THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 799/15

In the matter between:

LUVUYO NICOLAAS MBELE **APPELLANT**

and

ROAD ACCIDENT FUND **RESPONDENT**

Neutral citation: *Mbele v Road Accident Fund* (799/15) [2016] ZASCA 134 (29 September 2016)

Coram: Shongwe, Saldulker, Swain and Zondi JJA and Dlodlo AJA

Heard: 26 August 2016

Delivered: 29 September 2016

Summary: Road Accident Fund Act 56 of 1996 – a claim for future medical expenses based on an undertaking in terms of s 17(4)*(a)*(i) of the Act in respect of an action for damages arising from a motor vehicle accident lodged in terms of s 17(1) of the Act is not subject to prescription under the Prescription Act 68 of 1969, instead, s 23(3) of the Road Accident Fund Act as it read prior to its amendment in 2008 is applicable.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Savage J sitting as court of first instance).

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and substituted with the following:

'The special plea of prescription is dismissed with costs.'

JUDGMENT

Shongwe JA (Saldulker, Swain, Zondi JJA and Dlodlo AJA concurring)

[1] This appeal concerns the question whether an undertaking that was made by the respondent, the Road Accident Fund (the Fund), in terms of s 17 (4)*(a)*(i) of the Road Accident Fund Act 56 of 1996 (the Act) for future medical and hospital expenses, has prescribed. This issue depends for its resolution on whether the relevant prescription legislative regime applicable is s 23(3) of the Act or s 11*(d)* of the Prescription Act 68 of 1969 (the Prescription Act). Related to this issue is the question of what the effect of the amendment of s 23(3) of the Act is on the respondent's plea of prescription.

[2] On 7 July 2006 the appellant was injured in a motor vehicle collision. He instituted action proceedings against the Fund in terms of s 17(1) and in accordance with the procedure set out in s 24 of the Act. The summons in that action was lodged timeously in 2007 and the claim was subsequently settled. The settlement agreement was made an order of court on 21 April 2009 and included, inter alia, payment of a lump sum in excess of R2 million for general damages and the costs of suit. Prior to the conclusion of the settlement

agreement the Fund made an undertaking, on 23 October 2008, in terms of s 17(4)*(a)*(i) of the Act to compensate the appellant for the costs of future medical and hospital expenses, after the costs have been incurred and upon proof thereof (the undertaking).

[3] In the light of the undertaking the appellant, around October 2010, sent a letter of demand to the Fund and requested payment in respect of hospital and medical expenses, and presented proof of the expenses he allegedly incurred. It appears that this letter was received by the Fund in November 2010, but no payment was forthcoming.

[4] Subsequently, on 10 April 2013, the appellant served a summons on the Fund claiming, in terms of the undertaking, the sum of R94 063.28. The appellant alleged that this sum was for medical and hospital expenses and that he had furnished the Fund with the proof of these expenses, but that the Fund failed to pay. In opposing the action the Fund filed a special plea that the appellant's claim had prescribed within a period of three years from the date that the abovementioned expenses were allegedly incurred. According to the appellant, these expenses were incurred in or about June 2009. Therefore, the Fund contended, the claim prescribed in or before July 2012.

[5] In the court a quo, the parties agreed on a stated case upon which the Fund's special plea of prescription was to be argued. In terms of the stated case, it was uncontested that the undertaking had been issued by the Fund on 28 October 2008, and that it was for payment of future hospital and medical treatment incurred, on proof thereof. It was also uncontested that the appellant had not been paid in terms of the undertaking. The Fund however contended that the undertaking was contractual and not purely statutory in nature; that it amounted to a debt and that its obligation to pay arose once the appellant

incurred the debt and had furnished proof. Thus, the debt had prescribed in terms of s 11*(d)* of the Prescription Act which provides that the periods of prescription of debts shall, save where an Act of Parliament provides otherwise, be three years in respect of any other debt.

[6] On the other hand the appellant contended that there was no prescription applicable as regards the undertaking, and that the Fund was obliged to compensate him in terms of his claim regardless of the date of treatment or service because his claim was not susceptible to prescription, due to the fact that it formed part of a unitary claim instituted and prosecuted in terms of s 17(1) of the Act. In other words when the settlement agreement was reached, which included the undertaking, the Fund admitted liability for future medical and hospital expenses incurred as part of its liability for all the heads of damages claimed.

