

SOUTH AFRICA / JUDGMENT

Karsten and Another v Road Accident Fund and Others (1962/2012) [2024] ZANCHC 29 (22 March 2024)

[2024] ZANCHC 29

COURT

Northern Cape High Court, Kimberley

BEFORE

Tyuthuza

CASE / FILE NUMBER

1962/2012

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IN THE HIGH COURT OF
SOUTH AFRICA
(NORTHERN CAPE
DIVISION, KIMBERLEY)

Case

Number: 1962/2012

Heard: 25 January 2024

Delivered: 22 March 2024

Reportable:

YES/NO

Circulate

to Judges: YES/NO

Circulate

to Regional Magistrates: YES/NO

Circulate

to Magistrate: YES/NO

In

the matter between: MAGDALENA
 KARSTEN
 First Plaintiff/Applicant
 WILLOW-JEAN
 BERNADETTE KARSTEN
 Second Plaintiff/Applicant
 and
 ROAD
 ACCIDENT FUND
 First Defendant/Respondent
 POSTNET
 SOUTHERN AFRICA (PTY) LTD
 Second Defendant/Respondent
 THE
 SOUTH AFRICAN POST OFFICE SOC LTD
 Third Defendant/Respondent

Coram: Tyuthuza AJ

JUDGMENT

Tyuthuza AJ

INTRODUCTION

1. Ms Magdalena Karsten and Ms Willow-Jean Bernadette Karsten, the first and second plaintiffs (the plaintiffs) issued summons against the First Defendant, the Road Accident Fund (RAF), for damages relating to a motor vehicle collision. In the alternative, the plaintiffs claim damages against the second and third defendants, Postnet Southern Africa (Pty) Ltd (Postnet) and South African Post Office SOC Limited (Post Office) in the event that the court finds the plaintiffs' main claim against the first defendant was not valid and/or timeously lodged, for a breach of duty of care.
2. In response to the plaintiffs' claim the RAF, has raised a special plea of prescription in that:
 - 2.1 In terms of section 23 (1) and 23(4) of the Road Accident Fund Act 56 of 1996 (the Act), the right to claim compensation from the first defendant, in the case where the identity of the driver or the owner of the motor vehicle from whose driving the loss or damage arose is known, becomes prescribed upon the expiry of three years from the date upon which the cause of action arose.
 - 2.2 The plaintiffs' claim arose on the 27th of April 2008. The last day for the lodging of these claims was thus the 26th of April 2011.
 - 2.3. The claims were posted by registered mail on 26th April 2011.

2.4. The plaintiffs failed to submit a claim to the RAF within three years from the date upon which the cause of action arose.

3. In the replication to the special plea the plaintiffs plead that they complied with the provisions of sections 23(1), (4) and 24(1)
 - (b) of the Act in that they duly lodged their claims by registered mail on 26 April 2011. The plaintiffs plead that the RAF is therefore barred from raising prescription as a defence.
4. The matter has been set down to hear the special plea. Prior to the hearing, the Post Office filed a notice on 17 January 2024 wherein it advised that it would raise a point in law in relation to section 131(4)(a) of the Companies Act[1], on the basis that it has been placed under business rescue. I propose to consider this point first.

SECTION 133 MORATORIUM

5. The question arising for consideration under this head is whether the plaintiffs' claim against the Post Office is precluded by the general moratorium on legal proceedings against companies under business rescue in terms of section 133(1) of the Companies Act 71 of 2008 (the Companies Act).
7. It is common cause that the Post Office was placed under business rescue by the Gauteng Division on 10 July 2023. The third defendant submits that as a result of the order that places it under business rescue, the court lacks jurisdiction to entertain this matter or to grant the relief sought against it, regard being had to section 133 (1) of the Companies Act.
9. Mr Ali for the Post Office, submitted that the matter should not have been enrolled. Instead, he argued, the appropriate application to lift the moratorium should have been brought or the consent of the business rescue practitioner sought. He further contended that the moratorium is not unimpeachable and that the plaintiffs can approach the court to uplift same but have failed to do so.

