



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 4972/2016

In the matter between:-

JOHANN SEBASTIAAN EKSTEEN

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

CORAM: MUSI, JP *et* LOUBSER, J *et* MURRAY, AJ

HEARD ON: 16 APRIL 2019

JUDGMENT BY: MUSI, JP

DELIVERED ON: 2 MAY 2019

[1] This matter concerns the interpretation of section 2(1)(e)(ii) of the Road Accident Fund (Transitional Provisions) Act¹ (TPA). It was referred to the Full Court by a single Judge of this Division.

¹ Road Accident Fund (Transitional Provisions) Act 15 of 2012.

- [2] The court *a quo* was called upon to adjudicate a stated case pertaining to the defendant's special pleas of prescription and *lis alibi pendens* in terms of Rule 33(1).² It was made aware of disparate judgments of other Divisions and one of this Division which differed from some of those. The learned Judge referred the matter to the Full Court after discussing the matter with me but without seeking a formal directive as contemplated in section 14 of the Superior Courts Act.³
- [3] At the hearing, we pointed this out to the parties and they submitted that we should proceed with the matter. We decided to proceed with the matter in the interests of justice and expediency. The alternative of removing the matter from the roll for lack of a proper directive would have been expensive and time consuming. Everybody was ready and prepared to move the matter to finality.
- [4] The agreed facts are as follows. On 18 June 2003, a collision occurred between two motor vehicles at the intersection of Monument Road and Nico van der Merwe Avenue, Bloemfontein. The plaintiff was a passenger in one of those vehicles.
- [5] The plaintiff submitted a claim with the defendant within the prescribed period of time, in accordance with the provisions of the Road Accident Fund Act as amended (Act).⁴ The plaintiff thereafter issued summons against the defendant in the Magistrate's Court, Bloemfontein. The summons was served on 17 January 2008. The defendant filed a plea in the Magistrate's Court and that action is still pending in that Court. The claim was limited to an amount of R25 000 in terms of section 18(1) of the Act.⁵ The limit was removed by the

² Uniform Rule 33(1) provides:

"The parties to any dispute may, after institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court."

³ Section 14(1) of the Superior Courts Act 10 of 2013 reads as follows:

" (1) (a) Save as provided for in this Act or any other law, a court of a Division must be constituted before a single judge when sitting as a court of first instance for the hearing of any civil matter, but the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge, may at any time direct that any matter be heard by a court consisting of not more than three judges, as he or she may determine.

(b) A single judge of a Division may, in consultation with the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge, at any time discontinue the hearing of any civil matter which is being heard before him or her and refer it for hearing to the full court of that Division as contemplated in paragraph (a)..."

⁴ Road Accident Fund Act 56 of 1996.

⁵ Section 18(1) of the old Act read as follows:-

" The liability of the Fund or an agent to compensate a third party for any loss or damage contemplated in section 17 which is the result of any bodily injury to or the death of any person who, at the time of the occurrence which caused that injury or death, was being conveyed in or on the motor vehicle concerned, shall, in connection with any one occurrence, be limited, excluding the cost of

Road Accident Fund Amendment Act.⁶ Sections 18(1)(a)(i), 18(1)(b) and 18 (2), as they read before 1 August 2008 were subsequently declared unconstitutional.⁷

- [6] As a result of the declaration of invalidity the Legislature enacted the TPA. The TPA, in essence, gave a third party, who issued summons in the Magistrate's Court based on the section 18(1) limitation, the right to issue summons in the High Court without running the risk of facing a special plea of prescription.
- [7] On 19 October 2016, plaintiff issued summons against the defendant from this Court claiming an amount of R1 764 200. This claim was based on the same cause of action between the same parties. The plaintiff has, to date, not withdrawn the action in the Magistrate's Court. On 26 May 2017, the defendant filed its plea wherein it raised two special pleas, viz prescription and *lis alibi pendens*.
- [8] The defendant pointed out that the prescription period in terms of the Act is five years. It contended that the plaintiff's claim, in this Court, has prescribed because the collision occurred on 18 June 2003 and summons was issued on 19 October 2016.⁸ It further contended that the plaintiff's claim for non-pecuniary loss has also prescribed on the same basis.
- [9] With regard to the special plea of *lis pendens*, he pointed out that the parties are already engaged in the Magistrate's Court in the matter arising out of the same factual matrix and cause of action.