[7] The matter was eventually set down for the hearing of the special plea. The court's view was that the undertaking was a contractual obligation which was separate from the s 17(1) claim instituted by the appellant in 2006. It equated the undertaking to a discrete and new agreement and accordingly found that the Prescription Act was applicable. This meant, the court continued, that since the appellant had failed to claim within three years from the date upon which the debt became due, his right to claim had prescribed as provided in s 11*(d)* of the Prescription Act. Accordingly, it upheld the Fund's plea with costs. The current appeal is against this order upholding the special plea and is with leave of the court a quo.

[8] Before us, counsel for the appellant persisted with his submission that any claim lodged in terms of the undertaking does not and cannot attract prescription. He argued further that the undertaking does not create a new and

independent contractual obligation or a distinct claim based on a different cause of action. His view was that for purposes of prescription, the provisions of the Act as it appeared prior to its amendment was applicable.

[9] It is indeed a startling proposition by the appellant that claims in terms of an undertaking in terms of the Act do not prescribe at all, and counsel was unable to provide any authorities to support such a proposition. I do not agree with his contention and I am of the view that it has no merit. The law encourages finality in litigation therefore no claim can exist indefinitely. (See *Road Accident Fund & another v Mdeyide* [2012] ZACC 18; 2011 (2) SA 26 (CC) para 8.)

[10] On its part, the Fund argued that the undertaking constituted a new cause of action which is susceptible to prescription. Counsel for the Fund submitted that the undertaking is a stand-alone agreement which creates a new contractual foundation and which exists independently of the claim in terms of s 17(1) of the Act. As regards prescription, the Fund submitted that s 23(3) of the Act prior to its amendment did not specify undertakings and was limited to s 17(1) claims and consequently, the applicable prescription period was provided for in s 11*(d)* of the Prescription Act. Counsel also submitted that the nature of the claim transforms into something else, which he was however unable to describe. He argued that the introduction of s 17(4)*(a)* of the Act was a deviation from the common law rule of delictual claims. It is indeed so and as Trollip JA remarked in *Marine & Trade Insurance Co Ltd v Katz NO* 1979 (4) SA 961 (A) at 970C-D:

'The purpose of the provision [Section 21 (IC)*(a)*] was to innovate a departure from the common law.'

Section 21(IC)*(a)* of the Compulsory Motor Vehicle Insurance Act 56 of 1972 is the predecessor of s 17(4)*(a)* of the Act.

[11] Counsel for the Fund referred us to *Stupel & Berman Inc v Rodel Financial Services (Pty) Ltd* [2015] ZASCA 1; 2015 (3) SA 36 (SCA) para 15 and to *Lieberman v Santam Ltd* 2000 (4) SA 321 (SCA) in support of the proposition that in an agreement couched as an undertaking, the undertaking creates a new contractual foundation for a valid and enforceable obligation to pay which exists independently of any previous obligation under the Act. In *Stupel & Berman* the cause of action related to a transaction of purchase and sale which involved the transfer of immovable property. This case had nothing to do with a collision regulated by the Act and is distinguishable from the present case, because the undertaking referred to there was indeed a stand-alone agreement between *Rodel*, on the one hand, and *Stupel & Berman* on the other hand, from which certain obligations arose for *Stupel & Berman*. *Stupel & Berman* acted as the conveyancing attorneys.

[12] The *Lieberman* case is also distinguishable from the present case. In para 12 Vivier JA observed that:

'It is sufficient to say that the agreement provided the appellant with a contractual basis upon which to found a cause of action for payment which he was free to invoke if he so chose'.

In that case the cause of action was not the collision itself but the action was based on an agreement entered into by the parties whereby the fund admitted liability and agreed to pay 50 per cent of such losses and damages as might be agreed between the parties or ordered by the court. It was not an undertaking in terms of s 17(4)*(a)* of the Act. The parties had also concluded a verbal agreement in terms whereof the Fund had undertaken not to plead prescription before a particular date. All in all, both cases do not deal with the provisions of s 17(1) and 17(4)*(a)* of the Act. In *Nonkwali v Road Accident Fund* [2008] ZASCA 3; 2009 (4) SA 333 (SCA) para 8 Maya JA (as she then was) correctly observed that there was a plethora of authorities to the effect that a claimant

seeking compensation for damages sustained as a result of wrongful and negligent driving under the Act had '… but a single, indivisible cause of action and that the various items constituting the claim were thus not separate claims or separate causes of action.' She referred with approval to what Corbett JA said in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 836D-E. (See also *Evins* at 837A-C).

