

SOUTH AFRICA / JUDGMENT

Ntoni v Road Accident Fund (2158/2007) [2015] ZAECPEHC 34 (5 May 2015)

[2015] ZAECPEHC 34**COURT**

Eastern Cape High Court, Port Elizabeth

BEFORE

N G Beshe

CASE / FILE NUMBER

2158/2007

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**IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE DIVISION,
PORT ELIZABETH)
CASE
NO.: 2158/2007
In the matter**

between:

WELLINGTON
SEBENZILE
NTONI
Plaintiff
And
ROAD
ACCIDENT
FUND
Defendant

JUDGMENT**BESHE J:**

- [1] Plaintiff instituted action for damages against the defendant for injuries plaintiff sustained in an accident as contemplated in Section 17 (1) of the Road Accident Fund Act 56 of 1996 (the Act). Plaintiff alleges that on or about the 21 of September 2002 and on the N2 Highway between Thornhill and Jeffreys Bay a collision

occurred between a motor vehicle where the identity of neither the owner nor the driver thereof could be established, and the plaintiff,

who was a pedestrian. He further alleges that the accident was caused by the sole negligence of the driver of the unidentified vehicle. That as a result of the collision he suffered severe damages to his lower limbs which resulted in his right leg being imputed. And that as a result of the injuries he sustained, he suffered damages in the total amount of R668 000.

- [2] It is common cause that summons in this regard were served on the defendant on the 9 October 2007. This date falls outside the 5 year prescription period for plaintiff's claim. This prompted the defendant to raise a special plea wherein a point was taken that plaintiff's claim has prescribed and is unenforceable in law. In terms of Regulation 2 (4) of the Regulations published in terms of the Act "The liability of the Fund in respect of any claim sent or delivered to it as provided in sub regulation (3) shall be extinguished upon expiry of a period of 5 years from date upon which the claim arose, irrespective of any legal disability which the third party concerned may be subject, and notwithstanding anything to the contrary in law, unless the summons to commence legal proceedings has been properly served on the Fund before the expiry of the said period". The 5 year period after the plaintiff's claim arose lapsed on the 20 September 2007 some 19 days before the issuing of summons by the plaintiff.
- [3] Prior to the summons being issued, correspondence was exchanged between plaintiff's attorneys and the Fund. It appears to be common cause that plaintiff's claim was received by the Road Accident Fund on the 8 March 2004. On 20 April 2004, Mr Cairns of the Road Accident Fund (The Fund) addressed a letter to plaintiff's attorneys acknowledging receipt of plaintiff's claim documentation. In the same letter, the Fund objected to the validity of the claim on the basis that plaintiff had not complied with Regulation 2 (1) (c) and referred the plaintiff to the judgment in *Road Accident Fund v Thugwana* case number 575/2002. Regulation 2 (1) (c) provides that:

"(1) in the case of any claim for compensation referred to in section 17 (1) (b) of the Act, the fund shall not be liable to compensate any third party unless"

- (c) the third party submitted, if reasonably possible within 14 days after being in a position to do so, an affidavit to the police in which particulars of the occurrence were fully set out."

The Thugwana case referred to above, was concerned with the validity of Regulation 2 (1) (c), with whether it was ultra vires or not. Reversing the decision of the court a quo, the SCA found that the regulation was not ultra vires.[1] As to whether the regulation is peremptory – Cloete JA had this to say at paragraph [11]: "That brings me to the question whether the regulation is peremptory. It clearly is. It provides a penalty for non-compliance, namely the fund incurs no liability to the claimant. That is decisive."

- [4] In October 2005, plaintiff's attorneys forwarded an affidavit that was submitted by the plaintiff to the police in connection with the collision in question. They also proffered an explanation as to why plaintiff could not submit the statement within the 14 days as required by Regulation 2 (1) (c). The explanation is as follows:

"You will note that the accident occurred on 21 September 2002, but that the client was seriously injured and only discharged from hospital on 12 November

2002. As client's leg was amputated he reported the matter 4 weeks later as soon as was reasonably possible to do so."

In response, the Fund required an explanation as to why it was not possible for the plaintiff to report the accident to the police sooner than 12 December 2002. An explanation was provided on behalf of the plaintiff. Reference was also made by the plaintiff's attorneys to two WLD (as it then was) decisions concerning the 14 day requirement. In February 2006, the Fund once again drew plaintiff's

attention to the Thugwana matter (supra) where it was stated that non-compliance with Regulation 2 (1) (c) is fatal. It was also pointed out on behalf of the Fund that it was not bound by the WLD decisions quoted by plaintiff's attorney.

- [5] In replication to defendant's special plea, plaintiff pleaded that his right to enforce his claim against the defendant was extended in the light of the Constitutional Court judgment in Engelbrecht v Road Accident Fund and Another 2007 (6) SA 96.

- [6] The court in the Engelbrecht matter was concerned with the constitutionality of Regulation 2 (1) (c). The court found that the court in the Thugwana matter was correct in concluding that the regulation in question must be observed.[2] But that the imperative character of the regulation does not render it immune to challenges on the basis of unconstitutionality. After a careful analysis of the requirements of the regulation and the purpose it is designed to achieve vis-a-vis the harm it inflicts in the event of non-compliance therewith, the court concluded as follows:

"For all these reasons the respondents have failed to show that regulation 2 (1) (c) is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. I accordingly find that regulation 2 (1) (c) is inconsistent with s34 of the constitution."