recovering the said compensation, and except where the person concerned was conveyed in or on a motor vehicle other than a motor vehicle owned by the South African National Defence Force during a period in which he or she rendered military service or underwent military training in terms of the Defence Act, 1957 (Act 44 of 1957), or another Act of Parliament governing the said Force, but subject to subsection (2) —

(a) to the sum of R25 000 in respect of any bodily injury or death of any one such person who at the time of the occurrence which caused that injury or death was being conveyed in or on the motor vehicle concerned —

- (i) for reward; or
- (ii) in the course of the lawful business of the owner of that motor vehicle; or
- (iii) in the case of an employee of the driver or owner of that motor vehicle, in respect of whom subsection (2) does not apply, in the course of his or her employment; or
- (iv) for the purposes of a lift club where that motor vehicle is a motor car; or

(b) in the case of a person who was being conveyed in or on the motor vehicle concerned under circumstances other than those referred to in paragraph (a), to the sum of R25 000 in respect of loss of income or of support and the costs of accommodation in a hospital or nursing home, treatment, the rendering of a service and the supplying of goods resulting from bodily injury to or the death of any one such person, excluding the payment of compensation in respect of any other loss or damage."

⁶ Road Accident Fund Amendment Act 19 of 2005.

⁷ *Mvumvu and Others v Minister for Transport and Another* 2011 (2) SA 473 (CC).

⁸ Section 23(3) Act 56 of 1996:-

"(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."

[10] The plaintiff contended that the claim has not prescribed because of the provisions of section 2(e)(ii) of the TPA. The special plea of *lis pendens* was resisted on the basis that section 2(e)(ii) permits a plaintiff to litigate in two different *fora* against the same defendant based on the same *causa*.

[11] Section 2 of the TPA reads as follows:

“(1) Unless the third party expressly and unconditionally indicates to the Fund on the prescribed form, within one year of this Act taking effect, to have his or her claim remain subject to the old Act, the claim of such third party is subject to the new Act under the following transitional regime:

- (a) Subject to the remaining provisions of this Act, the cause of action of the third party is deemed to have arisen on 1 August 2008 for purposes of section 12 of the Road Accident Fund Amendment Act, 2005 (Act 19 of 2005), and section 17 (4A) (b) of the new Act.
- (b) The right of the third party to claim compensation for non-pecuniary loss is limited to a maximum amount of R25 000, unless (i) the third party submits a serious injury assessment report as contemplated in Regulation 3 of the Road Accident Fund Regulations, 2008, indicating a serious injury, within two years of this Act taking effect; and (ii) it is determined in accordance with Regulation 3 of the Road Accident Fund Regulations, 2008, that the third party suffered a serious injury...
- (e) A third party who has, prior to this Act coming into operation
 - (i) lodged a claim with the Fund on the prescribed claim form in terms of the old Act, shall not be required to lodge an RAF1 form in terms of the new Act; and
 - (ii) instituted an action against the Fund in a Magistrate's Court, may withdraw the action and, within 60 days of such withdrawal, institute an action in a High Court with appropriate jurisdiction over the matter: Provided that no special plea in respect of prescription may be raised during that period...”

[12] It is common cause that the plaintiff did not give notice to the defendant as contemplated in section 2(1) of the TPA. The claim of the plaintiff is therefore subject to the new Act read with the TPA.

[13] In terms of section 2(1)(b) of the TPA, the plaintiff's right to claim compensation for non-pecuniary loss is limited to an amount of R25 000, unless the plaintiff submits a serious injury assessment report, indicating a serious injury, within two years of the TPA taking effect. The date of commencement of the TPA was 13 February 2013. It is common cause that

the serious injury assessment report was submitted by the plaintiff to the defendant on 13 March 2014. It was therefore submitted within two years of the TPA taking effect. Plaintiff's claim for non-pecuniary loss has therefore not prescribed. I turn to interpret section 2(e)(ii) of the TPA.

[14] In **Natal Joint Municipal Pension Fund v Endumeni Municipality**⁹ the proper approach to interpretation of documents, including legislation, was expressed as follows:

“[18]...Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”¹⁰

[15] In interpreting the section, we must pay due regard to the overall scheme and purpose of the Act. Although the section must be interpreted purposively we must guard against ignoring the clear language of the section under the guise of adopting a purposive interpretation.¹¹

⁹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

¹⁰ *Ibid* para [18].

¹¹ *Smyth and Others v Investec Bank and Another Ltd* 2018 (1) SA 494 (SCA) at paras [28] and [45].