[13] It is necessary, before I proceed to deal with the issues raised in paragraph 1 above, to set out the relevant legislative provisions of the Act dealing with the prescription of undertakings both prior to and after the Act was amended in 2008. Before its amendment s 23 of the Act read as follows:

'(3) Notwithstanding subsection (1), no claim which has been lodged in terms of s 24 shall prescribe before the expiring of a period of five years from the date on which the cause of action arose.'

This subsection was amended with effect from 1 August 2008, by s 10 of the Road Accident Fund Amendment Act 19 of 2005, and currently reads as follows:

'(3) Notwithstanding subsection (1), no claim which has been lodged in terms of section 17 (4) (a) or 24 shall prescribe before the expiry of a period of five years from the date on which the cause of action arose.'

The only difference between the unamended version and the amended one is the insertion of s 17(4)*(a)*. This insertion, in my view, buttresses the proposition that the legislative regime that determines prescription in claims lodged in terms of s 24 read with s 17(1) of the Act shall be the Road Accident Fund Act and not the Prescription Act.

[14] For the present purposes it is clear that the Prescription Act is not relevant. It is also not clear from the court a quo's judgment why it saw fit to apply it. My understanding is that as part of the settlement, the Fund undertook to compensate the appellant for future medical and hospital expenses, after such

expenses have been incurred and proved. Had there been no collision which resulted in the injuries to the appellant and the admission of liability by the Fund, the undertaking would not have come into existence. Thus the claim filed in terms of s 17(1) read with s 24 of the Act, which claim included future medical and hospital expenses is the basis upon which the undertaking in terms of s 17(4)*(a)*(i) of the Act was issued. It cannot be that this claim is a separate claim unrelated to a claim in terms of s 17(1) of the Act. Accordingly, it is ineluctable that the period of prescription of a claim under s 17(4)*(a)* the Act can only be determined in terms of s 23 of the Act and not in terms of the Prescription Act. The principles governing the interpretation of statutes must apply as explained in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA; 2012 (4) SA 593 para 18 that interpretation is a process of attributing meaning to the words used in a document read in context and having regard to the purpose of the provision. (See also *Bothma-Batho Transport (EDMS) Bpk v S Bothma & Seun Transport (EDMS) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 para 10.)

[15] What I need to emphasize is that future medical expenses in relation to a claim in terms of s 17(1) of the Act cannot constitute a separate and distinguishable claim but it is an integral and indivisible part of a third party claim for damages. (See *Evins v Shield Insurance Co Ltd* at 836A – 837D; *Nokwali v Road Accident Fund* [2008] ZASCA 3; 2009 (4) SA 333 (SCA) paras 8 – 9. *Klaas v Union and South West Africa Insurance Co Ltd* 1981 (4) SA 562 (A) at 577D-H. H B Klopper in his article 'Prescription of Obligations Arising from Undertaking Issued by the Road Accident Fund in Pursuance of Section 17(4)*(a)* of the Road Accident Fund Act 56 of 1996', 2014 (77) *THRHR* 485 at 488 observes that '[a]n undertaking issued in terms of the strict wording of s 17(4)*(a)* also does not create a contractual relationship between the claimant and the Fund'. He opines that it is only rights contractually created that are

susceptible to prescription as being a debt, and cites s 10 of the Prescription Act and *Evins* at 838. I agree with the learned author. It is clear from the above discussion that s 17(4)*(a)* of the Act does not create any new and independent contractual obligation or a debt independent of s 17(1).

[16] Furthermore the Constitutional Court has put paid to the question of which legislative regime is applicable in these circumstances. In *Road Accident Fund & another v Mdeyide* para 50, Van der Westhuizen J observed that:

'There is therefore a clear reason for the difference between the Prescription Act and the RAF Act. The Prescription Act regulates the prescription of claims in general, and the RAF Act is tailored for the specific area it deals with, namely claims for compensation against the Fund for those injured in road accidents. The legislature enacted the RAF Act – and included provisions dealing with prescription in it – for the very reason that the Prescription Act was not regarded as appropriate for this area. Looking for consistency in this context is a quest bound to fail.'

