

SOUTH AFRICA / JUDGMENT

Road Accident Fund v Ndaba (A184/06)

[2008] ZAGPHC 236 (30 July 2008)

[2008] ZAGPHC 236**COURT**

High Courts - Gauteng

BEFORE

BR du Plessis, MF Legodi, LM Molopa

CASE / FILE NUMBER

A184/06

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA (TRANSVAAL PROVINCIAL DIVISION)****Case****No: A184/06****Date****heard: 4 June 2008****Date****of judgment: 30 -07-2008****In****the matter between:**ROAD
ACCIDENT FUND
Appellant
and
JOSEPH
NDABA
Respondent**JUDGMENT****DU PLESSIS J:**

- [1] The respondent was injured in a motor vehicle collision and has instituted a third party claim against the appellant. The appellant filed a special plea contending that the respondent's claim has become prescribed. In the circumstances a brief account of events in chronological order is called for.

[2] The respondent was born on 14 September 1977. He was injured in the accident on 24 July 1986 when he was between eight and nine years old. According to the respondent's particulars of claim, the identity of the insured

motor vehicle and that of the driver thereof are known. The respondent attained majority on 14 September 1998 and just under three years later, on 15 May 2001. he lodged a claim with the appellant for the payment of damages arising from his injuries. The appellant did not pay. and on 17 May 2002 the respondent issued summons.

[3] The matter came before Vilikazi AJ, who, by agreement between the parties, was only called upon to decide whether the respondent's claim had become prescribed. The learned judge found for the respondent and dismissed the appellant's special plea of prescription. Before us now is an appeal against Vilikazi AJ's judgment and order.

[4] Since the date of the relevant accident until the respondent instituted action against the appellant, three different Statutes governed third party claims.

[5] On the date of the accident. 24 July 1986. third party claims were governed by the Motor Vehicle Accidents Act, 84 of 1986 ("the 1986 MVA Act"). On 1 May 1989. before the respondent had attained majority, the Multilateral Motor Vehicle Accidents Fund Act, 93 of 1989 ("the MMF Act") came into operation. Section 3(a) of the MMF Act provided that as "... from the commencement of this Act ... the application of the provisions of the Motor Vehicle Accidents Act. 1986 (Act No. 84 of 1986). shall be suspended for as long

as the Agreement applies in terms of section 2 (I shall later deal with an important proviso to this subsection.) On 1 May 1997, still before the respondent had attained majority, before he had lodged his claim with the appellant and before he had instituted action, the Road Accident Fund Act, 56 of 1996 ("the 1996 RAF Act") came into operation. In terms of section 27 read with Part I of the Schedule to the 1996 RAF Act. the 1986 MVA Act and the MMF Act were repealed.

[6] Each of the three Statutes contains a provision that prescription does not run against a minor (See section 14(1)(b)(i) of the 1986 MVA Act, article 56 of the Agreement forming part of the MMF Act and section 23(2)(a) of the 1996 RAF Act). It is therefore manifest that prescription began to run against the respondent on 14 September 1998 when he became a major. The essential issue is what the applicable prescriptive period is. The prescriptive periods in the respective Statutes differ and it is. therefore, necessary to determine which of the Statutes governs the respondent's claim. I start with the current 1996 RAF Act.

[7] The 1996 RAF Act was current when the respondent became a major and when he instituted his claim. Section 28(1) of that act, however, provides that "this Act shall not apply in relation to a claim for compensation in respect of which the occurrence concerned took place prior to the commencement of this Act in terms of a law repealed by Section 27, and any such claim shall be dealt with as if this Act had not been passed". The "occurrence concerned" in this case took

The structure of the MMF Act was that it made an agreement between South Africa and certain former independent states part of our domestic law.

place prior to the commencement of the 1996 RAF Act and while the 1986 MVA Act was in operation. Section 27 of the 1996 RAF Act repealed the 1986 MVA Act "in terms of which the occurrence took place. It is therefore plain that the respondent's claim must be dealt with as if the 1996 RAF Act had not been passed. The said section 27 also repealed the MMF Act.

