JUDGES: ~~YES~~

26.07.2005
DATE SIGNATURE

26/7/05

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO. *25080/02* Date of Judgment:
26 July 2005

REPORTABLE

In the matter between:

DAPHNEY MAHAMBO obo SIBONGILE Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

PATELJ

A. Introduction

[1] The plaintiff, Daphney Mahambo, in her capacity as the sister of the minor child, Sibongile Lynette Mahambo, instituted an action against the defendant, the Road Accident Fund ("the Fund") for loss of support arising from a collision on 2 June 1999. The mother of the plaintiff and the minor child ("the deceased") was a

pedestrian along the Garsfontein road when an unidentified motor vehicle collided with her. The deceased was fatally injured.

[2] The defendant filed a plea. Except for admitting that it is liable to handle the claim, it pleaded that the deceased was not involved in a collision either as alleged or at all. In essence the defendant denied liability and refused to pay.

[3] Subsequently, the defendant filed an amended plea in which it raised a special plea which reads as follows:

> "1. The Plaintiff's cause of action against the Defendant arose on 2 June 1999;
>
> 2. In terms of Regulation 2(3) of the Regulations promulgated in terms of Section 26 of the Road Accident Fund Act, 1996 ("the Act"), the Plaintiff's claim against the Defendant had to be properly lodged with the Defendant before the expiry of two years from the date on which the cause of action arose, irrespective of any legal disability to which the third party concerned may be subject;
>
> 3. A valid claim should have been lodged with the Defendant before or on 1 June 2001;
>
> 4. The Plaintiff purported to lodge a claim against the Defendant on 8 May 2002;
>
> 5. Consequently, no valid claim against the Defendant was lodged before the expiry of the two year period

as prescribed by Regulation 2(3) of the regulations promulgated in terms of the Act."

[4] In response to the defendant's special plea, the plaintiff replicated and pleaded as follows:

"2.2.1 The provisions of regulation 2(3) of the regulation promulgated in terms of Section 26 of the Road Accident Fund Act, 1996, is *ultra vires;*

2.2.2 The prescription period within which the Plaintiff's claim has to be lodged with the Defendant is governed by the provisions of Section 13 and 16 of the Prescription Act, Act 68 of 1969;

2.2.3 The provisions of regulation 2(3) of the regulations promulgated in terms of Section 26 of the Road Accident Act, 1996, which are in conflict thereof, is unenforceable; and

2.2.4 Regulation 2(3) of the regulations promulgated in terms of Section 26 of the Road Accident Fund Act, 1996, is in any event unconstitutional, as it discriminates against minors who have a claim against the Defendant, when the claim is a claim arising from a collision, where the identity of neither the owner nor the driver can be established."

[5] It is common cause that the claim was lodged with the defendant on 8 May 2002.

[6] The parties agreed that the issue raised by the defendant's special plea should be dealt with pursuant to a stated case in terms of Rule 33(4) of the Uniform Rules.

B. Plaintiff's argument

[7] The main theme of the plaintiffs argument advanced by Mr Bezuidenhout is that regulation 2(3) promulgated in terms of section 26 of the Road Accident Fund Act 56 of 1996 is not *ultra vires.* [1] However, it is unconstitutional because it discriminates against a minor who has a claim against the Fund when the claim arises from a collision where the identity of neither the owner nor the driver of the vehicle can be established.

[8] Counsel also submitted that the provisions of section 13 and 16 of the Prescription Act 69 of 1969 applied to the regulations promulgated in terms of the provisions of section 6 of the Multilateral Motor Accident Vehicle Accidents Fund Act 93 of 1989 and that the two year period provided for in regulation 3(2) (i) and (ii)2 was therefore unenforceable.[s] Thus, for the same

1 Hlongwane v Multilatende Motorvoertuigongelukke Fonds 2000 (1) SA 570 (T); Mbalha v Multilateral Motor Vehicle Accident Fund 1997 (3) SA 713 (SCA) at 718F.

