

SOUTH AFRICA / JUDGMENT

Malinga v Road Accident Fund (12896/2001) [2011] ZAGPPHC 224; 2012 (5) SA 120 (GNP) (6 October 2011) [2011] ZAGPPHC 224

COURT

North Gauteng High Court, Pretoria

BEFORE

Phatudi

CASE / FILE NUMBER

12896/2001

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REPORTABLE

IN THE NORTH GAUTENG HIGH COURT,
PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE

NUMBER: 12896/2001

DATE:06/10/2011

In

the matter between:

ALPHEUS

MALINGA.....Plaintiff

And

ROAD

ACCIDENT

FUND.....Defendant

JUDGMENT

PHATUDI J:

[1.] The plaintiff caused issue of summons against the defendant on the 24th May 2001 claiming damages he sustained as a result of the motor vehicle collision that occurred on the 6th of September 1997. The plaintiff was a passenger in a motor vehicle with registration number RBJ 830 T driven by a certain Mpungelwa Khumalo. (Khumalo)

[2.] The plaintiff alleged that the defendant is obliged to compensate him in terms of section 17(1) (a) of the RAF Act 56 of 1996,

Firstly: On the basis that the collision was caused solely by the negligence of the driver of a motor vehicle driven by Josiah Ndaba alternatively Second: The Collision was caused solely by the negligence of Khumalo further alternatively Third: the collision was caused by the joint and simultaneous negligence of the said Ndaba and Khumalo.

[3.] He, as a result, sustained certain bodily injuries set out in particulars of claim.

[4.] The plaintiff succeeded in his application for amendment of its particulars of claim. Particulars of Claim were amended on 29 November 2010.

[5.] The amended cause of action reads:

“ On 6 September 1997, at approximately 18h00, the plaintiff was a passenger in motor vehicle bearing registration number RBJ 830 T (first insured vehicle driven by Mgungelna Kumalo, ... when an unidentified motor vehicle whereof the registration number is unknown (second insured vehicle) driven by unidentified driver and which was approaching from the opposite direction proceeded onto its incorrect site of the road thereby obstructing the line of travel of the first insured, causing the latter vehicle of necessity to swerve towards its left hand side in an endeavour to avoid a collision with the second insured vehicle Thereby colliding with a motor vehicle ... driven by Ndaba which was stationary at a stop street in another road at an intersection.

[6.] The plaintiff further alleges that the defendant is, in terms of section 17(1) (a) of RAF Act, obliged to compensate the plaintiff for damages sustained as a result of the collision.

[7.] The defendant filed a special plea that the plaintiff's claim as set out in the amended particulars of claim has prescribed.

[8.] At the commencement of the hearing, Mr Rontgen places on record that the parties have agreed on separating the determination of special plea from the rest of the claim in terms of rule 33(4) of the uniform rules of this court. I ordered separation.

[9.] Mr Ferreira, counsel for the defendant, submits that the plaintiff's claim as per amended particulars of claim is subject to the provisions of the regulation promulgated in terms of section 26 of RAF Act. He submits that regulation 2(1) stipulates that the defendant would not be liable to compensate the plaintiff unless he had complied with subsections 2(1) (a) to (d). He further submits that the regulation 2(4) provides that a claim against an unidentified driver will be extinguished upon the expiry of a period of 5 years from date upon which the claim arose, irrespective of any legal disability to which the plaintiff concerned may be subject and notwithstanding anything to the contrary in any law, unless the summons to commence legal proceedings has been properly served on the defendant before the expiry of the said period. Further thereto, the defendant pleads that the plaintiff's summons containing a claim against an unidentified driver was only served on or about 29 November 2010, which is more than 5 years from date upon which the claim arose, namely 6 September 1997.

[10.] On the other hand the plaintiff's argument is that the amended particulars of claim has not prescribed because the plaintiff seeks to enforce the same "debt" as claimed in the summons prior to the amendment.

[11.] Section 17(1) provides that 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 the motor vehicle where the identify of the owner or the driver thereof has been established.

(b) Subject to any other 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..."

[12.] Regulation 2 of the regulations published (under (GMR 770) in Government Gazette 31249 of 21 July 2008, under section 26 of the RAF Act in respect of provision for liability of Fund in terms of section 17(1) (b) provides "2(1) (a) A claim for compensation referred to in section 17(1) (b) of the Act shall be sent or delivered to the fund in accordance with the provisions of section 24 of the Act, within two years from the date upon which the cause of action arose.

(b)

(c) In the event of a claim having been lodged in terms of paragraph (a) such claim shall not prescribe before the expiry of a period of five

(5) years from the date upon which the cause of action arose.