ANALYSIS

10. The Post Office was joined in these proceedings in March 2016, pursuant to an application by the plaintiffs for the joinder of Postnet and the Post Office. The plaintiffs base their claim against the Post Office on negligent misrepresentation because it permitted Postnet to use its official registered postage slips. In so doing, the Post Office misrepresented to the public that Postnet was the Post Office's lawful agent. As a result of the Post Office's wrongful and negligent breach, the plaintiffs suffered damages for which Postnet and the Post Office are jointly and severally liable. In the alternative, the plaintiffs claim an amount of R115,295.20 from Postnet and the Post Office.
11. As already alluded to, section 133 of the Companies Act makes provision for a general moratorium on legal proceedings commenced or proceeded with against a company whilst the company is under business rescue. It is not in dispute that when the present proceedings

were instituted against the Post Office it was not in business rescue. It is trite that although there is an automatic moratorium on legal proceedings against the company in business rescue, this is not an absolute bar and it merely serves as a procedural limitation on a party's rights of action.[2]

12. In *Timasani (Pty) Ltd (in business rescue) and Another v Afrimat Iron Ore (Pty) Ltd* (91/2020) [2021] ZASCA 43 (13 April 2021), the following was stated at paragraph 25:

“Section 133 must be read as a whole: the different subsections of a provision dealing with the same subject matter must not be considered in

isolation but read together so as to ascertain the meaning of the provision. Section 133(1) is a general moratorium provision that applies in relation to the assets and liabilities of the company at the stage when business rescue comes into effect. It protects the company against legal action in respect of claims in general, save with the written consent of the business rescue practitioner and failing such consent, with the leave of the court. This Court has stated the purpose of s 133(1) as follows:

‘It is generally accepted that a moratorium on legal proceedings against a company under business rescue is of cardinal importance since it provides the crucial breathing space or a period of respite to enable the company to restructure its affairs. This allows the practitioner, in conjunction with the creditors and other affected parties, to formulate a business rescue plan designed to achieve the purpose of the process.’

13. The plaintiffs did not invoke section 133(1) of the Companies Act in order to proceed with the matter against the Post Office. It goes without saying that without the consent of the practitioner or the leave of the court, the present action against the Post Office cannot proceed. The upshot of this is that the point in limine in relation to the Post Office is upheld. I now turn to consider the special plea of prescription raised by the RAF.

SPECIAL PLEA

14. Ms Valerie Botes (Ms Botes), the plaintiffs' instructing attorney, testified on their behalf. She testified that the plaintiffs approached her offices in June 2008 and instructed her to institute a loss of support claim against the RAF. She lodged the claim on 26 April 2011 at the Postnet Midrand, where an official from Postnet assisted her and completed the registered slip. Ms Botes is of the view that the plaintiffs' claim did not prescribe in that she received proof of lodgement.
15. Under cross-examination, she testified that she first consulted with the plaintiffs on 08 June 2008. The doctor completed the MMF1 form on 21 April 2011 and that the claim was ready for lodgement from 22 April 2011. She intimated that she was informed at Postnet that the documents would reach the post office on the same day before 15:00. She further explained that she had made use of the services of Postnet before and none of the documents so previously sent were repudiated. She testified that she did not insist on a stamp because she had received a tracking number and the receipt.