2 *Moloi and Others v Road Accident Fund* 2001 (3).

reasons, the provisions of regulation 2(3) in terms of the two year period is also unenforceable.

[9] It was further submitted that based on the decision of *Road Accident Fund v Scholtz*[4] a claim by a minor, where the identity of the driver or owner of a vehicle involved in a collision is known, prescription only starts to run from the date on which the minor attains majority. Therefore, in the light of that decision, the provisions of regulation 2(3) is discriminatory and unconstitutional because a minor's claim where only a two year period is afforded the minor, and the minor is not offered the same protection as minors in general and the minors where the identity of the driver or owner of the vehicle is known. Thus, it was submitted that the Road Accident Fund Act like its predecessor the Multilateral

3 Regulation 3(2) promulgated in terms of the Multilateral Motor Vehicles Accidents Fund Act of 1989 read:

> "The liability of the MMF in respect of claims which arise in terms of this regulation will be subject to the following further conditions:
>
> (a) (i) A claim for compensation of loss or damages' suffered <by the claimant shall be delivered to the MMF within two years from the date upon which the claim arose *mutatis mutandis* in accordance with the provisions of Article 62 of the Agreement.
>
> Qi) The provisions of subparagraph (i) shall also apply to all third parties and claimants, irrespective of whether they are subject to any legal disability."

42003 (5) SA 362 (SCA).

Motor Accident Vehicle Fund Act, were promulgated to afford the widest possible protection to victims of motor vehicle accidents.[5]

C. *Relevant statutory and regulatory provisions*

[10] Section 17 is an important provIsion since it determines the Fund's liability. It distinguishes b~tween cases where the owner or driver is identified and those where neither is identified.

Section 17(1) provides that the Fund shall be obliged to compensate and person for specified loss or damage -

> "(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 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."

[11] Section 26 empowers the Minister of Transport to -

> "make regulations to prescribe any matter which in terms of this Act shall or may be prescribed or which may be necessary to expedient to prescribe in order to achieve or promote the object of this Act."

5 See: S A *Eagle Insurance* Co *Ltd v Pretorius* 1998 (2) SA 656 (A).

[12] Regulation 2(3) was issued under section 26. It provides that an unidentified vehicle claim -

> "shall be sent or delivered to the Fund, in accordance with the provisions of section 24 of the Act (prescribing procedures for lodging a claim), 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."

[13] Regulation 2(4) provides that once a claim has been sent or delivered to the Fund within the two-year cut-off, the liability of the Fund -

> *"shall be extinguished upon the expiry* of a *period* of *five years from the date on 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."*

D. Regulation 2(3) *is* intra vires

[14] The prescribing of time limits is inherent in the right to regulate.[6] There are good reasons to impose more stringent time limits relating to *"unidentified claims"* as opposed to the time limits

[6] *Road Accident Fund v Makwetlane* 2005 (4) SA 501 (SCA) para [26} at 61A-B.

applicable to *"identified claims".*[7] The main difference between *"unidentified claims"* and *"identical claims"* is that in the case of an *"identified claim"* the third party's claim is against the Fund instead of against the wrongdoer, whereas in the case of an *"unidentified claim"* the third party is given an enforceable right in a case where he would have had no such right if it had not been for the third party legislation.[8] The obligation to compensate the third party in respect of unidentified claims is in terms of section 17(1)(b). It is specifically enacted to be subject to the regulations.

[15] Mr Grobler for the defendant argued that the Minister, in terms of section 26, is obliged to make regulations to prescribe the Fund's obligation within the framework of the object of the Act. Regulation 2(3) is not *ultra vires* because it deals with the procedural aspects relating to the lodgement and perusal of claims and not with the determination of liability contrary to the object of the Act. Regulation 2(3) cannot be held to be *ultra vires* because the regulation does not exclude or limit the liability of the Fund further than the liability provided for in the framework of the

[7] *Mbatha Multilateral Motor Vehicle Accident Fund* 1997 (3) SA 713 (SCA) at 718 G/HI/J. *Bezuidenhout v Road Accident Fund* 2003 (6) SA 61 SCA at 65J-66B.

