



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO.: 8590/2011

In the matter between:

TITUS PERIAMTHAMBI

Plaintiff

and

**JESSICA GOUNDEN trading as
JESSICA GOUNDEN AND ASSOCIATES**

Defendant

JUDGMENT

Heard: 18th May 2015
Delivered: 26th May 2015

JEFFREY AJ:

[1] This matter came before me as a stated case in terms of Uniform Rule 33.

[2] The parties have agreed to the following written statement of the facts:

- “1. On 6th October 2007 the plaintiff was involved in a collision on the N2 southbound freeway, Durban.
2. At the time of the collision the plaintiff was a passenger in a motor vehicle bearing registration letters and numbers ND 94265.
3. At the time of the collision the plaintiff was a passenger being conveyed in the course and scope of his employment with his employer.
4. The plaintiff's claim as at the date of the collision being 6 October 2007 fell to be determined in terms of the provisions of s 18 of the Road Accident Fund Act, No. 56 of 1996, and would have been limited to the sum of R25 000.00.
5. The plaintiff consulted and instructed the defendant, a practising attorney, on 26 August 2010 to lodge a claim and institute an action, if necessary, against the Road Accident Fund.
6. The defendant failed to lodge the claim with the Road

Accident Fund timeously and only did so on 6 October 2010.

7. The plaintiff's claim against the Road Accident Fund consequently prescribed."

[3] The parties have also agreed that this Court is to determine a question of law of whether, in the light of the judgment in *Mvumvu and others v The Minister of Transport and another* 2011 (2) SA 473 (CC) and the Road Accident Fund (Transitional Provisions) Act, No. 15 of 2012, the plaintiff's claim against the Road Accident Fund would have been limited to R25 000.00.

[4] The plaintiff's cause of action is based on the defendant's breach of her mandate. Accordingly, it is common cause that the damages to which the plaintiff may be entitled against the defendant can be characterised as contractual damages.

[5] Mr *Pillay* who appeared for the defendant, argued that the rule should be applied that damages for breach of contract must be assessed as at the date of breach; and, if this was done, the plaintiff's claim as a passenger would be limited to an amount of R25 000.00 in terms of s 18 (1) of the Road Accident Fund Act No. 56 of 1996 which was still extant at the date of breach. Section 18 (1) of the Road Accident Fund Act, No. 56 of 1996, limited the amount that passengers

could claim to R25 000.00. This limitation was removed by the Road Accident Fund Amendment Act, No.19 of 2005, which came into effect on 1 August 2008. But the Amendment Act provided that claims which arose prior to this date, like the plaintiff's claim that arose on 6 October 2007, had to be dealt with as if the Amendment Act had not taken effect. In other words, the limitation of R25 000.00 still applied.

[6] In *Mvumvu* the Constitutional Court declared that ss 18(1)(a)(i), 18(1)(b) and 18(2) of the Road Accident Fund Act 56 of 1996, as they read before 1 August 2008, were inconsistent with the Constitution and invalid. This declaration of invalidity was suspended for 18 months to enable Parliament to cure this defect. The Road Accident Fund (Transitional Provisions) Act, No. 15 of 2012 was consequently enacted and this Act came into effect on 13 February 2013. The Transitional Act sought to remedy the constitutional flaws in s 18 of the Road Accident Fund Act, 1996, No. 56 of 1996, as it stood prior to 1 August 2008: see *Da Silva v Road Accident Fund and Another* 2014 (5) SA 573 (CC) 576B-C at para [4]. In terms of the Transitional Act, persons such as the plaintiff (a) whose claims arose prior to 1 August 2008 and which were subject to the limitation of R25 000.00; and (b) whose claims had not prescribed or been finally determined by settlement or judgment when the Act took effect on 13 February 2013 - were given an option in terms of s 2(1) of the Transition Act to indicate to the Road Accident Fund on the prescribed form, within one year of 13 February 2013, that

his or her claim would remain subject to the Road Accident Fund Act, No. 56 of 1996, as it stood prior to 1 August 2008, failing which the claims of such persons would be subject to the Road Accident Fund Act, No. 56 of 1996, as it stood from 1 August 2008 onwards but subject to a so-called “transitional regime” that included a provision that the right of a person such as the plaintiff to claim compensation for non-pecuniary loss would be limited to a maximum amount of R25 000.00, unless - (a) he or she submitted 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 the Act taking effect on 13 February 2013; and (b) it was determined in accordance with Regulation 3 of the Road Accident Fund Regulations, 2008, that the plaintiff suffered a serious injury.

[7] Turning to the plaintiff’s claim against the defendant, as a general proposition the general rule regarding the date for assessment of contractual damages as being the date of breach is undoubtedly correct, but contractual damages are not always assessed at the date of breach.

[8] Innes CJ described the fundamental rule in the award of damages for breach of contract in the oft-quoted *dictum* in *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22 where he said:

"... we must apply the general principles which govern the investigation of that most difficult question of fact - the assessment of compensation for breach of contract. The sufferer by such a breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party."

