THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 575/2002
Reportable

In the matter between :

ROAD ACCIDENT FUND — Appellant

and

SAMUEL FELI THUGWANA — Respondent

CORAM : HARMS, SCOTT, BRAND, CLOETE JJA, VAN HEERDEN AJA

HEARD : 21 NOVEMBER 2003

DELIVERED : 28 NOVEMBER 2003

Summary: Regulation 2(1)(c) contained in *Government Gazette* 17939 of 25 April 1997 and made in terms of s 26 of the Road Accident Fund Act 56 of 1996, interpreted, held to be peremptory and held not *ultra vires*.

JUDGMENT

CLOETE JA

CLOETE JA

[1] This appeal raises three questions: the meaning of the regulation made in terms of the Road Accident Fund Act, 56 of 1996 ('the Act') which requires a person injured in a 'hit and run' motor vehicle accident to furnish an affidavit to the police; whether that regulation is peremptory; and if it is, whether it is *ultra vires*.

[2] The obligation to provide compensation imposed on the Road Accident Fund ('the Fund') or an agent is contained in s 17(1) of the Act which provides:

'(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 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.'

It is immediately apparent that a distinction is drawn between the situation where the identity of the owner or driver has been established and the situation where the identity of neither has been established. In the former case, the liability of the Fund or an agent is stated to be 'subject to this Act' and in the latter, 'subject to any regulation made under s 26'.

[3] Section 26 in turn provides *inter alia*—

'(1) The Minister shall or may make regulations to prescribe any matter which in terms of this Act shall or maybe prescribed or which may be necessary or expedient to prescribe in order to achieve or promote the object of this Act.'

[4] The regulation at issue in the present appeal is regulation 2(1)(c) contained in *Government Gazette* 17939 of 25 April 1997. It provides:

'2(1) In the case of any claim for compensation referred to in s 17(1)(b) of the Act, the Fund shall not be liable to compensate any third party unless—

(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'.

[5] In the present matter the respondent, as plaintiff, instituted an action for compensation against the appellant, as defendant, for damages for injuries sustained in an accident as contemplated in s 17(1)(b) of the Act. The appellant delivered a special plea alleging non-compliance by the respondent with regulation 2(1)(c). The respondent replicated that he had complied with the provisions of the regulation; alternatively, that he had substantially complied therewith; and further alternatively, that the

provisions of the regulation were *ultra vires* the Act. The Court *a quo* (De Vos J) dismissed the special plea. The present appeal is with the leave of that Court.

[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.

[7] If a claimant is physically or mentally incapable of making an affidavit, it cannot be said that he or she is in a position to do so. He or she would also have to be in possession of the facts which the affidavit has to contain: what is required is an affidavit 'in which particulars of the occurrence concerned were fully set out'. Once the claimant is in a position to make the affidavit, the fourteen-day period begins to run. But the claimant may have difficulties in making the necessary arrangements to depose to an affidavit or to submit it to the police. If the affidavit is submitted more than fourteen days after the claimant was in a position to do so, the question would arise whether it was reasonably possible for this to have been done within the fourteen-day period. If so, the Fund will incur

no liability. If not, the fourteen-day period would be extended for so long as it was not reasonably possible for the claimant to have submitted it — but no longer. Any other interpretation would absolve a claimant from the obligation to submit an affidavit at all if this was not reasonably possible within the fourteen-day period, or provide no time limit in such a case for the furnishing of the affidavit; and manifestly neither interpretation can have been what the Legislature intended. Against this background I turn to the facts of the present matter.

[8] The accident occurred on 17 November 1998 on the Springs/Kwa Thema Road when a motor vehicle of which the identity of neither the owner nor driver are known collided with the respondent, who was a pedestrian. The respondent was taken from the scene to various hospitals where he remained for between five and six weeks. During the time he was in hospital the respondent was visited by a policeman to whom he orally gave details of the accident. In February 1999 the respondent went to the Springs police station to ascertain whether the accident had been reported. It had not. He subsequently met one Joshua Khoza, an ex-policeman who described himself in evidence as an ‘assessor’, who took a statement from him and accompanied him to the Delmas police station where the statement was sworn to before a commissioner of oaths on 28 February 2000. That affidavit was handed by the respondent to his attorney. The respondent deposed to a second affidavit on 14 November

2000 which his attorney forwarded to the appellant with his claim for compensation, and a third affidavit on 29 August 2002, i.e. shortly before the trial commenced, in which he formally reported the accident to the police.