- [8] When the accident in question took place, the 1986 MVA Act was still in operation. When the MMF Act came into operation on 1 May 1989, it suspended the application of the provisions of the 1986 MVA Act. Assuming, as we must, that the 1996 RAF had not been passed, the deemed position is that the MMF Act was in operation when the respondent became a major while the application of the provisions of the 1986 MVA Act was suspended.
- [9] For the appellant Mr Van Onselen submitted that the respondent's claim is governed by the 1986 MVA Act. Mr Mokutu for the respondent contended that the MMF Act is to be applied.
- [10] If Mr Van Onselen is correct, the respondent's claim had prescribed before he instituted action. In terms of the 1986 MVA Act, the relevant prescription period is two years. The respondent's claim was instituted more than two years after he had attained majority.
- [11] If the MMF Act governs the respondent's claim, it would not have become prescribed. I say that for the following reasons. Under the MMF Act, the prescriptive period applicable to the respondent's claim initially was two years

from the date upon which he became a major (See article 55 read with 56(a) of the Agreement as it read prior to its amendment by Proclamation 102 of 1991). With effect from 1 November 1991, while the respondent was still a minor, the prescriptive period was changed as follows. A claim would prescribe three years after the date upon which it arose unless a claim had been lodged with the appellant within the three year period in which event it would prescribe only five years after the claim arose (See articles 55 and 57 after the amendment of the Agreement by Proclamation 102 of 1991). Under the MMF Act, the respondent's claim had not become prescribed when Proclamation 102 of 1991 introduced the extended prescription periods: the respondent was still a minor at the time. Therefore, the respondent is entitled to the benefit of the extended period of prescription (*Swanepoel V Johannesburg City Council: President Insurance Co Ltd V Kruger* [1994] ZASCA 80; 1994 (3) SA 789 (A)). Having regard to the date upon which the respondent lodged his claim with the appellant and on which he instituted action, his claim did not prescribe if one applies the MMF Act.

- [12] Mr Van Onselen's argument started out from the common cause fact that, when the respondent's claim arose, third party claims were governed by the 1986 MVA Act. To apply to the claim the subsequently passed MMF Act would, so the argument went, be a violation of the rule that statutes do not apply retrospectively unless the legislature manifestly intended the contrary. In addition, counsel submitted, it would be contrary to section 3(a) of the MMF Act itself that suspended the operation of the 1986 MVA Act with the proviso "that such

suspension shall not (i) affect the previous operation of the said Act or anything duly done or suffered under the said Act; or (ii) affect any right, privilege, obligation or liability acquired, accrued or incurred under the said Act...".

- [13] I am not convinced that to apply the MMF Act to the respondent's claim would, save in one respect, amount to retrospective application thereof. A statute is retrospective if, with reference to past events and based thereon, it purports to give, change or take away accrued substantive (as opposed to procedural) rights and obligations. In the present context it must be borne in mind that the respondent's claim is founded in the common law of delict. Neither the 1986 MVA Act nor the MMF Act created such a claim. These statutes, and their predecessors, provided that certain claims known to the common law of delict arising from motor vehicle accidents were to be instituted against a fund in the nature of an insurance fund and not against the actual wrongdoer. Thus, section 3(1) of the 1986 MVA Act established "a juristic person to be known as the Motor Vehicle Accident Fund" against which certain claims had to be instituted (See also section 8 and 12 of the MVA Act).
- [14] The detail of the mechanism used is not now important, but the MMF Act established a new fund called the MMF against which claims were to be lodged. The MMF Act provided that the "Motor Vehicle Accident Fund established by section 3 of the Motor Vehicle Accidents Act, 1986, shall be closed, all amounts credited to that fund immediately before (the) ... commencement (of the MMF Act) shall vest in the MMF and all liabilities and rights, existing as well as accruing, of the said Motor Vehicle Accident Fund shall devolve upon the MMF" (Section 3(b)). In practice, therefore, claims instituted after the commencement of the MMF Act had to be instituted against the MMF. In that respect the MMF Act is retrospective, but it contains a clear provision that it must be applied retrospectively. I might add that even this was not a change of substance in that the same funds, albeit administered by a different entity, remained available to pay compensation.
- [15] While the MMF Act introduced new claims procedures and, as I have pointed out, an extended prescription period, it did not effect any changes to the substance of the rights and obligations of the parties. In this regard I must point out that counsel were invited to identify any changes to the parties' substantive rights brought about by the enactment of the MMF Act. They were afforded an opportunity to do the necessary research and to file supplementary heads of argument. Neither counsel could identify any such change to substantive rights.
- [16] In view of what I have said, the MMF Act did not purport to affect past events in the sense of giving, changing or taking away accrued substantive rights and obligations other than the one I have mentioned. The only possible exception is the extension of the prescriptive period but, as has been said, no "one can be said to have a vested right in there being a particular period of prescription" (*Kruger v President Insurance Company Ltd* 1994 (2) SA 495 (D&CLD) at 506A).