[8] Id 7181.

statutory provisions. It merely prescribes a time limit which is inherent in the right to regulate.

[16] Section 23 of the Act deals with the prescription of only *"identified claims" .*

> "23. **Prescription of claim** ... , the right to claim compensation under section 17 from the fund or an agent in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity of the driver or the owner thereof has been established .... "

The wording of section 23 and the words used in section 17(1)(b) to the effect that the Fund or an agent shall be obliged to compensate any person subject to any regulation made clearly indicates that the Minister is indeed empowered by virtue of delegated authority to determine the prescription period in the regulations.[9] The prescription periods for all third parties who claim on the basis of the negligence of an unidentified vehicle are the same and are prescribed in regulation 2(3) and (4) of the regulations promulgated in terms of section 26 of the Act, 1996. It is specifically legislated that the aforementioned prescription

9 *Road Accident Fund v Scholtz* 2003 (5) SA 362 (SCA) at 365C-F.

period applies *"irrespective of any legal disability ... and notwithstanding anything to the contrary in any law."*

[17] The relevant statutory provisions and the regulations, more particularly regulation 2(3) and (4) recently received the attention of the Supreme Court of Appeal in *Geldenhuys & Joubert v Van Wyk and Another; Van Wyk v Geldenhuys & Joubert and Another,* [10] where Cameron JA stated:

> "[10] The provlsions of section 21 are important to understanding the impugned regulation. This provides that when a third party is entitled to claim compensation, he or she may not claim from the owner or driver or the driver's employer, unless the Fund is unable to pay. This has significant implications. In a case where the claimant can trace the vehicle or the driver, the provision means that the claimant loses a valid claim against an identifiable wrongdoer. In effect, the Act substitutes the Fund as surrogate for a known wrongdoer, and replaces an enforceable common-law claim with a statutory claim against itself.
>
> [11] In the case of an unidentified vehicle, this by definition is not so. There is no identifiable wrongdoer to sue, and the injured party is remediless. The legislation instead creates a claim for compensation where otherwise there would have been none. The Fund is not substituted for a wrongdoer in hand, but intervenes to offer recourse where none existed before.

[10] 2005 (2) SA 512 (SCA).

[12] It is for this reason that the distinction the legislation makes between identified vehicle and unidentified vehicle cases is fundamental. This Court's decisions have repeatedly underscored its implications, most recently in *Bezuidenhout v Road Accident Fund. The legislation specifies that loss or damage involving identified vehicles must be compensated on terms expressly set out in the statute itself ('subject* to *this Act').* By *contrast, with unidentified vehicle claims, the Minister is given power* to *subject payment* of *compensation* to a *regulatory scheme, and thus* to *determine the conditions subject* to *which compensation may be granted ('subject* to *any regulation made under section 26').*

[13] In accordance with this distinction, section 23, which deals with prescription of claims, provides that the right to claim compensation in identified vehicle cases prescribes after three years (section 23(1)). This matches the ordinary period of prescription for debts under the Prescription Act (section 11 (d)). It reflects the fact that the claimant in an identified vehicle case forfeits a claim against a known wrongdoer and is obliged to seek recourse from the Fund instead. The three-year prescription period against the known perpetrator is replaced with an equivalent period against the Fund.

[14] In consonance with this, section 23(2) provides that in identified vehicle cases prescription shall not run against a minor, a person detained as a patient in terms of any mental health legislation or a person under curatorship. Again, this reflects the ordinary regime under the Prescription Act, because the minor (or person under other disability forfeits a claim against a known perpetrator.

(15] In unidentified vehicle cases, by contrast, the Minister has determined that, to be valid, claims of adults and minors alike must be sent or delivered to the Fund within two years. Once so lodged,

claimants have a five-year period from the incident within which to issue summons (regulation 2(3) and 2(4)). This regulatory scheme thus differs in two ways from the periods the statute determines for the prescription of identified vehicle claims. First, the two-year period for lodging a claim is one year shorter than the prescription period the statute specifies for identified vehicle claims; and, second, the regulatory scheme makes no special allowance for minor. In both cases, however, once a claim is lodged in terms of section 24, there is a five-year period from the date of the accident within which summons must be issued (section 23(3) in the case of identified vehicles; regulation 2(4) in the case of unidentified vehicles).

