

SOUTH AFRICA / JUDGMENT

Tusevele v Van Der Merwe (08/14641) [2009] ZAGPJHC 24 (8 June 2009)

[2009] ZAGPJHC 24**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Mathopo

CASE / FILE NUMBER

08/14641

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Source record**IN THE SOUTH GAUTENG HIGH COURT****(JOHANNESBURG)****CASE NO: 08/14641****In the matter between:**

LUBIKU TUSEVELE Plaintiff

and

SCHALK WILLEM VAN DER MERWE Defendant

JUDGMENT

MATHOPO J:

- [1] This is an action for professional negligence against the defendant an attorney arising out of a motor accident claim which has prescribed.

BACKGROUND

- [2] On the 22nd June 2002, at or about 06H00, the plaintiff a driver of a motor vehicle bearing registration numbers KVB 377GP, was involved in a motor accident with motor vehicle, a BMW, allegedly being driven by one Jerry residing at 500 Bakari Court, Cavendish Street, Mens Street, Yeoville. The accident happened at the robot controlled intersection of Rockey and Bezuidenhout Street, Bellview,

Johannesburg. The plaintiff sustained bodily injuries as a result and instructed the defendant, attorney Van der Merwe.

- [3] On the 2nd September 2002 attorney Van der Merwe instituted a third party claim against the Road Accident Fund.
 - [4] On the 13 December 2002, the defendant delivered by hand the claim documents to the Road Accident Fund, at Johannesburg. The Road Accident Fund affixed their stamp on the claim documents as proof of receipt of the claim.
 - [5] According to paragraph 2 of the claim form (RAF 1), the motor vehicle which collided with the plaintiff is described as a BMW Sedan, driven by Jerry of 500 Bakari Court, Cavendish Street, Mens Street, Yeoville, the registration numbers were not inserted, neither was the accident report from Yeoville Police Station annexed to claim documents but the case number was stated.
 - [6] Paragraph 2 of the claim form, forms the central or focal point of the dispute between the parties.
 - [7] It is common cause and not in dispute that after lodgement of the claim, the defendant wrote no less than 3 letters to the Road Accident requesting settlement proposals or an indication whether there are any outstanding requirements or not. The Road Accident fund did not advise the defendant whether there were any outstanding requirements affecting the validity of the claim or not.
 - [8] On the 22nd July 2005, the Road Accident Fund repudiated liability of plaintiff's claim for the following reasons "Hit and run" - No summons issued before date of prescription".
 - [9] The plaintiff terminated the mandate of the defendant and instructed his present attorneys Kraut in August 2005 to proceed with his claim.
 - [10] On the 17th August 2005, The Road Accident Fund following an enquiry by the plaintiff attorneys advised them that the claim had become prescribed.
 - [11] On the 3rd March 2006, the plaintiff's attorneys Kraut wrote to the Road Accident Fund seeking to persuade them to re-entertain the claim, alleging that the repudiation was based on the erroneous facts and stated as follows in their letter
- 2. Kindly be advised that your offices erroneously repudiated our clients claim on the mistaken basis that the claim was a hit and run and as no summons was issued before date of prescription the said claim had prescribed.
 - 3. We are at a loss as to why you regard this matter as a 'hit and run' as the MMF1 form, police report and Annexure 'A2' of the police report, being our client's affidavit, clearly states that a BMW motor vehicle bearing registration letter and number JKT 690GP collided with our client's motor vehicle.
 - 4. Kindly re-open your file and furnish us with your offer of settlement as a matter of urgency as our client has been prejudiced as a consequence of the foregoing.

- [12] The Road Accident Fund refused to re-entertain the claim and adopted the attitude that it had prescribed. No summons were issued against the Road Accident Fund by Kraut Attorneys with the result that five (5) years expired on the 21st June 2007 and the claim been prescribed.
- [13] The plaintiff then instituted the present proceedings against the defendant on the basis that he negligently submitted a defective or insufficient claim to the fund, because the defendant failed to ascertain the registration numbers and identity of the driver of the BMW vehicle by obtaining a copy of the accident report from Yeoville Police Station, notwithstanding that the defendant, was at all material times aware or should reasonably have been aware that the accident report was available and contained relevant information from the police. In a nutshell, the plaintiff alleges that the defendant failed to comply with the provisions of section 17(1) and 24(1) to 4 of the Act and Regulations.
- [14] The plaintiff case is that the defendant did not substantially comply with the requirements of the Act when he submitted the claim and due to its deficiency or lack of sufficient information in paragraph 2 of the claim form, the Road Accident Fund dealt with the claim as a hit and run and repudiated liability on the 20th July 2005.
- [15] The defendant denied any negligence or liability and averred that he complied with all the requirements of the Act and Regulations when he timeously lodged with the fund. In particular the defendant pleads that he endeavoured to obtain the registration numbers of the motor vehicle, particulars of the driver or owner of the offending motor vehicle and thus could not insert them in paragraph 2 of the claim form at the time when the claim was submitted

EVIDENCE

- [16] The plaintiff did not give evidence it being common cause between the parties that the merits of his claim were not in dispute. Mr Jasper Niewoudt, the Road Accident claim handler and Inspector Abrahams gave evidence in support of the plaintiff's claim.