[16] In **Sekwere**¹², an unreported judgment of this Division, the following was said about the impugned section:

“[10] Section 2(e)(ii) is clear and unambiguous. When the new RAF Act was promulgated, its main purpose was to do away with the burdens of the limitation and restrictions which the unconstitutionally declared s18 placed on claimants whose claims far exceeded the R25 000 threshold i.e. restricting them to the Magistrates court regardless of the fact that their claims evidently exceeded the R25 000 threshold. The section is couched in permissive terms. This is a clear indication that the section is not peremptory and neither does it oblige the claimants to first withdraw the Magistrates court summons and only thereafter issue same in the High court. Neither does the section or any other section in the new RAF Act, for that matter, make provision for the step-by-step process which the Fund contended the legislature had in mind. If the legislature intended such a process to be followed, it would have spelled that out in the Act or in regulations which the legislature did not even promulgate. If anything, the new RAF Act is silent on what steps a claimant in the same position as plaintiff (i.e. one who has a claim pending in the Magistrates court) must take once she has made her election to transfer her claim to the High court. The new RAF Act does not even make reference to another prerequisite which counsel for the Fund contended for, that the claimant should have prosecuted her claim to finality first under the original summons (the Magistrates’ court summons).”¹³

[17] In **Klaas**¹⁴ the learned Judge took a different view, and said:

“[25] I do not agree that the Legislature did not provide a step by step procedure of how the summonses or court actions were to be dealt with. What is to be done is very clear from the provisions of section 2(1)(e)(ii) of the TPA. The Legislature, quite logically, expected that claimants who had to go to the Magistrates’ Courts due to the statutory limitation in the *quantum* of their claims had to be offered a transitional mechanism to launch new actions in the High Courts, should there be a need. In my view, the sequence is very clear in the provision. You withdraw the earlier instituted Magistrate’s Court action and within 60 days of such withdrawal institute an action in the High Court. I agree that the wording in the provision is cast in non-peremptory terms. This, in my interpretation, is due to the fact that no

¹² *Sekwere v Road Accident Fund* ZAFSHC Case no 2691/2014 Delivered on 18 June 2015.

¹³ *Ibid* para [10].

¹⁴ *Klaas v Road Accident Fund* (25693/2013) [2015] ZAGPPHC 778 (17 September 2015)

claimant was obliged to withdraw the Magistrate's Court action. Some claims could be well within the jurisdiction of the Magistrate's Court despite the repealed limitation. The Legislature was well aware that there may be reasons for some of these lawsuits to remain where they were initially instituted, despite the favourable legislative changes.”¹⁵

- [18] The purpose of the TPA is stated in the long title of the Act as to provide for transitional measures in respect of certain categories of third parties whose claims were limited under the Road Accident Fund Act (Act 56 of 1996), prior to 1 August 2008. The aim was therefore to level the playing fields and create equality amongst third parties. A ‘third party’ is defined in the TPA as a person who has a right to claim compensation from the Fund in terms of section 17 of the old Act, whose claim is subject to the limitations imposed by section 18(1) or (2) of that Act, and whose claim has, upon this Act taking effect, not prescribed or been finally determined by settlement or judgment.¹⁶ It is common cause that the plaintiff is indeed a third party.
- [19] It is clear from the judgments cited above that the different interpretations are caused by the way the word ‘may’ in the context of section 2(1)(e)(ii) is interpreted. In all the judgments it is correctly stated that ‘may’ in this context is couched in permissive terms. The true question, however, is what is permitted? In Sekwere it was stated that the section permits a plaintiff to issue summons in the High Court without first withdrawing the summons in the Magistrate’s Court. In Klaas it was stated that ‘may’ in this section means that no plaintiff is obliged to withdraw the summons in the Magistrate’s Court action, but must first do so before issuing summons in the High Court.
- [20] I agree with the Klaas judgment. The word ‘may’ in the context of this section means that a plaintiff has an election. The plaintiff may prosecute the claim in the Magistrate’s Court until it is finalized or the plaintiff may decide to institute the action in the High Court. The plaintiff may elect to continue with the claim in the Magistrate’s Court because with or without the cap it may fall within the

¹⁵ Ibid para 25. See also *Buthlezi v Road Accident Fund* (87223/14) [2018] ZAGPPHC 449 (2 February 2018) at para [26] and *Tshabalala v Road Accident Fund* (27822/2013) [2015] ZAGPJHC 281 (21 October 2015) at paras [27] and [29].