[16] The reason for the sharp difference in treatment between identified and unidentified vehicle claims is plain. In *Mbatha,* Harms JA pointed out that 'there are good reasons for having stricter requirements for unidentified vehicle cases':

> '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; (and) the later the claim the greater the Fund's problems'.

[17] This is not to suggest that fraud does not occur in identified vehicle cases - it does - nor that unidentified vehicle claims are necessarily false: as pointed out in *Bezuidenhout,* this is obviously not so. Yet the evidentiary considerations mentioned in *Mbatha* have equal force under the current statutory regime, and they are relevant to understanding the intent of the Act and hence the validity of the contested regulation. Notable here is that section 2291)(a) places an obligation on the owner and the driver (if the driver is not the owner) to furnish to the Fund if reasonably possible within fourteen days particulars of an occurrence in which any person other than the driver has been injured or killed: the

> effect of this requirement is that in identified vehicle cases the Fund or its agent has early notice of an impending claim. It underscores the evidentiary difficulties the Fund faces in unidentified vehicle cases."

legislation and the extent of the power to make it.

[18] The learned Judge of Appeal elucidated that:

> "[25] The regulation plainly makes the lodging of the claim within the two-year period a precondition to the existence of the debt under the Act. If the claim is not lodged within the period, there is no 'debt', and the provisions of the Prescription Act do not come into play.
>
> [26] In exercising the power to regulate the Fund's liability to unidentified vehicle claimants, the Minister must of course act lawfully, and the regulations issued must survive scrutiny for conformity with the usual requirements of legality and reasonableness (bearing in mind that it is funded by the public. from a fuel levy: section *5(1)(a).* As this Court stated in *Bezuidenhout (supra)* section 26(1) -
>
> > 'cannot empower the making of regulations which widen the purpose and object of the present Act or which are in conflict therewith . ... [U]nderlying the concept of delegated legislation is the basic principle that the Legislature delegates because it cannot directly exert its will in every detail. All it can in practice do is to lay down the outline. This means that the intention of the Legislature, as indicated in the enabling Act, must be the prime guide to the meaning of delegated

[27] In *Bezuidenhout,* it was also suggested (though it was unnecessary to deicide), that the regulation at issue (which required physical contact with the offending vehicle in unidentified vehicle cases) might be unreasonable in the classic sense of not having been authorised by the legislation. This underscores the ample constitutional and common--law safeguards that hem the Minister's power in exercising the authority the statute creates.

[28] None of these safeguards suggest that the power was exercised improperly here. On the contrary, the imposition of a two-year period for lodging claims in unidentified vehicle cases is in my view an unimpeachable exercise of the Minister's regulatory power. It gives claimants a reasonable time within which to lodge their claims in accordance with the procedures the statute prescribes, while giving the Fund the opportunity to undertake investigations necessary to safeguard its resources against fraud."

E. Is regulation 2(3) *discriminatory?*

[19] The plaintiffs special plea alleges that the phrase " ... *irrespective* of *any legal disability to which the third party concerned may be subject and notwithstanding anything to the contrary in any law'* contained in regulation 2(3) and (4) give rise to the interpretation that the running of prescription in respect of claims based on the negligence of an unidentified vehicle is not suspended for as long

as the third party is a minor is *unconstitutional* because it is discriminatory. This *bald allegation* does not refer to a transgression of any *particular* provision of the Constitution. However, I can *safely* surmise that *plaintiff's allegation* refers to inequality of treatment of the two *differently placed claimants.*

[20] Regulation 2(3) and (4) relates *exclusively* 10 the commonly known "*hit and run*" claims. In terms of section 17(1)(b) third parties obtain a statutory right that is non-existent in the common law but subject to the regulations. The statutory rights created within the framework of the regulations is *sui generis* and cannot be equated to the common law rights of a victim to sue a wrongdoer for damages caused on delict. *In* view of the *sui generis* nature of the right to claim, the question is whether the *regulation* invades a right of a minor or not should be considered by comparing the rights of the minors to *claim* on the basis of a hit and run incident. A comparison of the rights of minors who *claim* on the basis of a hit and run incident to the rights of minors who *claim* where the wrongdoer is identified amounts to a comparisons of *apples* with pears.