In *Rens v Coltman* 1996(1) SA 452 (A) 458E-H Scott AJA (as he then was) said in relation to this rule:

"The fundamental rule with regard to the award of damages for breach of contract is now well established. The innocent party should be placed in the position he or she would have occupied had the contract been properly performed, so far as this can be done by the payment of money without undue hardship to the party in breach. The application of this rule will ordinarily require in many cases, and typically the case of a breach of a contract of sale by the purchaser, that the date for assessment of damages be the date of performance, or as it has often been expressed, the date of the breach. But even in contracts of this nature, there is no hard and fast rule (cf *Culverwell and Another v Brown* 1990 (1) SA 7 (A) at 30G-31H) and in each case the appropriate date may vary depending upon the circumstances and the proper application

of the fundamental rule that the injured party is to be placed in the position he would have occupied had the agreement been fulfilled. The position is the same in England. In *Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801 (HL) Lord Wilberforce (at 813) recognised that 'as a general rule in English law damages for tort or for breach of contract are assessed as at the date of the breach' but in the same passage emphasised that the general rule did not preclude the Courts in particular cases from determining damages as at some later date."

See also *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 (SCA) 187B-E; *Solomon NO v Spur Cool Corporation (Pty) Ltd* 2002 (5) SA 214 (C); and *Standard Bank of South Africa Ltd v Renico Construction (Pty) Ltd* 2015 (2) SA 89 (GJ) 95D-96C at para [24-26], where this *dictum* was applied.

[9] In my view an important consideration in this matter that may have warranted a departure from the general rule that contractual damages for breach are to be assessed at the date of breach, is that the provisions of s 18 of the Road Accident Fund Act as it stood prior to 1 August 2008, were declared to be constitutionally invalid in *Mvumvu*. Had this declaration of constitutional invalidity resulted in the complete abolition of the limitation provisions of s 18 in the amending legislation, then I would have had little hesitation in finding that, in law, the amount

of the plaintiff's claim was not subject to the prior statutory limitation of R25 000.00 and an appropriate adjustment to the date of the assessment of the plaintiff's contractual damages would have been warranted on the proper application of the fundamental rule to ensure that the plaintiff was placed in the position that he would have occupied had the defendant fulfilled her mandate.

[10] But the Transitional Act so bristles with contingencies that it is impossible to determine, within the confines of the stated agreed facts as I am obliged to do – see *Sibeka v Minister of Police* 1984 (1) SA 792 (W) 795B – that, if the defendant had fulfilled her mandate the plaintiff's claim against the Road Accident Fund, the plaintiff's claim would have been limited to R25 000.00 or not. First, in the absence of an agreement in this regard between the parties in the stated case, it is speculative as to whether the provisions of the Transitional Act would have applied at all to the plaintiff's claim because its application would have been conditional on his claim not having prescribed or been finally determined by settlement or judgment when the Act commenced on 13 February 2013. If the defendant had performed in terms of her mandate, in the absence of agreement, an inference cannot be properly drawn on the stated case that the plaintiff's matter would not have been finally determined by settlement or judgment when the Act commenced on 13 February 2013. But even if I am wrong, on the assumption that the Transitional Act would have applied to the plaintiff's claim, the

parties did not agree in the stated case that the plaintiff had suffered a “serious injury” as contemplated in s 17(1)(1A)(a) and (b) of the Road Accident Fund Act, No. 56 of 1996 and the Road Accident Fund Regulations 2008. Such an agreement is critical to the determination that I am requested to make because, as I have said above, s 2(1)(b) of Transitional Act provides that, even under the “transitional regime”, the plaintiff’s claim for non-pecuniary loss would have been limited to R25 000.00 unless it was determined in terms of the Regulations that he had suffered a “serious injury”.

[11] In the premises, and particularly since there has been is no agreement between the parties that the plaintiff’s injuries were “serious injuries” as contemplated in the Road Accident Fund Act, No. 56 of 1996 and the Regulations; in my view there is no justification for finding that, if the plaintiff had not breached her mandate, the amount of the plaintiff’s claim would not have been subject to the statutory limitation of R25 000.00. A departure, therefore, from the general rule that contractual damages are assessed at the date of breach is not warranted.

[12] In the result, the following order is made:

1. It is declared that the amount of plaintiff’s claim against the Road Accident Fund would have been limited to

R25 000.00, notwithstanding the decision of the Constitutional Court in *Mvumvu and others v The Minister of Transport and another* 2011 (2) SA 473 (CC) and the provisions of the Road Accident Fund (Transitional Provisions) Act, No. 15 of 2012.

2. The costs shall be paid by the plaintiff.

JEFFREY AJ

Appearances:

Counsel for the plaintiff	:	Ms R Singh
Plaintiff's attorneys	:	Nolan Naicker & Co Ref. NN/CC/P1522 Tel. 031 400 5983/4
Counsel for the defendant	:	Mr I Pillay
Defendant's attorneys	:	Woodhead Bigby Inc. Ref. Mr R C McDonald 14G7530A3 Tel. 031 360 9700
Date of hearing	:	18 th May 2015
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