

SOUTH AFRICA / JUDGMENT

Masizana v Road Accident Fund (3224/2012) [2017] ZAECHGHC 7 (17 January 2017) [2017] ZAECHGHC 7

COURT

Eastern Cape High Court, Grahamstown

BEFORE

P.W. Tshiki

CASE / FILE NUMBER

3224/2012

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE, GRAHAMSTOWN)

Case

no: 3224/2012

Date

heard: 11th

November 2016

Date

delivered: 17th

January 2017

In

the matter between: ELIZABETH
 NOMLAMLELI MASIZANA
 Plaintiff
 vs
 ROAD
 ACCIDENT FUND
 Defendant

JUDGMENT

TSHIKI J:

- [1] In this matter the plaintiff Elizabeth Nomlamleli Masizana, an unemployed female, is suing the Road Accident Fund in terms of section 17 of the Road Accident Fund Act 56 of 1996 for compensation for the bodily injuries to herself which she sustained in a motor vehicle accident. The accident occurred on the 29th January 2007 at Norpoort and in Middleburg in the Eastern Cape Province wherein she sustained injuries when a motor vehicle with registration letters and numbers [C...] (“the insured motor vehicle”) overturned as a result she was injured. At the time of the accident, she was a passenger in the said motor vehicle and the insured vehicle in question was being driven by one TK Bhunce. The accident is said to have been due solely to the negligence of the driver of the insured vehicle, the aforesaid TK Bhunce.
- [2] As a result of the said negligence of the driver of the insured vehicle, the plaintiff has now sued the Road Accident Fund.
- [3] The Road Accident Fund has defended the action and denies that it is liable to pay the plaintiff in the amount claimed or any amount at all.
- [4] In its plea, the defendant has stated, inter alia, that the:
- “A) Plaintiff’s claim fell to be determined in terms of the provisions of the Road Accident Fund Act 56 of 1996 as it existed at the date of the collision.
- B) Plaintiff’s claim as pleaded falls within the provisions of the Transitional Provisions of Act 15 of 2012 hereafter referred to as the TPA. In terms of section 2(1) thereof, unless the plaintiff expressly and unconditionally indicated to the Fund on the prescribed form with one year of the Act taking effect (as at 13 February 2013) to have his or her claim remaining subject to the old Act, the claim of the plaintiff would be subject to the “new Act”.
- C) The New Act is the Road Accident Fund Act 56 of 1996 as amended on 1 August 2008.
- D) The plaintiff failed to expressly and unconditionally indicate to the defendant on the prescribed form within one year of the Act taking effect to have her claim subject to the old Act and accordingly the claim of third party is subject to the new Act.

E) In terms of the Road Accident Fund Act 56 of 1996 (as amended) the new Act, the right to claim compensation under section 17 from the defendant shall become prescribed upon the expiry of a period of three years from the date upon which the cause of action arose (section 23(1)).

F) In terms of section 23(3) no claim which has been lodged shall prescribe before the expiry of a period of five years from the date on which the cause of action arose.

G) The plaintiff alleges that the collision occurred on the 29th January 2007.

H) In the event that the plaintiff is able to prove that a claim was lodged in terms of section 17(4) (a) or section 24 of the Act within three years from the date upon which the cause of action arose, the prescriptive period is thus extended to five years from the date upon which the action arose.

I) Accordingly the plaintiff needed to serve summons on the defendant on or before the 28th January 2012 in order to interrupt prescription.

J) The plaintiff served summons on the defendant on 23rd October 2012 which is a period greater than the five year prescriptive period determined by section 23(3) of the Road Accident Fund Act 56 of 1996.

K) The plaintiff's claim for compensation has accordingly prescribed."

[5] For obvious reasons, I do not have to deal with the contents of the defendant's plea over.

[6] The special plea was set down for argument and was argued before me on the 11th November 2016.

[7] When the special plea was argued Mr Mayekiso appeared for the plaintiff and Ms Watt represented the defendant and the latter had to begin and proceed with the argument pertaining to the special plea.

[8] It follows, therefore, that the Court cannot, on its own motion, raise a defence of prescription. This is so because the proper way of raising a prescription in action proceedings is by way of a plea or special plea and not by way of an exception. The rationale for that is that the plaintiff may have a valid answer such as a delay or interruption to the plea of prescription which may even be raised in replication.

