

SOUTH AFRICA / JUDGMENT

Shabalala v Road Accident Fund (12777/04) [2006] ZAGPHC 84 (29 August 2006) [2006] ZAGPHC 84

COURT

High Courts - Gauteng

BEFORE

M. B. Labe

CASE / FILE NUMBER

12777/04

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IN THE HIGH COURT OF SOUTH AFRICA (WITWATERSRAND LOCAL DIVISION) Case No:
2004/12777 Nelson John Shabalala

Plaintiffs The Road Accident Fund

Defendant JUDGMENT Labe J: INTRODUCTION [1] This matter comes before me as a stated case in terms of rules 33(1) and 33(6) of the Uniform Rules of Court (the rules). [2] The plaintiff sued the defendant for the payment of damages arising out of a collision between him and a motor vehicle in Katlehong. [3] The question to be decided by me is whether the plaintiff complied with his obligations in terms of section 17(1)(b) of the Road Accident Fund Act 56 of 1996 (the Act) read with section 26 thereof and with regulation 2(1)(c) of the Regulations published under section 26 of the Act. The plaintiff contends that he did so; the defendant contends that he did not do so. [4] It was agreed that the stated case would be determined as a separate issue under rule 33(4) of the Rules. The parties had already agreed on the merits of the matter, and that if the stated case were decided in favour of the plaintiff, the plaintiff would receive 100% of his agreed and proved damages. THE RELEVANT PROVISIONS OF THE ACT AND THE REGULATIONS [5] The relevant portion of section 17(1) of the Act reads: “(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.....” [6] The relevant portion of the Regulations reads as follows: “2. (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 – (a)..... (b) the third party took all reasonable steps to establish the identity of the owner or the driver of the motor vehicle concerned; (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 concerned were fully set out; and(d).....

(2).....(3)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 claim arose, irrespective of any legal disability to which the third party concerned may be subject and notwithstanding anything to the contrary in any law.(4)The liability of the Fund in respect of any claim sent or delivered to it as provided for in subregulation (3) shall be extinguished upon the expiry of a period of five years from the date upon which the claim arose, irrespective of any legal disability to which the third party concerned may be subject and notwithstanding anything to the contrary in any law, unless a summons to commence legal proceedings has been properly served on the Fund before the expiry of the said period.(5).....

(6).....(7)The liability of the Fund in the case of any claim for compensation referred to in section 17 (1) (b) of the Act shall be subject to the provisions of the Act only to the extent that those provisions are consistent with this regulation and capable of being applied in the circumstances mentioned in the said section 17 (1) (b).”THE AGREED FACTS AS THEY APPEAR FROM THE STATED CASE[7] The agreed facts as they appear from the stated case are:“1.1The Plaintiff is Nelson John Shabalala who was born on 19 April 1984.1.2The Plaintiff was injured in a pedestrian motor vehicle collision, which occurred in Katlehong at approximately 19h00 on 15 August 2003.1.3The Plaintiff, who inter alia sustained orthopaedic injuries, was admitted to and treated at theNatalspruitHospitalat 15 August 2003 where he underwent treatment for his injuries. On the 25 August 2003 he was discharged from the hospital and was thereafter treated as an out-patient.1.4On 27 August 2003 he was taken by his elder half brother to the offices of Norman Berger & Partners Inc for the purposes of investigating a claim for damages for the personal injuries sustained by him in the said accident.1.5An affidavit setting out the circumstances of the collision as reported by the Plaintiff and his half brother was prepared.1.6It appears that the affidavit was commissioned at the South African Police Services at Katlehong on 27 August 2003, a copy of such affidavit is annexed hereto marked NJ1.1.7The Plaintiff was unable to furnish the registration numbers and letters of the offending vehicle or the name and address of the driver of that vehicle. It thus became necessary to make enquiries in order to ascertain whether the driver who had left the scene of the collision had reported the incident to the Police or not.1.8On 4 September 2003 the Plaintiff’s attorney of record telefaxed a letter to the South African Police at Katlehong requesting that they indicate whether the offendingdriver had furnished them with a report of the accident or not. The heading of that letter indicates that the Plaintiff was not personally in possession of such information, a copy of such letter is annexed hereto marked NJ2.1.9It was uncertain at that stage whether the claim which would be deal with by the Defendant would be in terms of Section 17(1)(a) (Identified motor vehicle/owner/driver) or alternatively Section 17(1)(b) (Unidentified motor vehicle/owner, driver).1.10 In11 September 2003 a claim in terms of Section 17(1)(b) was delivered to the Defendant by hand together with all supporting documentation and in particular an affidavit by both the Plaintiff and his half brother setting out particulars of the occurrence, which was sworn to on the 27 August 2003.1.11 By 28 September 2003 no response had been received from the South African Police at Katlehong and accordingly the Plaintiff ‘submitted’ an affidavit to the Police. A copy of such affidavit is annexed

hereto marked NJ3.1.12 Thereafter on 1 October 2003 the attorneys of record received a letter from the South African Police at Katlehong (dated 7 September