16. The RAF called one witness, Mr Adams, its employee engaged as the Acting Team Leader: Litigation Cape Town Office. He has been in the employ of the first defendant for six years as a senior claims handler and in February 2022 was appointed as the Acting Team Leader. He testified that he has had knowledge of the claim since June 2022. According to him, the claim is an identified claim as contemplated in section 17(1) of the Act in that the identity of the insured driver was established by the plaintiffs. Mr Adams testified that the accident occurred on 27 April 2008 and that the plaintiffs had a period of three years within which to lodge their claim, and thus the last day to lodge the claim was 26 April 2011.
17. Mr Adams stated that the plaintiffs lodged the claim by sending it to the Cape Town Office by registered post. He intimated that the first defendant determines the date of the lodgement of the claim, by looking at the date on which the sender posted the mail from the local post office. The date of the registered slip was the 26th of April 2011 whereas the date on the post slip was not an indication of the date of the lodgement as the slip is completed by the sender. He indicated that the post office would usually stamp the post slip. He testified that the date on the envelope, which the first defendant receives, is the date upon which the document is sent to the Fund. Under cross-examination, he said that the date of 28 April 2011 is the date on which the claim was lodged. Consequently, the claim was lodged out of time and unenforceable. The plaintiffs were informed.
18. Section 17 of the Road Accident Fund Act makes the RAF liable to pay compensation in respect of claims arising from the driving of a motor vehicle where either the identity of the owner or driver has been established (section 17(1)(a)) or where it has not (section 17(1)(b)).
[3]
19. Section 23 of the Act provides 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”.
20. A claim for compensation referred to in section 17 of the Act shall be sent or delivered to the Fund in accordance with the provisions of section 24, by registered post or delivered by hand at the agent’s registered office or local branch office.
21. Section 24 of the Act deals with the procedure for the lodgement of claims and states as follows:
“24. Procedure. —
 - (1) A claim for compensation and accompanying medical report under section 17 (1) shall—

- (a) be set out in the prescribed form, which shall be completed in all its particulars;
 - (b) be sent by registered post or delivered by hand to the Fund at its principal, branch or regional office, or to the agent who in terms of section 8 must handle the claim, at the agent's registered office or local branch office, and the Fund or such agent shall at the time of delivery by hand acknowledge receipt thereof and the date of such receipt in writing."
22. What arises for consideration is the question whether the claim was lodged on 26 April 2011 or 28 April 2011. Section 7 of the Interpretation Act[4], provides-

"7. Meaning of service by post. —

Where any law authorizes or requires any document to be served by post, whether the expression 'serve', or 'give', or 'send', or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a registered letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post." (own emphasis)

23. In terms of section 24 of the Act, a claim is lodged with the RAF once it is sent by registered post or delivered by hand. It has been held that the word "sent" in section 24(1)(b) must be given its ordinary grammatical meaning. It is not to be confused with delivery. Thus, the crucial date is that on which the relevant documents were dispatched in the post.[5]
24. The plaintiffs' receipt and registered slip indicates that the claim was lodged on 26 April 2011 and not 28 April 2011 as alleged by the RAF. They thus established that the claim was sent to Postnet on 26 April 2011. It is the sending of the document that amounts to delivery and not the receipt thereof. As to when the RAF received the post is, in my view, irrelevant.
25. In that premise, I find that the plaintiffs did comply with the provisions of Section 24 of the Act and that the claim was lodged on 26 April 2011. The plaintiffs' claim has thus not prescribed as envisaged in terms of section 23 (1) and 23 (4) of the Road Accident Fund 56 of 1996.
26. I make the following order:
- 1. The proceedings against the third defendant, South African Post Office SOC Limited, are suspended pending the finalisation of the business rescue proceedings against the third defendant.
 - 2. Ms Magdalena Karsten and Ms Willow-Jean Bernadette Karsten, the first and second plaintiffs, are to pay the third defendant's costs for 25 January 2024.
 - 3. The Road Accident Fund's special plea of prescription is dismissed with costs.

T TYUTHUZA

ACTING JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

APPEARANCES:

On behalf of the Plaintiff: Adv N Snellenburg SC On the instruction of: Stiglitz Botes Attorneys c/o Van der Wall Inc. On behalf of the First Defendant: Ms R Rabie On the instruction of: Office of the State Attorney On behalf of the Third Defendant: Adv N.S.H. Ali On the instruction of: Madhlopa & Thenga Inc. c/o Lulama Lobi Inc

[1] 71 of 2008

[2] Commissioner for the South African Revenue Services v Louis Pasteur Investments (Pty) Ltd (in provisional liquidation) and Others (2022) JOL 53784 (GP); 2022 (5) SA 179 (GP) at paras 55-56.

[3] 17. Liability of Fund and agents. (1) The Fund or an agent shall— (a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established; (b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established, be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.

[3] 17. Liability of Fund and agents.

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the employee's duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.

[4] 33 of 1957

[5] Saner SC (2019) Prescription in South African Law 4-58; See also Hatang v RAF

[2006] JOL 17392 (T)

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