[17] I conclude, therefore, that to apply the MMF Act to the respondent's claim would not amount to retrospective application of the MMF Act beyond its clear provision to that effect. Counsel for the appellant referred us to judgments of the

appeal court wherein the 1986 MVA Act was applied albeit that the claims were instituted against the MMF (See for instance *Multilateral Motor Vehicle Accidents Fund v Radebe* [1995] ZASCA 80; 1996 (2) SA 145 (AD) at 147B to D). In those cases the present issue was not pertinent, however.

[18] Even if I am wrong, and applying the MMF Act to the respondent's claim would amount to retrospective application, there are important exceptions to the presumption against retrospective application of statutes. First, a statute that introduces new rules of procedure must be applied from its inception "even though the cause of action arose before promulgation" (*Curtis v Johannesburg Municipality* 1906 TS 312; See Steyn: *Die Uitleg van Wette* (5th ed.) p. 90). It follows that the fact that the accident in question occurred before the MMF Act was passed, does not mean that the MMF Act cannot be applied in this case. In the second place, it is an exception to the presumption against retrospective application "as die wet 'n eksepsie of vrystelling invoer of afskaf (Steyn op. cit. p. 94). Voet (1.3.17) specifically mentions that this exception has been applied to cases where, before a claim became prescribed, the period of prescription was extended. In such a case the extended period was applied (Gane's translation Vol 1 p.48). This is in accordance with the general rule that benefits that the legislature bestows on subjects must be applied as widely as possible (Steyn p.49).

[19] I have quoted the proviso to section 3(a) of the MMF Act. For the reasons already stated, nothing in it precludes the application in this case of the MMF Act.

[20] In the result, the learned judge a quo correctly dismissed the appellant's special plea of prescription. The following order is made: The appeal is dismissed with costs. BR du Plessis JUDGE OF THE HIGH COURT I agree. MF Legodi JUDGE OF THE HIGH COURT I agree. LM Molopa JUDGE OF THE HIGH COURT

[20] In the result, the learned judge a quo correctly dismissed the appellant's special plea of prescription.

The following order is made:

The appeal is dismissed with costs.

BR du Plessis

JUDGE OF THE HIGH COURT

I agree.

MF Legodi

LM Molopa

Appellant's legal representatives: Adv. CR van Onselen FourieFismer Inc. Mr CP Fourie/lde/R354.

Respondent's legal representatives: Adv. E Mokutu Morlanthe Inc. Mr Motlanthe/mva/GV/N0222.

Appellant's legal representatives:

Adv. CR van Onselen FourieFismer Inc.

Mr CP Fourie/lde/R354. Respondent's legal representatives: Adv. E Mokutu Morlanthe Inc.

Mr Motlanthe/mva/GV/N0222.

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