THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED

***Eksteen v Road Accident Fund* (873/2019) [2021] ZASCA 48 (21 April 2021)**

From: The Registrar, Supreme Court of Appeal

Date: 21 April 2021

Status: Immediate

The following summary is for the benefit of the media in the reporting of the case and does not form part of the judgments of the Supreme Court of Appeal

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Today, the Supreme Court of Appeal (SCA) handed down judgment in terms of which it upheld the appellant's appeal in part against the dismissal of his action by the full bench of the Free State Division of the High Court on the basis that his claim had prescribed and that the appellant had prior to instituting his high court action, instituted an action in the Bloemfontein Magistrate's Court based on the same cause of action.

The appellant, Mr Johan Sebastiaan Eksteen, instituted an action against the respondent, the Road Accident Fund, in the Bloemfontein Magistrate's Court on 17 January 2008 for damages he suffered as a result of a motor vehicle collision which occurred on 18 June 2003. The appellant was a passenger in a vehicle driven by Mr Hyde who was alleged to be the sole cause of the collision. The appellant's claim fell under the class of claims limited to R25 000 in terms of s 18(1) of the Road Accident Fund Act 56 of 1996 (the RAF Act). However, ss 18(1) and 18(2) of the RAF Act were declared inconsistent with the constitution by the Constitutional Court in 2011 and therefore invalid. Subsequent to that declaration, the Road Accident Fund (Transitional Provisions) Act 15 of 2012 (TPA) was enacted in order to provide for a transitional statutory regime in relation to claims instituted in a magistrate's court in terms of ss 18(1) and 18(2) of the Act. Pursuant to the provisions of s 2(1)(e)(ii) of the TPA, the appellant, without first withdrawing the magistrate's court action, instituted another action in

the high court claiming the same relief save that the amount claimed in respect of non-pecuniary loss was increased from R25 000 to R600 000. The respondent defended the action instituted in the high court as it did with the action in the magistrate's court and raised two special pleas and the main plea disputing liability.

The first special plea was that the appellant's action instituted in the magistrate's court was still pending (*lis alibi pendens*) when the high court action was instituted. The second special plea was that in any event the appellant's claim had prescribed. After the parties had agreed that the special pleas be adjudicated separately from the main plea, the high court, per Jordaan J, granted an order to that affect. As Jordaan J's prima facie view on the matter was different from an earlier decision of a single judge in the same division and in other divisions of the high court in relation to the same issue, he referred the matter to the full bench for a final determination of the issue.

The full bench (Musi JP, Loubser J and Murray AJ concurring) found in favour of the respondent. In upholding the special plea of *lis alibi pendens*, it held that in terms of s 2(1)(e)(ii) of the TPA the appellant was required to first withdraw the action pending in the magistrate's court before instituting another action in the division of the high court having jurisdiction. With regard to the plea of prescription, it found that once the action had been withdrawn in the magistrate's court the appellant had 60 days within which to institute an action in a division of the high court having jurisdiction. As the appellant had failed to institute his action within the 60 day period, his claim had prescribed.

At the core of the appeal at the SCA was the interpretation of s 2(1)(e)(ii) of the TPA. The minority in the SCA held that the appellant had an election to make, whether to proceed with his action in the magistrate's court or institute another in the high court. Once the election was made, he was required first to withdraw his action in the magistrate's court and within 60 days institute another in the high court. This would afford the appellant the protection against a plea of prescription by the respondent. According to the minority, this interpretation would assist in bringing certainty and an end to legal proceedings whilst also interpreting the legislation in the context for which the TPA was enacted.

The majority agreed that the *lis alibi pendens* plea was rightly and meritoriously taken by the respondent and correctly upheld by the full bench. It, however, held that the appellant must, as a matter of fact, withdraw the action and not merely elect to do so. It found that only then would the 60 day prescription window period commence to run. This interpretation means that, absent

the withdrawal of the action first, there can be no question of the 60 day prescription period having commenced to run. This interpretation, in line with interpreting social legislation, would afford the widest possible protection and compensation to third parties against loss and damages arising out of the negligent driving of motor vehicles. Furthermore, the majority held that the facts in the agreed statement of the parties were inadequately stated for purposes of enabling the full bench to determine the fate of the special plea of prescription. For this reason, the full bench should have declined to determine the special plea of prescription.

In the result the SCA, by majority, upheld the appeal in part with costs. It also referred the action back to the high court for trial in accordance with the principles set out in the majority judgment before a differently constituted court.