2003) wherein they advised, 'We have no record of your client. Kindly advise your client to report the case at Katlehong Police Station', a copy of such letter is annexed hereto marked NJ4.1.13 At the time that action had to be instituted, the Plaintiff was a minor and it became necessary to appoint a Curator ad Litem and this was duly done on 9 June 2004, who ratified all steps taken to date of her appointment." DISCUSSION [8] During the course of argument, counsel for the defendant, Mr Adv B. Joseph, contended that because of the submission of the claim by the plaintiff's attorney and documentation which included an affidavit by the plaintiff and his half brother which set out the particulars of the occurrence, the plaintiff was in a position to comply with the requirements of regulation 2(1)(c) by that date (11 September 2003). On that basis the plaintiff had fourteen days to comply with these requirements. It was common cause that such period expired on 25 September 2003. As appears from paragraph 1.11 of the agreed facts the appropriate affidavit was submitted to the South African Police Service (the SAPS) on 28 September 2003. [9] The crux of the matter is whether as at 11 September 2003 the plaintiff was in a position to comply with regulation 2(1)(c) of the regulations and whether it was reasonably possible for him to have done so. [10] Whether the claim is to be brought in terms of section 17(1)(a) or section 17(1)(b) of the Act, depends on whether the identity of the owner has been established or not. In the latter case it is proper to claim under section 17(1)(b) of the Act; in the former to claim under section 17(1)(a) thereof. In my opinion the plaintiff was not "in a position to comply with" regulation 2(1)(c) because at that date it had not been established on a balance of probabilities that the identity of the driver or owner of the insured vehicle was unknown. The plaintiff was also not in a position "reasonably" to furnish the affidavit for the very same reason namely that it had not been established on a balance of probabilities that the identity of the driver or owner of the insured vehicle was unknown. The fact that the plaintiff was able to, in fact, to give particulars of the occurrence does not alter the fact that in law his obligation in law and his ability to do so in law had not yet become operative. See *Road Accident Fund v Thugwana* 2004(3) SA 169 (SCA) at 172B – C where this was said: "[6] The regulation is not a model of clarity. The difficulty is occasioned by the double qualifications 'if reasonably possible' and 'after being in a position to do so'. In order to give meaning to both phrases one has to envisage the situation where the claimant is in a position to submit an affidavit but it is not reasonably possible for this to be done – otherwise the two phrases would be synonymous and such a construction would offend against the trite principle of statutory interpretation which strives to avoid tautology." [11] In *Mbumba v Road Accident Fund*, an unreported decision handed down in this court, in case number 14120/2004, the learned judge said that the fact that the identity of the owner of the vehicle concerned had not been established had to be proved by the plaintiff beyond a reasonable doubt. He relied upon the meaning of "establish", contained in the Concise Oxford Dictionary (See paragraph [6]). With respect, I do not agree. In my opinion, like any allegation in a civil case, the question of whether the

