THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable
CASE NO 585/2006

In the matter between

THE ROAD ACCIDENT FUND — Appellant

and

THEMBISILE VIERA NGUBANE — Respondent

Coram: Scott, Mthiyane, Jafta, JJA and
Malan, Mhlantla AJJA

Heard: 7 SEPTEMBER 2007
Delivered: 21 SEPTEMBER 2007

Summary: Regulation 2(3) read with section 17(1)(b) of the Road Accident Fund Act 56 of 1996 – claim to be lodged with the Fund within two years – the Fund may waive this requirement or enter into a compromise.

Neutral citation: This judgment may be referred to as *Road Accident Fund v Ngubane* [2007] SCA 114 (RSA)

JAFTA JA

[1] On 8 December 2000 a collision occurred on Mid Illovo Highway, Umbumbulu, KwaZulu-Natal between a motor vehicle driven by the respondent (the plaintiff) and another vehicle driven by an unidentified person. Arising from the injuries sustained by her in the collision, the plaintiff lodged a claim and later instituted action for compensation against the Road Accident Fund (the Fund) in the Durban High Court. The Fund, in a special plea, alleged that the plaintiff's claim had prescribed as it was lodged after the expiry of two years from the date of the collision. However the plaintiff had, in her particulars of claim, alleged that the Fund had agreed to pay 80 per cent of damages proved at the trial.

[2] Having ordered a separation of issues, the court below (Hurt J) was asked to deal with the matter as if it were an exception and determine whether on the facts alleged in the particulars of claim, the Fund had the authority to conclude an agreement to compensate the plaintiff. The importance of this was that the allegations in the plaintiff's particulars were taken as correct for purposes of deciding the special plea. The remaining issues stood over for determination at a later date. I will adopt the same approach in deciding this appeal.

[3] The learned judge held that 'the passage of a period of two years after the date of injury, without the delivery of a claim form in terms of section 24 cannot vitiate any claim which the "plaintiff" may have'. Accordingly he ruled that the defendant had the capacity to enter into the agreement in question and postponed the matter *sine die* at the request of the parties. The Fund appeals against that ruling with leave of this court.

[4] It is common cause that the plaintiff did not comply with reg 2(3) of the regulations made under s 26 of the Road Accident Fund Act 56 of 1996 (the Act), regarding the time frame within which she ought to have lodged her claim. The regulation requires that claims such as the present be lodged with the Fund within two years from the date of the accident. In this case the plaintiff's claim was lodged six weeks after the deadline.

[5] But the Fund (through a claims handler) entered into an agreement with the plaintiff in terms whereof it admitted liability to an apportioned degree and agreed to pay 80 per cent of the plaintiff's established damages. This agreement was concluded after the period of two years had expired. The question that arose both in this court and the court below was whether the Fund had, by entering into the agreement, competently caused to be enforceable what was otherwise an invalid and unenforceable claim, in view of the peremptory provisions of the subregulation.

[6] Before dealing with the Fund's submissions it is necessary to refer to the relevant legislation. The Fund's liability to compensate claimants such as the plaintiff is imposed by s17 of the Act. The section provides:

'(1) The fund or an agent shall-

(a) ….

(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 which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person,

caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee.'

[7] The relevant part of regulation 2 reads:

'(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.'

[8] Relying on *Geldenhuys & Joubert v Van Wyk and Another*; *Van Wyk v Geldenhuys & Joubert and Another* 2005 (2) SA 512 (SCA), counsel for the Fund submitted that the lodging of a claim within two years of the collision is a precondition for the existence and enforceability of any claim against the Fund under s 17(1)(b). Accordingly, so it was argued, neither the claims handler nor the Fund was empowered to 'give life' to a claim after the expiry of the two-year period by concluding an agreement to accept liability. Any such agreement would, the argument concluded, be *ultra vires* the Act and regulations and hence not binding on the Fund. It was also argued that, although s 4(1)(b) empowers the

Fund to 'investigate and settle' claims arising under the Act, it does not entitle the Fund to undertake liability where none existed at the time of the settlement or compromise.