¹⁶ Section 1 of the TPA.

monetary jurisdiction of that court. He or She may decide to amend the monetary value of the claim so that it is more than the cap but less than the maximum monetary jurisdiction of the Magistrate's Court or he or she may abandon the amount which is more than the maximum monetary jurisdiction of that court. 'May', in this context, therefore means that the plaintiff may, according to his or her election, litigate in one of the two *fora*.

- [21] The interpretation in **Sekwere** to the effect that 'may' in the section gives the plaintiff the right to litigate simultaneously in two different *fora* based on the same cause of action between the same parties is untenable and not sensible. This is so because, first the defendant would then be called upon to defend a matter arising out of the same facts in the High Court and in the Magistrate's Court simultaneously and at great expense. Second, the same fate will befall the plaintiff. Third, the Legislature, being omniscient, must be presumed to know that it is impermissible in our law to litigate in two different *fora*, at the same time, between the same parties based on the same cause of action.
- [22] The absurdity of the interpretation advanced in **Sekwere** was pointed out in **Tshabalala** where the learned Judge said:

"[32] The plaintiff's argument that the Section entitles her to institute the action in the High Court without first withdrawing the one in the Magistrate's court is difficult to appreciate, as, firstly, it may render her summons in the High Court excipiable on the basis of *lis alibi pendens*, and, secondly, if it was not excipiable it would create an instant defence to the defendant on that basis. The principle underlying the defence of *lis alibi pendens* is that there should be finality in litigation. If the plaintiff's argument is to be upheld, then the Transitional Act would be at cross-purposes with itself, as, on the one hand it would endorse a plaintiff's entitlement to pursue a fresh action, whilst on the other, it would create a good defence for a defendant in terms of which the fresh action may be terminated. This is illogical. In interpreting the Section, it must be presumed that the legislature would have neither intended nor endorsed such absurd consequences. Indeed, one of the reasons that the legislature would have imposed the obligation upon a plaintiff to first withdraw the prior action is to prevent him/her from falling foul of a potential *lis alibi pendens* exception or plea in the new action."¹⁷

¹⁷ *Tshabalala v Road Accident Fund* above para [32]

- [23] The Legislature could not have used words which are normally viewed as being peremptory such as 'must' or 'shall' instead of 'may' in this context. This would have meant that the jurisdiction of the Magistrate's Court might be ousted even in matters that fall squarely within its monetary jurisdiction.
- [24] The word 'such' in the section is also a relevant aide for its interpretation. 'Such' is defined as 'of the kind, degree, or category previously specified or implied contextually'.¹⁸ The *prima facie* logical or grammatical effect of the word is to require what has been said before to be taken as having been repeated.¹⁹ What was previously specified that need not be repeated? It can be nothing else but the withdrawal of the action in the Magistrate's Court. In the context of this section 'such' has a grammatically intractable meaning and does not have an alternative meaning. The words 'within 60 days of such withdrawal' therefore mean within 60 days from the date of the withdrawal of the action in the Magistrate's Court.
- [25] The section should therefore be interpreted as follows. There must be an action in the Magistrate's Court based on the cap. There must be an election to prosecute that action in the High Court with jurisdiction over the matter. The plaintiff must first withdraw the action in the Magistrate's Court and within 60 days after the withdrawal of the action in the Magistrate's Court institute the action in the High Court. If the steps are followed in this sequence the plaintiff would be protected against a special plea of prescription.
- [26] The reason why there must first be a withdrawal is to ensure that the same action is not prosecuted in two different *fora*. Even if the new claim in the High Court shall have prescribed, the plaintiff is afforded a shield for 60 days against a special plea of prescription. If the claim is withdrawn in the Magistrate's Court and it is not prosecuted in the High Court within 60 days, then the plaintiff would be without Legislative protection against a special plea of prescription. When the claim is instituted in the High Court within 60 days after the withdrawal of the Magistrate's Court action, then only the High Court would be seized of the matter. The withdrawal of the action in the Magistrate's

¹⁸ See The New Shorter Oxford English Dictionary

¹⁹ *Nissan SA (Pty) Ltd v Commissioner for Inland Revenue* [1998] 4 All SA 269 (A) at 275

Court and within 60 days thereafter instituting it in the High Court, are therefore conditions precedent to the protected institution of the claim in the High Court.