[21] In terms of the regulations and more specifically regulation 2(3) all third parties are equal and obtain exactly the same (limited) rights in terms of section 17(1)(b) of the Act. Therefore there is no introduction of an invasion of any of the minor's rights contained in regulation 2(3). If this proposition is tested against the Bill of Rights it does not infringe upon any of the rights in the Bill in that the limited right created by section 17(1)(b) applies equally and affords equal protection and benefit to all third parties. A comparison of the rights of minors who claim on the basis of a hit and run claim with the rights of minors who claim on the basis of an identified wrongdoer I order to establish whether a right is being invaded would be inappropriate as such a comparison would have to presuppose that the right created in terms of section 17(1)(b) included the right of minors to be protected against the running of prescription and that regulation 2(3) then invaded this right. This is untenable. Accordingly this Court finds that no constitutional right is invaded. Thus, the second question does not arise for consideration.

[22] Assuming that a fundamental right is invaded by regulation 2(3), then the question whether section 36 of the Constitution nevertheless excuses the invasion. In *Mohlomi v Minister* of

Defence[11] the Constitutional Court made the following *obiter* remark about prescription periods:

> "[11] Rules that limit the time during which litigation may be launched are common in our legal system as well as many others, inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken."

[23] The reason for prescribing a different prescriptive period for so-called *"hit and run claims",* i.e. the purpose for prescribing such a prescriptive period and the importance of that purpose was alluded to in *Mbatha v Multilateral Motor Vehicle Accidents Fund.*[12]

> "Taking into consideration that there are good reasons for having stricter requirements for unidentified vehicle cases,

11 1997 (1) SA 124 (CC) at 1295G-H.

12 1997 (3) SA 713 (SCA) at 718H.

the argument has to fail. In those 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. In addition, whilst in the identified vehicle case the claim against the agent comes in the steed of the claim against the wrongdoer, the claimant in the present case is given an enforceable right in a case where there otherwise would not have been any *[Terblanche v Minister van Vervoer en 'n ander* 1977 (3) SA 462 (T) at 470BOC]."

This passage was approved in ***Bezuidenhout v Road Accident Fund***[13] and further:

> "[12] There is good reason for the provision in s17(1)(b) making the Fund's liability in the case of claims involving unidentified motor vehicles subject to regulations issued in terms of s26(1). As Harms JA pointed out in the case of Mbatha ... the possibility of fraud is greater in unidentified vehicle cases since it is usually difficult for a fund to find evidence to controvert the claimant's allegations. Regulations of a regulatory or evidentiary kind designed to eliminate fraud and facilitate proof would thus fall within the power to regulate."

{24] This aspect of alleged inequality of claims was more recently considered by the Supreme Court of Appeal in ***Road Accident Fund v*** *Makwetlane*[14] *where* Marais JA for the majority said:

13 2003 (6) SA 61 (SCA) at 6511/J. 14 2005 (4) SA 51 (SCA).

"[40] Is the victim of a 'hit and run' driver unfairly discriminated against because the regulation imposes a burdensome obligation upon him or her which is not imposed upon the victim in a case where the driver is identifiable? It is so, of course, that in both situations there is a victim who has been injured and has suffered loss as a consequence of the negligent driving of a motor vehicle. They are in the same boat to that extent, but they are very differently placed in other vital respects.

[41] In the case of the identifiable driver the claimant, but for s 21 of the Road Accident Fund Act 56 of 1996, would have been able to institute a claim at common law against the driver. In lieu of that common-law claim there is a legislatively conferred claim against the Fund. Because the driver is identified, the Fund will, more often than not, have access to his or her version of what happened and may be able to resist successfully an unmeritorious claim. In addition, in a case in which it is held liable, it may, depending on the circumstances, even have a right of recourse in terms of s 25 of the Act against the identified driver.