[9] For the plaintiff to interrupt prescription she had to serve the summons on the defendant on or before the 28th January 2012. In the present case, the plaintiff served the summons on the defendant on the 23rd October 2012 which, according to the defendant, is a period greater than the five year prescriptive period determined by section 23(3) of the Road Accident Fund Act (the RAF Act). It is for those reasons that the defendant has contended that the plaintiff's claim for compensation has accordingly prescribed.

[10] Section 23(1) of the Act 15 of 2012 "New Act" provides as follows:

Transitional Arrangements for certain categories of third parties (the Road Accident Fund Act 56 of 1996 – prior to 1 August 2008 and to provide for matters connected therewith:

“Transitional Arrangements for certain third parties:

2.1 Unless the third party expressly and unconditionally indicates to the Fund on the prescribed form, within one year of this Act, taking effect, to have his or her claim remain subject to the old Act, the claim of such third party is subject to the new Act under the following transitional regime:

- (a) subject to the remaining provisions of this Act, the cause of action of the third party is deemed to have arisen on 1 August 2008 for purposes of section 12 of the Road Accident Fund Amendment Act 2005 (Act no. 19 of 2005), and section 17(4A)(b) of the new Act.
- (b) The right of the third party to claim compensation for non-pecuniary loss is limited to a maximum amount of R25 000.00 unless –
 - (i) the third party submits a serious injury assessment report as contemplated in Regulation 3 of the Road Accident Fund Regulation, 2008; indicating a serious injury within two years of this Act taking effect; and
 - (ii) it is determined in accordance with Regulation 3 of the Road Accident Fund Regulations, 2008 that the third party suffered a serious injury.

...

2 If the third party is subject to an impediment contemplated in section 23(2) of the new Act or section 13(1)(a) of the Prescription Act, 1969 (Act no 68 of 1969) the period of one year referred to in subsection

- (1) and the period of two years referred in subsection (1)(b)(i) shall commence running when the impediment ceases to exist.”

[11] Before the judgment in *Mvumvu and Others v Minister for Transport and Another* 2011 (2) SA473 CC Section 18 of the Road Accident Fund Act 56 of 1996 limited the amount of collision victims could recover in certain circumstances to R25 000.00. The limitation applied to six categories of passengers, out of which one conveyed for reward which I will only deal with later for the purposes of this judgment.

The Constitutional Court also corrected the deeming causes of action to have arisen on 01 August 2008 and now the Road Accident Fund Amendment Act 2005 (Act 19 of 2005) and section 17(4A) of the new Act. Section 12 of Road Accident Fund Act now reads:

“Any claim for compensation under section 17 of the principal Act in respect of which the cause of action arose prior to the date on which this Act took effect must be dealt with as if this Act had not taken effect.”

[12] Furthermore, section 2(1)(e)(ii) of the Road Accident Fund Transitional Provisions Act 15 of (2012) (The TPA) and in terms of section 2(1)(a) of the TPA reads as follows:

“Subject to the remaining provisions of this Act, the cause of the third party is deemed to have arisen on 1 August 2008 for purposes of section 12 of the Road Accident Fund Amendment Act, 2005 (Act no 19 of 2005), and section 17(4A)(b) of the new Act.”

[13] It does not appear to me that the plaintiff's cause of action has arisen on the 1st August 2008. It seems to me at least from the evidence before me, that the plaintiff was injured in a motor vehicle accident which occurred on the 29th January 2007. The plaintiff was a passenger in the motor vehicle when the accident occurred. It also follows that the

provisions of the TPA are applicable to the plaintiff's claim and was a passenger in a vehicle in which he was injured in that accident.

[14] The plaintiff issued summons against the Road Accident Fund only on the 23rd October 2012 when the accident took place on the 29th January 2007 and when the driver was known. Section 23(1) of the “New Act” provides that a claim shall prescribe

within three years from the date upon which the cause of action arose where the identity of the driver is known. On the same breath section 2(1)(a) of the TPA provides that the cause of action of the third party is deemed to have arisen on 1 August 2008 for purposes of section 12 of the Road Accident Amendment Act 19 of 2005 which commenced operation on the 1st August 2008. The plaintiff only issued and served summons upon the defendant on the 23rd October 2012. By that time it was already late for the plaintiff to enforce her claim against the defendant.

[15] The defendant has raised a special plea of prescription and informed the court that the provisions of the Road Accident Fund (Transitional Provisions) Act 15 of 2012 are applicable to the plaintiff's claim as she was a passenger in the motor vehicle when the accident occurred. The proviso of the Road Accident Fund (Transitional Provisions) Act 15 of 2012 are applicable to the plaintiff's claim for the reason that the plaintiff was a passenger in the vehicle.

