradictory affidavit as one caused by an unidentified vehicle.

[38] The appellant successfully appealed to the SCA in *Pithey v Road Accident Fund* (3/9/13)

[2014] ZASCA 55 (16 April 2014). In para [25] of its judgment, the SCA held that:

“It is true that there is, in terms of the Act and regulation 2(3), a fundamental distinction between a claim under s 17(1)(a) and one under s 17(1)(b). This cannot, however, be taken to mean that even when the Fund, within the prescribed two year period is in possession of information which a claimant is statutorily obliged to supply and which, when read in tandem with the claim form, which in the circumstances of this case the claimant clearly intended, reveals that the claim really relates to an unidentified vehicle, the Fund is entitled to repudiate the claim on the basis that no valid claim had been made. Nor ought the Fund to benefit from its own failure to clarify with minimal time, effort and expense, whatever confusion the claim form and the attached documents revealed. This is not a case where no information was supplied to the Fund in relation to the claim in terms of s 17(1)(b). At worst, for the appellant, she supplied conflicting information which could be undone with relative ease. Significantly, it has not been suggested that there is even a whiff of a fraudulent or made-up claim.”

[39] The order of the full bench and that of Sapire AJ was set aside and replaced with an order dismissing the special plea.

[40] The crux of this decision is that while it is crucial to properly identify whether a claim falls under s 17(1)(a) or (b), in a claim form (form

1) the furnishing of contradictory information in the documents that accompany the claim form, does not invalidate the claim where the category of the claim can still be determined.

[41] In the present matter the plaintiffs supplied the defendant with the claim form together with supporting documentation before the expiry of the two year period as contemplated in Regulation 2 of the regulations, from the date on which the cause of action arose. Even if the information on the claim form refers to an identification claim as against an unidentification claim (a claim where neither the owner nor the driver of the vehicle has been identified) as soon as the Fund had received the supporting documents, in particular, the sworn statement of Mr Lazarus Masakhona and the OAR, the Fund should have investigated the matter and alerted the plaintiffs of the discrepancy especially taking into account that the Fund did not object to the validity of the claim. In as much as full completion of the claim form is peremptory, documents that accompanied the claim form cannot be ignored. It is my view that the claim form cannot be read in isolation of the supporting documents that were lodged with it. The Fund can therefore not benefit from its failure to investigate and enquire about the claim after receipt of the claim forms and the supporting documents that were

attached to it. It would not be in the interest of justice to penalise the plaintiffs for its failure to identify the unidentified insured vehicle on the claim form while the supporting documents mention it. Indeed it would have been different if the supporting documents did not mention the unidentified vehicle at all.

[42] The defendant's special plea of prescription in this matter is therefore without merit.

[43] In the result I make the following order

43.1 The defendant's special plea is dismissed with costs.

M J TEFFO

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

COUNSEL FOR THE PLAINTIFFS: ETIENNE BOTHA

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