[9] On these facts it is plain that the respondent was in a position, in the sense discussed above, to submit the affidavit required by the regulation to the police whilst he was still in hospital, and that it was reasonably possible for him to have done so at the latest in February 1999. It is also plain that it was only on 29 August 2002 that an affidavit was submitted to the police: the first affidavit was sworn to at a police station, but not left there and it was accordingly not 'submitted', i.e. furnished or provided for their consideration, to the police — the policeman concerned merely acted as a commissioner of oaths; and the second affidavit was not even sworn to at a police station, much less submitted to the police — it was sent to the appellant.

[10] The Court below reasoned as follows:

'[M]yns insiens lê die antwoord daarin dat nie gesê kan word dat die eiser in 'n posisie was om 'n beëdigde verklaring af te lê alvorens hy vasgestel het dat so 'n verklaring wel afgelê moet word nie. Die betekenis van "posisie" soos hier gebruik sluit in al die omstandighede waarin 'n mens jou bevind. Dit sou sekerlik insluit die feit dat 'n persoon moet wéét dat so 'n verklaring afgelê moet word, andersins kan tog nie geargumenteer word dat die persoon in 'n posisie was om die verklaring af te lê nie.

Een van die omstandighede wat dus in ag geneem moet word wanneer bepaal moet word of 'n persoon in sodanige posisie is, is om na die feitlike kennis van die eiser te kyk. In die onderhawige geval is dit nie betwis dat die eiser nooit bewus was van die feit dat so 'n verklaring afgelê moet word nie.'

I respectfully disagree. Harms JA stated in *Mbatha v Multilateral Motor Vehicle Accidents Fund* 1997 (3) SA 713 (SCA) at 718H—I:

'In these cases the possibility of fraud is greater; it is usually impossible for the Fund to find evidence to controvert the claimant's allegations; the later the claim the greater the Fund's problems….'

The purpose of the regulation is to reduce these problems. If the regulation is interpreted to require subjective knowledge of the provisions of the regulation on the part of the claimant before the obligation to furnish the affidavit arises, this purpose would be defeated.

[11] That brings me to the question whether the regulation is peremptory. It clearly is. It provides a penalty for non-compliance, namely, the Fund incurs no liability to the claimant. That is decisive. In *Nkisimane & Others v Santam Insurance Co Limited* 1978 (2) SA 430 (A) this Court considered whether the provisions of s 25(1) of the Compulsory Motor Vehicle Insurance Act were peremptory. That section provided that a claim for compensation had to be set out in the prescribed manner on a prescribed form sent or delivered to the authorised insurer liable to pay it. Section 25(2) provided that no claim was enforceable by legal proceedings before ninety days had expired from the date on which the claim was so sent or

delivered. Section 24(1) fixed the period of prescription of a claim and provided that prescription would not run during the ninety-day period. Trollip JA held in regard to s 25(1) at 434H—*in fine*:

'Moreover — and this is a decisive factor in rendering it peremptory (see *Sutter's* case *supra* at 174) — an effective sanction for non-compliance is provided in ss 25(2) and 24(1). They in effect enact that, unless the requirement is complied with, the claim cannot be enforced by legal proceedings, the running of prescription is not suspended, and the claim will ultimately become prescribed. Consequently counsel were right in treating this requirement as being peremptory.'

[12] The next question which arises for decision is whether the regulation is *ultra vires*. In *Padongelukkefonds (voorheen Multilaterale Motorvoertuigongelukkefonds) v Prinsloo* 1999 (3) SA 569 (SCA) this Court referred *inter alia* to regulation 3(1)(a)(iii) of the regulations contained in *Government Gazette* 12151 of 27 October 1989 and made in terms of s 6 of the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989. That regulation was in identical terms to the regulation in question in the present appeal. The Court said *obiter* at 576B—C that the regulation 'is prosesregtelik van aard en het betrekking op die voorlegging en voortsetting van eise (vgl *Mbatha* se saak *supra* op 718F), nie op die bepaling van aanspreeklikheid nie' and accordingly appeared to give effect to the Agreement establishing a Multilateral Motor Vehicle Accidents Fund, which was the law then applicable to motor vehicle

accidents by virtue of Act 93 of 1989. In the passage in *Mbatha* mentioned by the Court in coming to that conclusion, Harms JA referred to 'the general rule that the right to prescribe time limits within which procedural acts may be done is inherent in the right to regulate.'