- [27] The interpretation to the effect that the plaintiff may litigate against the same defendant in different *fora* at the same time based on the same *causa* renders the 60 days nugatory. The interpretation that the true meaning of the section is to have only one forum seized of the matter at any given time, means that the defence of *lis alibi pendens* will not arise.
- [28] In *casu*, both special pleas ought to succeed based on my interpretation of the section.
- [29] My interpretation is consonant with that in Klaas. In that matter the collision occurred on 1 April 2008. The plaintiff, who was a passenger in one of the vehicles, issued summons against the Road Accident Fund out of the Magistrate's Court for R25 000, in terms of section 18 the old Act. On 30 April 2013, whilst the Magistrate's Court action was still pending, the plaintiff issued summons from the High Court, based on the same *causa*. The defendant served its plea on 8 October 2013. On 28 May 2014, the plaintiff withdrew the action in the Magistrate's Court. On 11 August 2015, the defendant amended its plea and incorporated a special plea of prescription.
- [30] The learned Judge found that the Magistrate's Court action was supposed to have been withdrawn first before the High Court summons was issued. The Judge, however, opined that:

"It can never serve the purpose of the TPA that a claim validly instituted in the Magistrate's Court can be extinguished by a somewhat inadvertent issuing of new summons in the High Court and withdrawal of the old summons. That would be a far cry from purposive interpretation of legislative provisions."

- [31] The Judge found that the claim was saved by the provisions of the TPA and had not prescribed. It was clear that the claim in the High Court had prescribed and that the one in the Magistrate's Court had been withdrawn. The Judge inexplicably invoked the purposive approach to interpretation to interpret a section which he had already definitively interpreted. He seems to have used the interest of justice and equity under the guise of adopting a

purposive interpretation. In that case all would have been lost for the plaintiff which is not the case in this matter, because the claim in the Magistrate's Court is still alive.

- [32] The Legislature has granted the plaintiff the right to institute the action in the High Court without the possibility of a special plea of prescription being raised, during the window period. It has, however, also directed that certain formalities or conditions should precede to the exercise of that right. The formalities or conditions must therefore be rigorously observed. In **Munro v Dranklisensieraad, Welkom**²⁰ the learned Judge quoted Maxwell²¹ with approval where the latter said the following:

“...Where powers, rights or immunities are granted with a direction that certain regulations, formalities or conditions shall be complied with it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred, and it is therefore probable that such was the intention of the Legislature...”²²

- [33] Moreover, this section takes away the defendant's right to raise the defence of prescription whilst it gives the plaintiff the right to sue after the claim has prescribed. The defendant is therefore prejudiced, albeit for a noble reason. This is a further reason why there should be strict compliance with the formalities and conditions in the section.
- [34] The defence of *lis alibi pendens* is not necessarily dispositive of a claim. We have a discretion to stay these proceedings or to allow them to continue. This is so because:

“Where the defence of *lis pendens* is raised, the *onus* is on the plaintiff to satisfy the Court that the second proceedings are not vexatious. The defendant, however, has no right to a stay of action. The Court has a discretion to stay the second proceedings or to

²⁰ *Munro v Dranklisensieraad, Welkom, en 'n Ander* 1964 (3) SA 164 (OPD) at 169.

²¹ Maxwell: *Interpretation of Statutes* 8th ed p 321-322.

²² See also *Rex v Noorbhai* 1945 AD 58 at 64 and *Strydom v Die Land- en Landboubank van Suid-Afrika* 1972 (1) SA 801 (A) at 813.

allow them to continue. The exercise of this discretion will depend on grounds of convenience and fairness..."²³

- [35] In this case, both special pleas were properly and meritoriously taken. The special plea of prescription is dispositive of the matter.
- [36] Although the claim for non-pecuniary loss has not prescribed it is a composite part of the claim emanating from one collision. It is pending in the Magistrate's Court. It would be in the interest of justice, fair and convenient that the entire claim be adjudicated in the same forum.
- [37] The parties were correctly in agreement that costs should follow the event.
- [38] I therefore make the following order:
1. The defendant's special pleas of *lis alibi pendens* and prescription are upheld.
 2. The action is dismissed with costs.

C.J. MUSI, JP

I concur.

P.J. LOUBSER, J

I concur.

H. MURRAY, AJ

²³ *Friedrich Kling GmbH v Continental Jewellery Manufacturers; Guthmann and Wittenauer GmbH v Continental Jewellery Manufacturers* 1993 (3) SA 76 (C) at 83A-B.

Appearances:

For the Plaintiff: Adv N Snellenburg SC
 Instructed by Honey Attorneys
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For the Defendant: Adv M Mopeli
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