requisite facts have been established has to be proved on a balance of probabilities only. [12] As at 11 September 2003 all that the plaintiff was able to say about the identity of the owner or driver of the vehicle was that no one had identified himself or herself as being the owner or driver of the vehicle involved in the collision which failed to stop after the collision and disappeared from the scene. The plaintiff thought that the driver was a black man. [13] Can it be said that the fact that the owner of the vehicle or the driver thereof was unidentified had been proved by the plaintiff on a balance of probabilities? I think not. Had the defendant put in issue that the identity of the driver or owner of the vehicle had not been established on a balance of probabilities, I do not think that the court would have held that such fact had been established on a balance of probabilities. [14] I agree with the learned judge in Mbumba's case (paragraph [6]) that section 17(1) contemplates that an investigative process is to be undertaken which will enable the plaintiff or his attorney to be satisfied on a balance of probabilities that the requisite facts have been established. [15] If there is any doubt that the fact that the driver or the owner of the insured vehicle has not been established on a balance of probabilities, suspends the obligations imposed on the plaintiff in terms of regulation 2(1)(c) of the regulations that doubt must be resolved in favour of the plaintiff. See *Road Accident Fund v Makwetlane* 2005(4) SA 51 (SCA) at 56A – B (paragraph [7]) where this was said: “[7] The Act here under consideration is the latest in a long series of enactments dating back to 1942. The present Act, like its predecessors, is designed to compensate persons who are injured, or the dependants of persons who are killed in consequence of the negligent driving of motor vehicles. The Act must be given a liberal interpretation as it, again like its predecessors, is intended ‘...to give the greatest possible protection, by way of insurance, to persons who have suffered loss through a negligent or unlawful act on the part of the driver or owner of a motor vehicle’ (*Aetna Insurance Co v Minister of Justice* 1960 (3) SA 273(A) at 285E – F).” See also *Ebrahim v Minister of the Interior* 1977(1) SA 665 (A) at 674A – C and *Principal Immigration Officer v Bhula* 1931 AD 323 at 333. [16] The plaintiff has a reasonable time to establish whether the onus of section 17(1)(a) or section 17(1)(b) applies. This is in accordance with the principle that the Legislature intends in appropriate cases, to act fairly. See *Ebrahim's case* and *Bhula's case* supra *ibid*. [17] On 4 September 2003 the plaintiff's attorney telefaxed a letter to the SAPS requesting them to furnish details of the collision and inter alia the identity of the driver of the vehicle. In doing so he acted with reasonable expedition as he was only consulted by the plaintiff on 27 August 2003. It was not suggested otherwise. [18] By 28 September 2003 the plaintiff's attorney had not yet heard from the SAPS, so he submitted the affidavit required by regulation 2(1)(c) to them. I draw attention to the fact that NJ3 was commissioned on 15 October 2003; however, it was common cause that the required affidavit was submitted on 28 September 2003 and no explanation was given as to why NJ3 was commissioned on 15 October 2003. Regard being had to the terms of the stated case no explanation was necessary or relevant. (See *Dinath v Breedts* 1966 (3) SA 712(T) at 716H – 717A where this was said: “There was no denial of the allegation that the plaintiff was the owner of the property, and it is, in my view, impossible to hold that any such denial was implied in the plea. Leave to withdraw the admission was

never sought or granted, and the consequence was that, whatever the facts may have been, the action fell to be decided, and this appeal falls to be decided, on the footing that the averment introduced by the amendment was true.”) It was not the defendant’s case that the affidavit was submitted prematurely.[19] Eventually, and on 1 October 2003 the plaintiff’s attorney received a letter (dated 7 September 2003) from the SAPS to the effect that the accident had not been reported to it. In my opinion it was on 1 October 2003 that the plaintiff for the first time was able to satisfy the onus on him of proving on a balance of probabilities that the identity of the owner or driver of the vehicle had not been established. If the accident was not reported at Katlehong, and the plaintiff established that fact, it was, in my opinion, as far as he could reasonably be expected to go in satisfying the onus upon him to establish on a balance of probabilities that the identity of the driver or owner was not known. The actual facts were not in his own knowledge. This makes it easier for him to establish his case than it otherwise would have been. See: *Union Government (Minister of Railways) v Sykes* 1913 AD 156 at 173 – 174. No point was taken by the defendant that as at 28 September 2003, the plaintiff’s onus to show that the identity of the driver or owner was unknown had not been satisfied on a balance of probabilities. I do not think that the plaintiff’s attorney was dilatory in his handling of the plaintiff’s case at that stage, nor was that contention made.[20] In the circumstances I find that the plaintiff complied with the requirements of regulation 2(1)(c).[21] Although my finding in the immediately preceding paragraph disposes of the matter, I mention that Mr Ancer, somewhat faintly, argued that because the plaintiff was a minor in 2003 he did not have to comply with the requirements of regulation 2(1)(c) until he attained majority or a curator ad litem was appointed. It is not necessary for me to deal with this contention, and I do not do so, save to state that the provisions of regulations 2(3) and 2(4) appear prima facie to be against it.[22] I make the following order: 1. It is declared that the plaintiff has complied with the provisions of regulation 2(1)(c) of the Regulations published in terms of section 26 of the Road Accident Fund Act 56 of 1995. 2. The defendant is to pay the plaintiff’s costs up to the date of this order. 3. The issue of the quantum of the damages sustained by the plaintiff is postponed sine die. DATED THE DAY OF 2006 AT JOHANNESBURG _____ M. B. LABE JUDGE OF THE HIGH COURT Counsel for the Plaintiff:

Counsel for the Defendant: Adv B. Ancer SC

Adv B. Joseph Attorney for the Plaintiff:

Attorney for the Defendant: Norman Berger & Partners Inc

Brugmans Incorporated Argument was heard on 18 August 2006

IN THE HIGH COURT OF

SOUTH AFRICA

(

WITWATERSRAND

LOCAL DIVISION)

Case No: 2004/12777

Nelson John Shabalala

PlaintiffvsThe Road Accident Fund

Defendant

JUDGMENT

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J:

INTRODUCTION

[1] This matter comes before me as a stated case in terms of rules 33(1) and 33(6) of the Uniform Rules of Court (the rules).[2] The plaintiff sued the defendant for the payment of damages arising out of a collision between him and a motor vehicle in Katlehong.[3] The question to be decided by me is whether the plaintiff complied with his obligations in terms of section 17(1)(b) of the Road Accident Fund Act 56 of 1996 (the Act) read with section 26 thereofandwith regulation 2(1)(c) of the Regulations published under section 26 of the Act. The plaintiff contends that he did so; the defendant contends that he did not do so.[4] It was agreed that the stated case would be determined as a separate issue under rule 33(4) of the Rules. The parties had already agreed on the merits of the matter, and that if the stated case were decided in favour of the plaintiff, the plaintiff would receive 100% of his agreed and proved damages.

[1] This matter comes before me as a stated case in terms of rules 33(1) and 33(6) of the Uniform Rules of Court (the rules).[2] The plaintiff sued the defendant for the payment of damages arising out of a collision between him and a motor vehicle in Katlehong.[3] The question to be decided by me is whether the plaintiff complied with his obligations in terms of section 17(1)(b) of the Road Accident Fund Act 56 of 1996 (the Act) read with section 26 thereof

and

with regulation 2(1)(c) of the Regulations published under section 26 of the Act. The plaintiff contends that he did so; the defendant contends that he did not do so.[4] It was agreed that the stated case would be determined as a separate issue under rule 33(4) of

the Rules

. The parties had already agreed on the merits of the matter, and that if the stated case were decided in favour of the plaintiff, the plaintiff would receive 100% of his agreed and proved damages.

THE RELEVANT PROVISIONS OF THE ACT AND THE REGULATIONS

[5]The relevant portion of section 17(1) of the Act reads:

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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,

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.....”

[6] The relevant portion of the Regulations reads as follows:

“2. (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 –(a)

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b

) of the Act the fund shall not be liable to compensate any third party unless –

.....

the third party took all reasonable steps to establish the identity of the owner or the driver of the motor vehicle concerned;

(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 concerned were fully set out; and

(d)

(2)

(3)

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 claim arose, irrespective of any legal disability to which the third party concerned may be subject and notwithstanding anything to the contrary in any law.

A claim for compensation referred to in section 17 (1) (

) 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 claim arose, irrespective of any legal disability to which the third party concerned may be subject and notwithstanding anything to the contrary in any law.

(4)

The liability of the Fund in respect of any claim sent or delivered to it as provided for in subregulation (3) shall be extinguished upon the expiry of a period of five years from the date upon which the claim arose, irrespective of any legal disability to which the third party concerned may be subject and notwithstanding anything to the contrary in any law, unless a summons to commence legal proceedings has been properly served on the Fund before the expiry of the said period.

The liability of the Fund

in respect of any claim sent or delivered to it as provided for in subregulation (3) shall be extinguished upon the expiry of a period of five years from the date upon which the claim arose, irrespective of any legal disability to which the third party concerned may be subject and notwithstanding anything to the contrary in any law, unless a summons to commence legal proceedings has been properly served on the Fund before the expiry of the said period.

(5)

(6)

(7)

The liability of the Fund in the case of any claim for compensation referred to in section 17 (1) (b) of the Act shall be subject to the provisions of the Act only to the extent that those provisions are consistent with this regulation and capable of being applied in the circumstances mentioned in the said section 17 (1) (b).”

The liability of the Fund in the case of any claim for compensation referred to in section 17 (1) () of the Act shall be subject to the provisions of the Act only to the extent that those provisions are consistent with this regulation and capable of being applied in the circumstances mentioned in the said section 17 (1) ().”

THE AGREED FACTS AS THEY APPEAR FROM THE STATED CASE

[7] The agreed facts as they appear from the stated case are:

“1.1The Plaintiff is Nelson John Shabalala who was born on 19 April 1984.1.2The Plaintiff was injured in a pedestrian motor vehicle collision, which occurred in Katlehong at approximately 19h00 on 15 August 2003.

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The Plaintiff is Nelson John Shabalala who was born on 19 April 1984.

1.2

The Plaintiff was injured in a pedestrian motor vehicle collision, which occurred in Katlehong at approximately 19h00 on 15 August 2003.