[9] I do not accept the argument. *Geldenhuys & Joubert* was concerned with the validity of regulation 2(3), and which upheld it (see para 24). The statements made in that case to the effect that '[t]he regulation plainly makes the lodging of the claim within the two-year period a precondition to the existence of the debt' and '[i]f the claim is not lodged within this period, there is no "debt"' must be read in context. The reference to 'no debt' was clearly intended to be understood as meaning 'no recoverable debt'. This is so because in that case the court referred to the word 'debt' in the context of prescription as contemplated in the Prescription Act 68 of 1969. In that context the term 'debt' carries a wide and general meaning which includes a claim for damages.

[10] In the present case the claim came into existence at the time of the collision on 8 December 2000. The plaintiff's failure to lodge it timeously with the Fund did not affect its existence at all. Instead what was compromised was her right to enforce the claim. In rejecting the proposition that a claim does not exist in the absence of compliance, this court in *Road Accident Fund v Smith* 2007 (1) SA 172 (SCA) said (para 6):

'There is a claim but, unless there has been compliance with the regulation, the claim is not enforceable. Put differently, absent compliance with the regulation, the Fund is not obliged to compensate the claimant. It is the enforceability of the claim, not its existence, which is compromised by non-compliance with the regulation.'

See also *Engelbrecht v Road Accident Fund and Another* 2007 (5) BCLR

457 (CC) paras 21-22.

[11] It is by now settled that a statutory provision such as regulation 2(3) which was enacted for the special benefit of a body such as the Fund may be waived by that body if no public interests are involved (*SA Eagle Co Ltd v Bavuma* 1985 (3) SA 42 at 49G-H). Accordingly, compliance with the regulation can be waived by the Fund (*Road Accident Fund v Smith* para 8). It is not required, as was submitted on the Fund's behalf, that this waiver be specifically pleaded because implicit in the compromise is a waiver by the Fund of compliance with the regulation. In this case sufficient facts have been alleged to inform the Fund of the case the plaintiff is relying on (see *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A)).

[12] Consistently with waiver the parties have, by entering into a compromise, terminated whatever rights and obligations they may have had including the Fund's right to demand compliance with regulation 2(3). In other words the plaintiff is not entitled to recover full compensation for damages she had suffered and the Fund is precluded from raising any defence it had against the original claim. The agreement of compromise gave rise to new rights and obligations upon which the plaintiff has rooted her cause of action (see *Lieberman v Santam Ltd* 2000 (4) SA 321 (SCA) paras 11-12). Unless reserved in the compromise, parties thereto are precluded from enforcing rights and obligations arising from the compromised claim. In *Hamilton v Van Zyl* 1983 (4) SA 379 (E) the court said (at 383F-H):

'A compromise need not necessarily however follow upon a disputed contractual claim. Any kind of doubtful right can be the subject of a compromise….Delictual

claims are, for example frequently the subject of a compromise. Nor need the claim be even *prima facie* actionable in law. A valid compromise may be entered into to avoid even a spurious claim, and defendants frequently, for various reasons, settle claims which they know or believe the plaintiff will not succeed in enforcing by action.
An agreement of compromise, in the absence of an express or implied reservation of the right to proceed on the original cause of action, bars the bringing of proceedings based on such original cause of action…. Not only can the original cause of action no longer be relied upon, but a defendant is not entitled to go behind the compromise and raise defences to the original cause of action when sued on the compromise.'

See also *Gollach & Gomperts (1978) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others* 1978 (1) SA 914 (A) at 921.

[13] It follows that on the facts as they presently stand, the plaintiff has a claim enforceable in law. The position may, however, change if she fails to prove the agreement of compromise at the trial. Therefore, the ruling of the court below was correct.

[14] In the result the appeal is dismissed with costs.

C N JAFTA
JUDGE OF APPEAL

CONCUR:) SCOTT JA
) MTHIYANE JA
) MALAN AJA
) MHLANTLA AJA