[13.] Regulation 2(2) provides that:

"Notwithstanding anything to the contrary contained in any law a claim for compensation referred to in section 17(1) (b) of the Act shall be sent or delivered to the fund within two years from the date upon which the cause if action arose irrespective of any legal disability to which the third party concerned may be subject."

[14.] On perusal of the claim form (MMF1) lodged with the defendant, it is clear that the plaintiff lodged two claims on the 30 March 1999. The first claim is in terms of section 17(1) (a) and the other in compliance with section 17(1) (b). Mr Ferreira concedes to that effect.

[15.] In my evaluation of the evidence, it is not in dispute that summons were issues on the 24th of May 2001 and served on the defendant on 15 June 2001.

[16.] It is apparent that plaintiff pursued the claim in terms of section 17(1) (a) of the Act. The cause of action set out in paragraph 5 of the initial particulars of claim support the claim envisaged in terms of section 17(1)(a). The plaintiff's cause of action is based on the identified driver or identified owner of the motor vehicle. The plaintiff's alternatives thereto are also on the premise of provision of section 17(1) (a).

[17.] In the amended particulars of claim the plaintiff still allege that the defendant is in terms of section 17(1)(a) obliged to compensate him for damages sustained as a result of the collision that occurred on 6 September 1997.

[18.] Paragraph 5 of the amended particulars of claim sets out a different cause of action with an element of unidentified motor vehicle as the cause of the accident. The defendant allege that the new cause of action is tantamount to service of new summons which, as Mr Ferreira submits, has prescribed in that 5 years has expired from the date upon which the cause of action arose.

[19.] The plaintiff submits that the claim lodged on 30 March 1999 is substantially the same “debt” as claimed in the summons prior to the amendment.

[20.] Mr Ferreira submits that the Supreme Court of Appeal set the principle out in *Geldenhuis & Joubert v Van Wyk & Another*

2005 (2) SA 312, that a “debt” as considered in the Prescription Act 68 of 1969 is not applicable on arguments and allegation relating to prescription referred to in terms of section 17(1) (b) of the Act read with regulation 2(1) (a) ;(b) and (c)

[21.] He sets out the said principles in his heads of arguments as follows:

Ad paragraph 11 - ‘In the case of an unidentified vehicle ... there is no identifiable wrongdoer to be sued and the injured party is remediless’

Ad paragraph 12- It is for this reason that the distinction the legislation makes between identified vehicle and unidentified vehicle

cases fundamental.

[22.] It is further stated in *Geldenhuis* that:

“The reason for the sharp differences in treatment between identified and unidentified vehicle claims is plain.” The court quoted Harms JA from Mbatha case where he pointed out “there are good reasons for having stricter requirements for unidentified vehicles cases.”

[23] Mr Rontgen refers me to *Bezuidenhout v RAF* 2003(6) SA 61 SCA. The court dealt with the provision of regulation 2(1) (d) (which has since been repealed) that required physical contact with unidentified vehicle. His argument has no basis for purposes of this matter since the defendant concedes that the plaintiff lodged a claim against unidentified motor vehicle.

[24.] The issue to be determined is whether the summons were issued within the prescribed time or not as required in terms of regulation 2(1)(c).

[25.] It is clear from the unamended summons that the plaintiff did not sue the defendant on the basis of unidentified motor vehicle. It is further clear that the plaintiff set out his cause of action in the particulars of claim relying on the provisions of section 17(1) (a).

[26.] In my view, the amended particulars of claim introducing the new cause of action on unidentified motor vehicle is indeed tantamount to issuing of “new summons” for purposes of compliance with section 17(1)(b) read with regulation 2(1)(a) and (c).

[27.] It is further my view that the plaintiff failed to comply with the said provisions in that he failed to cause issue of summons in accordance with the provisions of regulation 2(1)(c).

[28.] There are indeed good reasons for having stricter requirements for claims in unidentified vehicle cases. The legislature enacted the section 17(1) (b) read with the regulations 2(1) (a) to (c) to enable the Road Accident Fund to (i) investigate and to (ii) find evidence that will controvert the claimant’s allegation.

[29.] Based on the above, I find the plaintiff’s claim to have prescribed.

[30.] It is trite law that costs follow the event. I find no basis to apportion the costs as submitted by Mr Rontgen. The defendant

succeeded and is entitled to his costs.

I, as a result, make the following order:

1. The plaintiffs claim as against the unidentified driver of an unidentified motor vehicle has prescribed.
2. The plaintiffs alternative claim against the unidentified driver of an unidentified motor vehicle is dismissed with costs.”

AML PHATUDI J

Date of hearing: 5th October 2011

Date of Judgment: 6 October 2011

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Prepared on 12 October 2026 · Esheria