[16] Section 2(1)(a) of the Transitional Provisions Act 15 of 2012 (TPA) provides:

“2 Transitional arrangements for certain third parties -

- (1) Unless the third party expressly and unconditionally indicates to the Fund on the prescribed form, within one year of this Act taking effect, to have his or her claim remain subject to the old Act, the claim of such third party is subject to the new Act under the following transitional regime:
 - (a) Subject to the remaining provisions of this Act, the cause of action of the third party is deemed to have arisen on 1 August 2008 for purposes of section 12 of the Road Accident Fund Amendment Act, 2005 (Act 19 of 2005), and section 17 (4A) (b) of the new Act.
 - (b) In respect of any claim for loss of income or support the amounts adjusted in terms of paragraph (a) shall be the amounts set out in the last notice issued prior to the date on which the cause of action arose.”

[17] In the case of *Mvumvu and Others v Minister of Transport and Another* (supra) the Constitutional Court held that Parliament should cure the invalidity and Parliament did so by way of the Road Accident Fund (Transitional Provisions) Act (TPA) no 15 of

2012. Another important enactment was also the introduction of section 12 of the Road Accident Fund Amendment Act 19 of 2005 which provides:

“12 Any claim for compensation under section 17 of the principal Act in respect of which the cause of action arose prior to the date on which this Act took effect must be dealt with as if this Act had not taken effect.”

[18] In the end and in respect of any claim for loss of income or support the amounts adjusted in terms of paragraph (a) shall be the amounts set out in the last notice issued prior to the date on which the cause of action arose. This was followed by the introduction of the RAF Act 56 of 1996 which was amended on the 1st August 2008. (See also *Mvumvu and Others v Minister for Transport and another* (supra)).

[19] The Court had to consider the constitutionality of section 18 of the Road Accident Fund Act with a view to establish whether the said section which limited the claim ought to have been paid to the passengers conveyed for reward and other categories did not discriminate against such passengers. The Court held that section 9(3) of the Constitution was a violation of the rights of the passengers affected by the limitation and did so unreasonably in a manner that would be unjustifiable in an open democratic society based on human dignity, equality and freedom. It was further held that the invalidity order was to be suspended for 18 months to give Parliament an opportunity to remedy the discrimination occasioned by the limitation.

[20] However, the declaration of invalidity would not apply to claims in which a final settlement had already been reached or a final judgment had been granted before the date of the judgment. The Court also emphasized that the said provisions indirectly discriminated against poor black people, who used public transport such as buses and taxis. This is so because the impugned provisions discriminated unfairly against the applicant or plaintiff (see *Mvumvu and Others v Minister for Transport and Another* supra). In her submissions in favour of the defendant the defendant had not filed a replication to the defendant's special plea. In *Klaas v Road Accident fund* (an unreported judgment of the North Gauteng High Court) the defendant raised a special plea of prescription and that the cause of action had prescribed.

[21] It, therefore, follows that, as Ms Watt for the excipient has argued that section 12 of the Road Accident Fund Amendment Act 19 of 2005 which reads:

“12 Any claim for compensation under section 17 of the principal Act in respect of which the cause of action arose prior to the date on which this Act took effect must be dealt with as if this Act has not taken effect.”

[22] Similarly section 17(4A) of the Road Accident Fund Act provides:

“(4A) (a) The Fund shall, by notice in the Gazette, adjust the amounts referred to in subsection (4) (c) quarterly, in order to counter the effect of inflation.

(b) In respect of any claim for loss of income or support the amounts adjusted in terms of paragraph (a) shall be the amounts set out in the last notice issued prior to the date on which the cause of action arose.”

[23] In my view, the facts and issues dealt with in the matter of *Klaas v Road Accident Fund supra* referred to by both counsel herein are distinguishable from those of this case. (See also *Mvumvu and Others v Minister of Transport and Another supra*).

[24] For the above reasons, I agree with Ms Watt for the excipient that the special plea of prescription should be upheld with costs.

[25] Therefore, the order I grant is as follows:

[25.1] The defendant’s special plea is hereby upheld with costs.

[25.2] The plaintiff’s claim is hereby dismissed with costs.

P.W. TSHIKI

JUDGE OF THE HIGH COURT

For the plaintiff

:

Mr Mayekiso

Instructed by

:

Mili Attorneys

GRAHAMSTOWN

Ref: Mr S Vapi

For the defendant :

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Prepared on 10 October 2026 · Esheria