Section 34 of the Constitution guarantees that disputes be settled by a court of law (Access to courts).

- [7] Mr Van der Linde SC for the defendant submitted that based on the dictum in the Thugwana matter, in 2003, plaintiff did not have an enforceable claim against the defendant. Further that prescription could not run in respect on a non-existent claim. He further submitted that plaintiff's claim was revived or resuscitated by the Constitutional Court in the Engelbrecht matter.

- [8] Section 12 (3) of the Prescription Act 68 of 1969 provides that “A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising

reasonable care”.

- [9] I was referred to an unreported decision of the Gauteng division in Steven Zulla Levenson and Fluxmans Incorporated case number 14/27503 dated 7/3/2015. At paragraph 13 of the judgment the court stated that:

“[13] It is not disputed that the applicant only became aware of the legal position with regards to contingency fee agreements in April 2014. The respondent submits that the applicant has confused knowledge of the facts, on the one hand, with knowledge of legal position, on the other. With reference to Classen v Bester 2012 (2) SA 404 (SCA), it is trite that the applicant cannot rely upon his ignorance of the legal invalidity of the agreement, as it was held in par [15] that “... knowledge of legal conclusions is not required before prescription begins to run.’ The respondent further contends that the applicant, on his own version, was aware of the respondent’s identity and of the facts from which the alleged debt arose already in 2008, and the claim has therefore become prescribed.”

After setting out the facts of the Claasen matter, the court concluded as follows at paragraph 15:

“The invalidity of a common law contingency fee agreement is a fact and not a legal conclusion” and later

“In Claasen the respondent was aware that no provision was made in the deed of sale for a price at which he could buy back the farm. The facts in Claasen are therefore distinguishable from facts in casu.” The applicant in the Levenson matter sought an order declaring a contingency fee agreement invalid, void ab initio and of no force and effect. The claim in respect of which a contingency fee agreement was entered into had since been settled. The application seeking a declaration in respect of the contingency fee agreement was launched after the Constitutional Court declared a common law contingency agreement invalid in Ronald Bobrolt & Partners v De La Guerre and Another 2014 (3) SA 134 on the basis that it did not comply with the formalities of the Act. The court in the Levenson matter found that the invalidity of a common law contingency fee agreement is a fact and not a legal conclusion.

- [10] In casu there is no issue in so far as the identity of the debtor is concerned. As far as the knowledge of the facts from which the debt arises, plaintiff contends that it only became apparent to him that he had an enforceable claim against the defendant after the

Engelbrecht decision, which changed the position that was enunciated in Thugwana.

- [11] To counter plaintiff’s submission that it was a result of defendant pointing out to plaintiff that he did not have an

enforceable claim due to failure to comply with Regulation 2 (1)

- (c) and the Thugwana case, that plaintiff did not issue summonses, Mr Frost for the defendant argued that that did not stop the plaintiff from serving defendant with the summons within the period of five years. That plaintiff did nothing to pursue his claim. Even though he had threatened to issue summons after being made aware of his failure to comply with Regulation 2 (1) (c) and the consequences of not doing so. Further that the defendant did not have a duty to apprise the plaintiff of what the law states.

Further that plaintiff only served summonses on the 9 October 2007 a while after the Engelbrecht judgment was delivered. It is indeed so that the Engelbrecht judgment was rendered in March 2007. The summons in this matter was issued in September

2007. There is no evidence of how and when the plaintiff learnt of the Engelbrecht judgment. We know from the particulars of claim that prior to the collision in question, plaintiff was employed in a dairy farm earning R500.00 per month. As a result of the collision his right leg was amputated. There can be no doubt that information, not to mention developments in law could not have been within his easy reach. Whatever the case plaintiff could only have learnt of the dictum in Engelbrecht after March

2007. As regards the evidentiary burden, in *Macleod v Kweyiya* 2013 (6) SA 1 SCA at page 6 paragraph [10], the following was stated:

"[10] This court has repeatedly stated that a defendant bears the full evidentiary burden to prove a plea of prescription, including the date on which the plaintiff obtained actual or constructive knowledge of the debt."

[12] In the period after the Thugwana declaration as regards Regulation 2 (1) (c) and the one in Engelbrecht, no purpose would have been served by plaintiff issuing and serving summons because his claim was not enforceable against the Road

Accident Fund. It had been dealt a fatal blow in the Thugwana matter. He did not have an enforceable claim after Thugwana but the possibility that he could have an enforceable claim loomed large only after the Engelbrecht case in 2007. I am therefore not persuaded that his claim for damages against the defendant has prescribed. As no prescription could not run in respect of a non-existent claim.

[13] For these reasons, the following order will issue:

The special plea is dismissed with costs including the costs consequent upon the employment of two counsel.

N G BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

For the Plaintiff : Adv: Van der Linde & Adv: Mouton

Instructed by : RAYNO PEO ATTORNEYS

23 Cape Road

Central

PORT ELIZABETH

Tel.: 041 – 373 1475

Ref.: Mr R Peo/Liesl/NT005

For the Defendant : Adv: A Frost

Instructed by :

FRIEDMAN SCHECKTER

75 Second Avenue

Newton Park

Tel.: 041 – 395 8416

Ref.: Mr Scheckter/rk/L05911

Date Heard : 21 April 2015

Date Reserved : 21 April 2015

Date Delivered : 5 May 2015

[1] Road Accident Fund v Thugwana 2004 (3) SA 169 at 174-5 at paragraph 15.

[2] Para 28 (at 104 D – E)

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