1.3The Plaintiff, who inter alia sustained orthopaedic injuries, was admitted to and treated at theNatalspruitHospitalat 15 August 2003 where he underwent treatment for his injuries. On the 25 August 2003 he was discharged from the hospital and was thereafter treated as an out-patient.

1.3

The Plaintiff, who inter alia sustained orthopaedic injuries, was admitted to and treated at the Natalspruit

Hospital

at 15 August 2003 where he underwent treatment for his injuries. On the 25 August 2003 he was discharged from the hospital and was thereafter treated as an out-patient.

1.4On 27 August 2003 he was taken by his elder half brother to the offices of Norman Berger & Partners Inc for the purposes of investigating a claim for damages for the personal injuries sustained by him in the said accident.

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On 27 August 2003 he was taken by his elder half brother to the offices of Norman Berger & Partners Inc for the purposes of investigating a claim for damages for the personal injuries sustained by him in the said accident.

1.5An affidavit setting out the circumstances of the collision as reported by the Plaintiff and his half brother was prepared.

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1.6It appears that the affidavit was commissioned at the South African Police Services at Katlehong on 27 August 2003, a copy of such affidavit is annexed hereto marked NJ1.

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It appears that the affidavit was commissioned at the South African Police Services at Katlehong on 27 August 2003, a copy of such affidavit is annexed hereto marked NJ1.

1.7The Plaintiff was unable to furnish the registration numbers and letters of the offending vehicle or the name and address of the driver of that vehicle. It thus became necessary to make enquiries in order to ascertain whether the driver who had left the scene of the collision had reported the incident to the Police or not.

1.7

The Plaintiff was unable to furnish the registration numbers and letters of the offending vehicle or the name and address of the driver of that vehicle. It thus became necessary to make enquiries in order to ascertain whether the driver who had left the scene of the collision had reported the incident to the Police or not.

1.8On 4 September 2003 the Plaintiff's attorney of record telefaxed a letter to the South African Police at Katlehong requesting that they indicate whether the offending driver had furnished them with a report of the accident or not. The heading of that letter indicates that the Plaintiff was not personally in possession of such information, a copy of such letter is annexed hereto marked NJ2.

1.8

On 4 September 2003 the Plaintiff's attorney of record telefaxed a letter to the South African Police at Katlehong requesting that they indicate whether the offending

driver had furnished them with a report of the accident or not. The heading of that letter indicates that the Plaintiff was not personally in possession of such information, a copy of such letter is annexed hereto marked NJ2.

1.9 It was uncertain at that stage whether the claim which would be dealt with by the Defendant would be in terms of Section 17(1)(a) (Identified motor vehicle/owner/driver) or alternatively Section 17(1)(b) (Unidentified motor vehicle/owner, driver).

1.9

It was uncertain at that stage whether the claim which would be dealt with by the Defendant would be in terms of Section 17(1)(a) (Identified motor vehicle/owner/driver) or alternatively Section 17(1)(b) (Unidentified motor vehicle/owner, driver).

1.10 In 11 September 2003 a claim in terms of Section 17(1)(b) was delivered to the Defendant by hand together with all supporting documentation and in particular an affidavit by both the Plaintiff and his half brother setting out particulars of the occurrence, which was sworn to on the 27 August 2003.

1.10 In

11 September 2003 a claim in terms of Section 17(1)(b) was delivered to the Defendant by hand together with all supporting documentation and in particular an affidavit by both the Plaintiff and his half brother setting out particulars of the occurrence, which was sworn to on the 27 August 2003.

1.11 By 28 September 2003 no response had been received from the South African Police at Katlehong and accordingly the Plaintiff 'submitted' an affidavit to the Police. A copy of such affidavit is annexed hereto marked NJ3.

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By 28 September 2003 no response had been received from the South African Police at Katlehong and accordingly the Plaintiff 'submitted' an affidavit to the Police. A copy of such affidavit is annexed hereto marked NJ3.

1.12 Thereafter on 1 October 2003 the attorneys of record received a letter from the South African Police at Katlehong (dated 7 September

2003) wherein they advised, 'We have no record of your client. Kindly advise your client to report the case at Katlehong Police Station', a copy of such letter is annexed hereto marked NJ4.

1.12 Th

ereafter on 1 October 2003 the attorneys of record received a letter from the South African Police at Katlehong (dated 7 September

2003) wherein they advised, '

We have no record of your client. Kindly advise your client to report the case at Katlehong Police Station

', a copy of such letter is annexed hereto marked NJ4.