[13] Harms JA dealt in *Mbatha* with what he described as 'a rather sweeping statement' by Goldblatt J in *Zeem v Mutual & Federal Insurance Company Limited* 1996 (4) SA 476 (W) at 482D—F to the effect that the intention of the Legislature could never have been to give the Minister the right to prevent injured parties from claiming and recovering damages if they failed timeously to file certain documents. The learned judge of appeal said at 718F—G:

'If Goldblatt J were correct, it would in the present case mean that no conditions for the liability of the Fund could have been prescribed. Since it is inherent in a time limit that a failure to comply therewith leads to the loss of the relevant right, any time limit would have been *ultra vires*.'

[14] In *Bezuidenhout v Road Accident Fund* [2003] 3 All SA 249 (SCA) Vivier JA said (para [12]):

'There is good reason for the provision in section 17(1)(b) making the Fund's liability in the case of claims involving unidentified motor vehicles subject to regulations issued in terms of s 26(1). As Harms JA pointed out in the case of *Mbatha v Multilateral Motor Vehicle Accidents Fund* 1997 (3) SA 713 (SCA) at 718H, the possibility of fraud is greater in unidentified vehicle cases since it is usually difficult for the Fund to find evidence to controvert the claimant's allegations. Regulations of a regulatory or

evidentiary kind designed to eliminate fraud and to facilitate proof would thus fall within the power to regulate. But these would be truly incidental or ancillary to the object of the Act.'

[15] There can be no doubt in view of the approach adopted in the three judgments of this Court to which I have referred — *Mbatha*, *Prinsloo* and *Bezuidenhout* — that the regulation in question in this appeal is not *ultra vires*. It is regulatory in nature, designed to eliminate fraud or facilitate proof. It stands in contra-distinction to the regulations made under the Multilateral Motor Vehicle Accidents Fund Act and the present Act which required that the unidentified motor vehicle had to make physical contact with the injured person, the deceased or anything which caused the injury or death. Those regulations were held to be *ultra vires*, in respectively, *Prinsloo* and *Bezuidenhout* because they ran contrary to the intention of the Legislature, namely, to give the greatest possible protection to victims of the negligent driving of motor vehicles (*Prinsloo* at 573I/J—574D and 575I—576A; *Bezuidenhout* para [11]). It follows from the conclusion reached in this paragraph that *Makwetlane v Road Accident Fund* [2003] JOL 10428 (W) was wrongly decided and it is overruled.

[16] Subject to what is said in the next paragraph, the effect of the regulation is to deprive a claimant such as the respondent of a valid claim in the event of non-compliance with its provisions. Indeed, that is likely to be the situation in the vast majority of cases as the vast majority of

claimants are unlikely to be aware of the requirements of the regulation. Nevertheless, it must be born in mind that, as was pointed out in *Mbatha* at 718I, whilst in the identified vehicle case the claim against the Fund or an agent lies instead of the claim against the wrongdoer, the claimant in a case such as the present is given an enforceable right in a case where there otherwise would not have been any.

[17] The conclusions reached above do not necessarily put an end to this matter however. The plaintiff did submit a claim to the defendant as required by s 24(1) of the Act. Section 24(5) provides:

'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.'

It may be that this section could provide an answer to the special plea. Counsel were unable to make considered submissions on the law and the facts are not before the Court. The defendant's counsel had no objection to leave being granted to the plaintiff to amend his replication, if so advised, to place reliance on s 24(5). That course commends itself for otherwise the plaintiff may be done an injustice. At the same time the order which this Court makes must provide for the eventuality that the plaintiff does not amend his replication so, in effect, conceding the special plea.

[18] I make the following order:

1. The appeal succeeds, with costs. The order of the Court below is set aside and the following order substituted therefor:

‘(a) The plaintiff is given leave to deliver an amendment to his replication to raise the provisions of s 24(5) of the Act in answer to the special plea within 15 days.

(b) If the amendment contemplated in paragraph (a) is not delivered timeously or within such further period as this Court might allow on good cause shown, the plaintiff’s claim is dismissed with costs.

(c) The plaintiff is ordered to pay the costs of the hearing on the special plea.’

2. The period of 15 days referred to above shall run from the date of this order.

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T D CLOETE
JUDGE
SUPREME COURT OF APPEAL

Concur:
Harms JA
Scott JA
Brand JA
Van Heerden AJA