[17] The Act was established, in my view, to give the greatest possible protection and to promote the socio-economic rights of victims of motor vehicle accidents. It must be construed at all times to give access to courts and justice rather than to limit access to justice. (See *Law Society of South Africa & another v Minister for Transport & another* [2010] ZACC 25; 2011 (1) SA 400 (CC) para 40; *Mvumvu & others v Minister of Transport & another* [2011] ZACC 1; 2011 (2) SA 473 (CC) at 479 para 20; *Englebrecht v Road Accident Fund & another* [2007] ZACC 1; 2007 (6) SA 96 (CC) para 23 and *Aetna Insurance Co v Minister of Justice* 1960 (3) SA 273 (A) at 285E-F.)

[18] In summary, in my view, s 17(1) to (4), 23(1) to (3) and 24 of the Act, must be read together. The reference in s 23(3) of the Act (before its amendment) to a 'claim which has been lodged in terms of s 24' must include a claim for the payment of future medical expenses, A claim in terms of s 17(1)

read with s 17(4) of the Act 'includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods. . .'. This claim is lodged in terms of s24, accompanied by the requisite medical report. The Fund is thereafter entitled to furnish an undertaking to cover the payment of future medical expenses. The third party cannot however claim or insist that the Fund furnish an undertaking, (see *Marine & Trade supra* at 970H), and consequently such a 'claim' cannot be 'lodged' for the purposes of s 23(3). The furnishing of an undertaking does not alter the fact that the claim for future medical expenses is and remains one in terms of s 17(1), which is lodged in terms of s 24. It does, however, affect 'the date upon which the cause of action arose' for the purposes of s 23(3) of the Act, in respect of individual claims which are covered by the undertaking. This 'date' must be the date when a complete cause of action arises, entitling the third party to institute action for recovery of the claims covered by the undertaking.

[19] A complete cause of action in respect of future medical claims covered by an undertaking must arise when the costs are incurred. In terms of s 17(4)*(a)*(i) of the Act, the Fund is only obliged to compensate the third party in respect of the costs 'after the costs have been incurred and on proof thereof'. In addition, the Fund is only obliged to compensate the third party for the reasonable costs of the defined medical expenses, which may not necessarily be their actual cost. (See *Marine & Trade supra* at 972). If the Fund declines to pay the medical costs claimed, the third party will have to institute action within five years of the complete cause of action arising, being the date when the costs were incurred. A complete cause of action cannot arise as at the time of the accident, in respect of future medical expenses covered by an undertaking, as these costs have not yet been incurred. If this were not so, the recovery of any medical expenses incurred more than five years after the accident would be precluded.

[20] Although the claim for future medical expenses forms an integral and indivisible part of a third party claim for damages, the effect of an election by the Fund to furnish an undertaking in terms of s 17(4)*(a)* of the Act, is that payment of these costs only falls due 'after the costs have been incurred'. This does not mean that a separate and distinct cause of action is created in respect of future medical claims covered by the terms of an undertaking, but that the obligation on the part of the Fund to make payment of these damages only arises after the medical costs have been incurred and the third party has thereby acquired a complete cause of action.

[21] The subsequent amendment of s 23(3) of the Act to include a reference to s 17(4)*(a)* of the Act confirms and clarifies the position, that prescription in respect of claims for payment of medical expenses, covered by the terms of an undertaking, only intervenes 'five years from the date on which the cause of action arose'. The reference in s 23(3) to a 'claim which has been lodged in terms of s 17(4)*(a)*. . .' can only refer to a claim for payment of medical expenses covered by the requisite undertaking and not to the undertaking itself. As pointed out, this is because a third party cannot claim or insist that the Fund furnish an undertaking and consequently such a claim cannot be 'lodged' for the purposes of s 23(3).

[22] In this case the appellant's hospital and medical expenses were incurred in June 2009 and summons was issued on 9 April 2013 to recover these expenses. Summons was accordingly issued within the period of five years as provided for in s 23(3) of the Act and the claims of the appellant had not prescribed.

[23] The following order is made:

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and substituted with the following:

'The special plea of prescription is dismissed with costs.'

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J B Z Shongwe
Judge of Appeal

Appearances

For the Appellant:	E Lombard Instructed by: A Batchelor & Associates, Cape Town; McIntyre & Van der Post, Bloemfontein.
For the Respondent:	A Bhoopchand Instructed by: Mayats Attorneys, Cape Town; Symington & De Kok, Bloemfontein.