1.13 At the time that action had to be instituted, the Plaintiff was a minor and it became necessary to appoint a Curator ad Litem and this was duly done on 9 June 2004, who ratified all steps taken to date of her appointment.”

1.13 A

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and this was duly done on 9 June 2004, who ratified all steps taken to date of her appointment.”

DISCUSSION

[8] During the course of argument, counsel for the defendant, Mr Adv B. Joseph, contended that because of the submission of the claim by the plaintiff’s attorney and documentation which included an affidavit by the plaintiff and his half brother which set out the particulars of the occurrence, the plaintiff was in a position to comply with the requirements of regulation 2(1)(c) by that date (11 September 2003). On that basis the plaintiff had fourteen days to comply with these requirements. It was common cause that such period expired on 25 September 2003. As appears from paragraph 1.11 of the agreed facts the appropriate affidavit was submitted to the South African Police Service (the SAPS) on 28 September 2003.[9] The crux of the matter is whether as at 11 September 2003 the plaintiff was in a position to comply with regulation 2(1)(c) of the regulations and whether it was reasonably possible for him to have done so.[10] Whether the claim is to be brought in terms of section 17(1)(a) or section 17(1)(b) of the Act, depends on whether the identity of the owner has been established or not. In the latter case it is proper to claim under section 17(1)(b) of the Act; in the former to claim under section 17(1)(a) thereof. In my opinion the plaintiff was not “in a position to comply with” regulation 2(1)(c) because at that date it had not been established on a balance of probabilities that the identity of the driver or owner of the insured vehicle was unknown. The plaintiff was also not in a position “reasonably” to furnish the affidavit for the very same reason namely that it had not been established on a balance of probabilities that the identity of the driver or owner of the insured vehicle was unknown. The fact that the plaintiff was able to, in fact, to give particulars of the occurrence does not alter the fact that in law his obligation in law and his ability to do so in law had not yet become operative.

[8] During the course of argument, counsel for the defendant, Mr

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B. Joseph, contended that because of the submission of the claim by the plaintiff’s attorney and documentation which included an affidavit by the plaintiff and his half brother which set out the particulars of the occurrence, the plaintiff was in a position to comply with the requirement

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of regulation 2(1)(c) by that date (11 September 2003). On that basis the plaintiff had fourteen days to comply with these requirements. It was common cause that such period expired on 25 September 2003. As appears from paragraph 1.11 of the agreed facts the appropriate affidavit was submitted to the South African Police Service

(the SAPS)

on 28 September 2003.[9]

The crux of the matter is whether as at 11 September 2003 the plaintiff wa

s in a position to comply with regulation 2(1)(c) of the regulations

and whether it was reasonably possible for him to have done so

.

[10] Whether the claim is to be brought in terms of section 17(1)(a) or section 17(1)(b) of the Act, depends on whether the identity of the owner has been established or not. In the latter case it is proper to claim under section 17(1)(b) of the Act; in the former to claim under section 17(1)(a) thereof.

In my opinion the plaintiff was not “in a position to comply with” regulation 2(1)(c) because at that date it had not been established

on a balance of probabilities

that the identity of the driver or owner of the insured vehicle was unknown. The plaintiff was also not in a position “reasonably” to furnish the affidavit for the very same reason namely that it had not been established on a balance of probabilities that the identity of the driver or owner of the insured vehicle was unknown.

The fact that the plaintiff was able to, in fact, to give particulars of the occurrence does not alter the fact that in law his obligation

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See Road Accident Fund v Thugwana 2004(3) SA 169 (SCA) at 172B – C where this was said:

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Road Accident Fund v Thugwana

2004(3) SA 169 (SCA) at 172

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where this was said:

“[6] The regulation is not a model of clarity. The difficulty is occasioned by the double qualifications ‘if reasonably possible’ and ‘after being in a position to do so’. In order to give meaning to both phrases one has to envisage the situation where the claimant is in a position to submit an affidavit but it is not reasonably possible for this to be done – otherwise the two phrases would be synonymous and such a construction would offend against the trite principle of statutory interpretation which strives to avoid tautology.”