EVIDENCE FOR THE PLAINTIFF

- [17] Mr Niewoudt, the Road Accident Fund claim handler testified that he did not personally deal with the plaintiff claim and that he had no personal knowledge of what the claim's handler did nor did not do. His evidence was based on the interpretation of the file. The essence of his evidence is that the Road Accident Fund after the claim was submitted to it did not object to the validity of the plaintiff's claim and according to section 24(5) of the Act, the claim is in law deemed to be valid in all respects. He further gave evidence that the Road Accident Fund wrote one letter to the SAP requesting inter alia, the police report, plan and key and no follow ups were made by the claim's handler. Again no letter was written to the defendant despite the latter requesting information regarding the outstanding requirements if any. According to his interpretation, the claim's handler repudiated liability because the identity of the driver or owner could not be established. He disagreed with the reasons stated in the

letter of repudiation as not correct and stated that the claim's handler made a mistake by using a wrong pro-forma. He again made reference in his evidence to a note on the file which seemed to suggest that the repudiation was based on the failure by the plaintiff to comply with regulation 2(1)(c) (the Thugwana Judgment).

- [18] During cross examination he conceded that, with regard to compliance with Regulation 2(1) (c), that the plaintiff or the defendant were never called upon to comply with it. He conceded further that, as regards the investigations relating to the merits, the Road Accident Fund did not do anything save writing one letter to the police on the 20 November 2004, i.e exactly 2 years and 4 months after the claim had been submitted. He further conceded that after writing one letter to Jerry which was not returned or responded to, the Road Accident Fund did nothing and no assessor was sent out to check the address or whereabouts of Jerry.
- [19] He again conceded that even after the defendant had written to the fund requesting an offer of settlement or indication as to any outstanding requirements to finalise the claim, the fund did not follow it up. In fact according to the file, nothing more was done with regard to the investigations of this claim. The next witness for the plaintiff was Inspector Abrahams, the investigating officer. He gave evidence that he followed up the address of Jerry, the alleged offending driver of the BMW. At his home he spoke to his mother Ms Gwangwa who told him that her son had left for Pretoria. Again when he went, he spoke to one gentlemen who introduced him as the father of Jerry and the latter was still not present at home.
- [20] During cross examination, he conceded that he did not attempt to contact Jerry on the cell numbers in the docket and he also did not follow up on the information regarding the witness in particular the passenger, who was with the plaintiff. According to him the docket was then closed as "undetected" due to lack of response from the driver.

The following admissions were agreed upon:

- a) that the defendant caused the letters in page 51,55,56,60,67 and 68 of the bundle to be sent to the South African Police Yeoville.
 - b) that the defendant received responses from the SAP and Metro Traffic Police Department and their letters are on pages 53,54 and 57 of the bundle .
 - c) that the defendant never phoned or visited the Yeoville police station to obtain a copy of the police docket.
 - d) that the defendant never followed up on the information as to the identity of Jerry as given to him by the plaintiff.
 - e) that the defendant never telephoned or visited the Road Accident Fund offices.
- [21] As a result of the aforesaid admissions the defendant closed his case without leading any evidence.

- [22] Mr Kraut who appeared on behalf of the plaintiff argued that, due to the deficiency in the claim form, a reasonable insurer in the position of the claim's handler or Mr Niewoudt would have regarded the claim as a hit and run in terms of Section 17(1) (b) instead of an identifiable claim in terms of Section 17(1) (a). He submitted further that according to the admitted facts, the defendant consulted once with the plaintiff and his failure to attend SAP Yeoville or telephone them to ascertain the details of the registration numbers of the motor vehicle and the driver or owner, amounts to negligence. He argued that the fact that the Road Accident Fund did not object to the claim within 60 days of its lodgement in terms of Section 24(5) of the Act, cannot assist the defendant because the claim form was deficient or insufficient and thus the Road Accident Fund were entitled to treat and regard it as a hit and run..
- [23] When I asked him why the plaintiff's present attorneys did not issue summons against the Road Accident Fund since five
- (5) years had not lapsed since the date of accident, he responded by saying that he advised them not to do so, because the defendant did not substantially comply with the Act and Regulations when submitting the claim documents which were invalid and thus unenforceable.
- [24] Mr Becker who appeared on behalf of the defendant, submitted that the defendant substantially complied with the Act and Regulations and that there was sufficient information on the claim documents to enable the Road Accident Fund to commence its investigations. According to the plaintiff's witness Mr Niewoudt, the Road Accident Fund in fact commenced its investigations by writing to the Police and the driver of the offending motor vehicle, Jerry. He submitted that the fund was thus in a position to decide whether to resist, settle or compromise the claim. This aspect he argued, find support in the contents of the Road Accident Fund file, as interpreted by Mr Niewoudt. Again he argued that even on the evidence of Mr Niewoudt, there was substantial compliance because the Road Accident Fund did not within 60 days object to the validity of the plaintiff's claim thus lending credence that it was valid claim. Again, even when the defendant enquired from the fund about the outstanding requirements to finalise the claim, the fund did not object to its validity and neither was there evidence on the file that the claim's handler was not satisfied with the plaintiff compliance with the Act.
- [25] He submitted further that no negligence could be attributable to the defendant because on the admitted facts he did not adopt a supine attitude to the claim but sent no less than 6 or 7 letters to the SAP and Metro Police enquiring about the police documents. He argued that his action or inaction as alleged by the plaintiff is not what caused the difficulty because plaintiff's witness Inspector Abrahams, testified that he could not locate the driver despite several visits to his home.