[42] In a 'hit and run' case, pragmatically viewed, there will be nobody against whom proceedings could actually have been instituted at common law. The existence in theory of such a remedy will be of cold comfort to the victim. Happily, s 17 *(b)* of the Act, subject to regulations made under s 26 of the Act, provides a remedy against the Fund. However, as I have already said, the position of the-Fund in such a situation is invidious. It will have no driver's version available to it and, if it has to pay the claimant, the right of recourse which s 25 of the Act gives it in such circumstances will be valueless. To expect, as a matter of course, equality of treatment of two such differently placed claimants is, in my

opinion, an unsound and unjustifiable point of departure. Apples cannot be equated with oranges.

[43] Unlike the victim of an identified driver who is deprived of his or her common-law remedy against the driver and given instead a remedy against the Fund, the victim of a 'hit and run' driver is given a remedy against the Fund even although he or she would have had no enforceable remedy at common law. Such a victim is really the recipient of what may be called legislative social largesse. Had there been any constitutional imperative to bestow that largesse the approach to the questions which this case poses would have had to be very different but there is none. In short, to the extent that the obligations which the regulation imposes upon the victim of a 'hit and run' driver are discriminatory, the discrimination is not unfair to such a victim.

[44] I might add that even if it were so that equality of treatment is required *prima facie,* it is at least conceivable that there might be evidence at the disposal of the Fund which would show that the difference in treatment of these different kinds of claimant is justifiable under s 36 of the Constitution. To decide the point against the Fund at this belated stage of the litigation when the issue was not raised in the court of first instance where evidence could have been led, does not seem justifiable."

[25] The importance of the limitation of a prescriptive period is to enable a defendant to commence with investigations regarding an incident and finding evidence about that incident. This was

accepted in principle in ***Hartman vv Minister van*** *Polisie.*[15] Therefore, the prescribed period of two years in regulation 2(3) is reasonable and justifiable and the desired ends could not reasonably be achieved through other less damaging means.

F. ***Conclusion***

[26] This Court finds that regulation 2(3) is neither *ultra vires* nor discriminatory and concomitantly unconstitutional. To that extent the defendant's special plea is upheld but that does not put an end to this matter. However, the question what is an appropriate relief in the circumstances of this case?

[27] It is common cause that the plaintiff submitted a claim on 8 May 2002, that is within three years from the date of the plaintiff's cause of action which arose on 2 June 1999. However, in its plea averred that a valid claim should have been lodged by the plaintiff against the defendant on or before 1 June 2001. In the circumstances, the plaintiff did not submit a claim as required by section 24(1) and accordingly no reliance can be placed on

15 1983 (2) SA 489 (A) at 487F-498A.

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section 24(5).16 In the circumstances it is not possible to sustain the plaintiff's claim against the defendant.

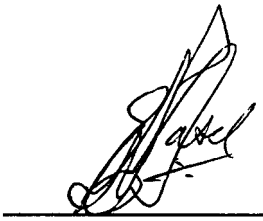
HEARD ON: 17/3/04, 9/11/04
FOR THE PLAINTIFF: ADV FRENCH BEZUIDENHOUT INSTRUCTED BY: SHABANGU & BEAUCHAMP ATTORNEYS, PTA FOR
DEFENDANT: ADV P M LEOPENG
INSTRUCTED BY: GILDENHUYS V.D. MERWE INC, PTA
DATE OF JUDGMENT: *26/7/05*

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

Order

(a) The defendant's special plea is upheld.

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



E M PATEL
JUDGE OF THE HIGH COURT

16 Compare: *Road Accident Fund v Thungwane* 2004 (3) SA 169 (SCA) para [17] at 175E1F-H; *Road Accident Fund v Makwetlane* 2005 (4) SA 51 (SCA) para [47] at 66AC.