[11] In *Mbumba v Road Accident Fund*, an unreported decision handed down in this court, in case number 14120/2004, the learned judge said that the fact that the identity of the owner of the vehicle concerned had not been established had to be proved by the plaintiff beyond a reasonable doubt. He relied upon the meaning of “establish”, contained in the Concise Oxford Dictionary (See paragraph [6]). With respect, I do not agree. In my opinion, like any allegation in a civil case, the question of whether the requisite facts have been established has to be proved on a balance of probabilities only. [12] As at 11 September 2003 all that the plaintiff was able to say about the identity of the owner or driver of the vehicle was that no one had identified himself or herself as being the owner or driver of the vehicle involved in the collision which failed to stop after the collision and disappeared from the scene. The plaintiff thought that the driver was a black man. [13] Can it be said that at that stage the fact that the owner of the vehicle or the driver thereof was unidentified had been proved by the plaintiff on a balance of probabilities? I think not. Had the defendant put in issue that the identity of the driver or owner of the vehicle had not been established on a balance of probabilities, I do not think that the court would have held that such fact had been established on a balance of probabilities. [14] I agree with the learned judge in *Mbumba’s* case (paragraph [6]) that section 17(1) contemplates that an investigative process is to be undertaken which will enable the plaintiff or his attorney to be satisfied on a balance of probabilities that the requisite facts have been established. [15] If there is any doubt that the fact that the driver or the owner of the insured vehicle has not been established on a balance of probabilities, suspends the obligations imposed on the plaintiff in terms of regulation 2(1)(c) of the regulations that doubt must be resolved in favour of the plaintiff. See *Road Accident Fund v Makwetlane* 2005(4) SA 51 (SCA) at 56A – B (paragraph [7]) where this was said:

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decision handed down in this court, in case number 14120/2004, the learned judge said that the fact that the identity of the owner of the vehicle concerned had not been established had to be proved by the plaintiff beyond a reasonable doubt

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(See paragraph [6])

With respect, I do not agree. In my opinion, like any allegation in a civil case, the question of whether the requisite facts have been established has to be proved on a balance of probabilities only.[12] As at 11 September 2003 all that the plaintiff was able to say about the identity of the owner or driver of the vehicle was that no one had identified himself or herself as being the owner or driver of the vehicle involved in the collision which failed to stop after the collision and disappeared from the scene. The plaintiff thought that the driver was a black man.[13] Can it be said that

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suspends the obligations imposed on the plaintiff in terms of regulation 2(1)(c) of the regulations that doubt must be resolved in favour of the plaintiff.

Road Accident Fund v Makwetlane

2005(4) SA 51 (SCA) at 56A – B (paragraph [7]) where this was said:

“[7] The Act here under consideration is the latest in a long series of enactments dating back to 1942. The present Act, like its predecessors, is designed to compensate persons who are injured, or the dependants of persons who are killed in consequence of the negligent driving of motor vehicles. The Act must be given a liberal interpretation as it, again like its predecessors, is intended ‘...to give the greatest

possible protection, by way of insurance, to persons who have suffered loss through a negligent or unlawful act on the part of the driver or owner of a motor vehicle’ (Aetna Insurance Co v Minister of Justice 1960 (3) SA 273(A) at 285E – F).”

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Aetna Insurance Co v Minister of Justice

1960 (3) SA 273(A) at 285E – F).”

1960 (3) SA 273

See also Ebrahim v Minister of the Interior 1977(1) SA 665 (A) at 674A – C and Principal Immigration Officer v Bhula 1931 AD 323 at 333 [16] The plaintiff has a reasonable time to establish whether the onus of section 17(1)(a) or section 17(1)(b) applies. This is in accordance with the principle that the Legislature intends in appropriate cases, to act fairly.

See also

Ebrahim v Minister of the Interior

1977(1) SA 665 (A) at 674A – C and

Principal Immigration Officer v Bhula

1931 AD 323 at 333

1931 AD 323

[16] The plaintiff has a reasonable time to establish whether the onus of section 17(1)(a) or section 17(1)(b) appl

ies. This is in accordance with the principle that the Legislature

intends in appropriate cases, to act fairly.

See Ebrahim’s case and Bhula’s case supra ibid.

[17] On 4 September 2003 the plaintiff's attorney telefaxed a letter to the SAPS requesting them to furnish details of the collision and inter alia the identity of the driver of the vehicle. In doing so he acted with reasonable expedition as he was only consulted by the plaintiff on 27 August 2003. It was not suggested otherwise.

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It was not suggested otherwise.

[18] By 28 September 2003 the plaintiff's attorney had not yet heard from the SAPS, so he submitted the affidavit required by regulation 2(1)(c) to them. I draw attention to the fact that NJ3 was commissioned on 15 October 2003; however, it was common cause that the required affidavit was submitted on 28 September 2003 and no explanation was given as to why NJ3 was commissioned on 15 October 2003. Regard being had to the terms of the stated case no explanation was necessary or relevant. (See *Dinath v Breed* 1966 (3) SA 712(T) at 716H – 717A where this was said: "There was no denial of the allegation that the plaintiff was the owner of the property, and it is, in my view, impossible to hold that any such denial was implied in the plea. Leave to withdraw the admission was never sought or granted, and the consequence was that, whatever the facts may have been, the action fell to be decided, and this appeal falls to be decided, on the footing that the averment introduced by the amendment was true.")