CONCLUSION

[26] In accept that when the defendant submitted the claim on the 13 December 2002, he substantially complied with the requirements of the Act and Regulations. In my view if the Road Accident Fund had or was of the view that there was any deficiency in the claim, it could have advised the defendant's of any outstanding requirements affecting the validity thereof.

[27] Its failure to do so, and the fact that Attorneys Van der Merwe wrote several times to them requesting an offer of settlement or attitude to the claim clearly shows that the claim as submitted by him was to all intents and purposes valid in terms of Section 24(5) of the Act which provides as follows:

If the fund or the agent does not, within 60 days from the date on which a claim was sent by registered post or delivered by hand to the fund or such agent as contemplated in subsection (1), object to the validity thereof, the claim shall be deemed to be valid in law in all respects.

[28] In my view the information in paragraph 2 of the claim form was sufficient to enable the Road Accident Fund to commence its investigations. I do not agree with the submission made by the plaintiff that a reasonable insurer in the position of the claim's handler or Mr Niewoudt could have treated and regarded the claim as a hit and run. This submission is negated by the evidence of Mr Niewoudt which is to the effect that after the claim was lodged, letters were written to the SAP, Yeoville and Jerry. On the authority of *Constantia Insurance C Ltd v Nohamba* 1986 (3) SA 27 A 39 F-I, the information supplied to the fund was sufficient to enable it to make the necessary enquiries in order to decide whether to resist or settle the claim. The fact that investigations were commenced by the fund, support, in my view the position adopted by the claim handler that the claim was valid in all respects pursuant to section 24(5) of the Act.

[29] It is sufficient if the statutory requirements concerning the claim form (in particular paragraph 2) are substantially complied with although not exactly or precisely. In *AA MUTUAL INSURANCE ASSOCIATION LTD v GCANGA* 1980 (1) SA AT 865 G-H the test was stated as follows with regard to substantial compliance i.e whether by looking at the MVA 13 form itself, having regard to all the information furnished the reasonable insurer would be prevented by the inaccuracy therein from properly investigating the claim and determining its attitude towards it.

[30] In the present case, it cannot be successfully contended that the Road Accident Fund was precluded from making such investigations because according to Mr Niewoudt such investigations were commenced after the claim was lodged. There was no evidence that the claim's handler looked at the claim form and recorded that it was deficient or lacking.

[31] Again if one looks at the information in paragraph 2 of the claim form it cannot be said that the fund was correct in dealing and treating the claim as a hit and run, because the name as well as the address of the driver were indicated. The plaintiff's witness, Mr Abrahams states

that after he was assigned the docket, he went to the address of Jerry and spoke to his parents on different occasions or dates. His parents did not deny knowledge of him but informed him that he had gone to Pretoria. This could not have been a hit and run as alleged by the plaintiff or the Road Accident Fund because not only was the identity of the driver known but his address also. In my view an unidentified vehicle denotes a motor vehicle of which the identity of the driver or owner is unknown. In the present matter, the Road Accident Fund could not hide behind its negligent failure to make investigations as a reasonable insurer, to attack the validity of the claim. Even if that was so, as the plaintiff wants to allege, this point was not raised by the fund in all its correspondences with the defendant.

- [32] I therefore cannot find any negligence on the part of the defendant. As a prudent attorney he submitted the claim and inserted all the information in paragraph 2 which was clearly and sufficient enough for the fund to commence its investigation. In addition he wrote several letters to the police and Johannesburg Metro Police requesting the police report. I am unable to agree with the plaintiff that his failure to attend or telephone the offices of SAP Yeoville amount to negligence. In my view even if he had gone there he would not have been able to obtain any better information than the one supplied to him by the plaintiff. Inspector Abrahams with all the police machinery at his disposal was also unable to locate the driver.
- [33] In the light of the foregoing it follows that the submission by the plaintiff is ill-founded and falls to be rejected. I cannot find any reason why the plaintiff did not issue summons against the fund after the latter refused to re-entertain the claim because a period of five
- (5) years had not yet expired then.

[34] Consequently I cannot find that there was any negligence on the part of the defendant.

ORDER:

The plaintiff's claim is dismissed with costs.

RS MATHOPO

JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff : MR KRAUT

instructed by : Kraut Attorneys

For the defendants : MR BECKER

instructed by : Maluleke Msimang & Associates

Date of hearing : 05 JUNE 2009

Date of Judgment : 08 JUNE 2009

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