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Dinath v Breed

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1966 (3) SA 712

17A where this was said:

“There was no denial of the allegation that the plaintiff was the owner of the property, and it is, in my view, impossible to hold that any such denial was implied in the plea. Leave to withdraw the admission was never sought or granted, and the consequence was that, whatever the facts may have been, the action fell to be decided, and this appeal falls to be decided, on the footing that the averment introduced by the amendment was true.”

)

It was not the defendant’s case that the affidavit was submitted prematurely.

[19] Eventually, and on 1 October 2003 the plaintiff’s attorney received a letter (dated 7 September 2003) from the SAPS to the effect that the accident had not been reported to it. In my opinion it was on 1 October 2003 that the plaintiff for the first time was able to satisfy the onus on him of proving on a balance of probabilities that the identity of the owner or driver of the vehicle had not been established. If the accident was not reported at Katlehong, and the plaintiff established that fact, it was, in my opinion, as far as he could reasonably be expected to go in satisfying the onus upon him to establish on a balance of probabilities that the identity of the driver or owner was not known. The actual facts were not in his own knowledge. This makes it easier for him to establish his case than it otherwise would have been. See: *Union Government (Minister of Railways) v Sykes* 1913 AD 156 at 173 – 174.

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Eventually, and on 1 October 2003 the plaintiff’s attorney received a letter (dated 7 September 2003) from the SAPS to the effect that the accident had not been reported to it. In my opinion it was on 1 October 2003 that the plaintiff for the first time was able to satisfy the onus on him of proving

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been

. See:

Union Government (Minister of Railways) v Sykes

1913 AD 156at 173 – 174.

1913 AD 156

No point was taken by the defendant that as at 28 September 2003, the plaintiff's onus to show that the identity of the driver or owner was unknown had not been satisfied on a balance of probabilities. I do not think that the plaintiff's attorney was dilatory in his handling of the plaintiff's case at that stage, nor was that contention made.

No

point was taken by the defendant that as at 28 September 2003, the plaintiff's onus to show that the identity of the driver or owner was unknown

had not been

satisfied

. I do not think that the plaintiff's attorney was dilatory in his handling of the plaintiff's case at that stage, nor was that contention made.

[20] In the circumstances I find that the plaintiff complied with the requirements of regulation 2(1)(c).[21] Although my finding in the immediately preceding paragraph disposes of the matter, I mention that Mr Ancer, somewhat faintly, argued that because the plaintiff was a minor in 2003 he did not have to comply with the requirements of regulation 2(1)(c) until he attained majority or a curator ad litem was appointed. It is not necessary for me to deal with this contention, and I do not do so, save to state that the provisions of regulations 2(3) and 2(4) appear prima facie to be against it.[22] I make the following order:

[

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] In the circumstances I find that the plaintiff complied with the requirements of regulation 2(1)(c).[

21

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it

.[

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] I make the following order:

1. It is declared that the plaintiff has complied with the provisions of regulation 2(1)(c) of the Regulations published in terms of section 26 of the Road Accident Fund Act 56 of 1995. 2. The defendant is to pay the plaintiff's costs up to the date of this order. 3. The issue of the quantum of the damages sustained by the plaintiff is postponed sine die.
1. It is declared that the plaintiff has complied with the provisions of regulation 2(1)(c) of the Regulations published in terms of section 26 of the Road Accident Fund Act 56 of 1995. 2. The defendant is to pay the plaintiff's costs up to the date of this order. 3. The issue of the

quantum

of the damages sustained by the plaintiff is postponed sine die.

DATED THE DAY OF 2006 AT JOHANNESBURG _____ M. B. LABEJUDGE OF THE HIGH COURT

DATED THE DAY OF 2006 AT

JOHANNESBURG

_____ M. B. LABEJUDGE OF THE HIGH COURT

Counsel for the Plaintiff:

Counsel for the Defendant: Adv B. Ancer SC

Adv B. Joseph Attorney for the Plaintiff:

Attorney for the Defendant: Norman Berger & Partners Inc

Brugmans Incorporated Argument was heard on 18 August 2006

Counsel for the Plaintiff:

Counsel for the Defendant: Adv B. Ancer SC

Adv B. Joseph Attorney for the Plaintiff:

Attorney for the Defendant:

Norman Berger & Partners Inc

Brugmans Incorporated

Argument was heard on 18 August 2006

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