IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

DELETE WHICHEVER IS NOT APPLICABLE
Case Number: 04/5529
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
DATE 29/07/05 SIGNATURE

In the matter between:

KUBULI RAYMOND MAWETHU Plaintiff

and

ROAD ACCIDENT FUND Respondent

JUDGEMENT

JAJBHAY J:

In this matter, the Plaintiff has instituted an action against the Defendant as a result of a collision, in terms of the Road Accident Fund Act 56 of 1996 ("the Act"). The Plaintiff alleges that he was run down by

an unidentified motor vehicle on 28 August 2003 at approximately 08h00 on the edge of Nederveen Road in Rondebult. The Plaintiff's claim for compensation against the Defendant is in terms of Section 17(1)(b) of the Act, read together with regulations 2 and 3. The regulations were made in terms of Section 26 of the Act.

The Defendant has raised a special plea that it was not liable to the Plaintiff, because the Plaintiff did not comply with the provisions of regulation 2(1)(c). The Defendant raised the defence that the Plaintiff failed to submit an affidavit to the police in which particulars of the occurrence concerned were fully set out, within the period of 14 days provided by regulation 2(1)(c) on the date of being in a position to do so.

The obligation to provide compensation imposed on the Road Accident Fund ("the Fund") or an agent is contained in Section 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 employees' duties as employee."*

The above section draws a distinction in clear terms between a 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 instance, 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 section 26".

Section 26 provides:

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

The regulation relied upon by the Fund is regulation 2(1)(c) contained in Government Gazette 17939 of 25 April 1997. It provides:

> *"(1) In the case of any claim for compensation referred to in section 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."*

The facts of the present matter may be summarised as follows. The accident occurred on the 28 August 2003 at approximately 08h00, on Nederveen Road, Rondebult. The Plaintiff was a pedestrian .He was struck by a motor vehicle causing injury to his right leg. He was taken to the Natalspruit hospital where he was diagnosed to have sustained compound right tibia – fibula fractures. The wounds were debrided and

the tibia was managed surgically by stabilisation with an external fixator. He was discharged one week later walking on crutches. His course was complicated by infection. The external fixator was removed after one month and the leg held in a plaster cast for a few months thereafter. Once the plaster was removed, a wound discharge continued which was managed by dry dressings.

At the hospital he was bed ridden. He did not receive any visitors whatsoever. He was in severe pain throughout this time. At the time of his collision the Plaintiff was twenty years of age. He completed standard six where after he left his schooling because his family could not afford his school fees. The hospital admission form stipulates that the Plaintiff had been run down by a motor vehicle. On 5 September 2003 the Plaintiff was discharged as an in–patient. Thereafter, he continued to receive treatment as an out-patient. Doctor Morare who examined the Plaintiff and administered the necessary treatment at the Natalspruit hospital testified that under ideal circumstances, the Plaintiff would have been kept in hospital for about two months. However due to the shortage of resources, at the Natalspruit hospital, the institution had no choice but to discharge the Plaintiff and to continue treating him as an out-patient.

At the time of his discharge the Plaintiff was instructed on how to care for his leg while at home. He was informed not to leave his home except for the purpose of visiting the hospital. He was further instructed

to keep his leg elevated as much as possible, and to wash and dress the wound three times a day. The Plaintiff explained that he lived in a "RDP" home with his parents and two siblings. Both his parents were employed at all material times. At home, the Plaintiff was provided with his food in bed. He could not bath. Water and soap were brought to his bed. He did not manage to keep the wound clean and it became septic.

Acting on the instructions of the hospital staff, the Plaintiff remained at home all the time, except for the five occasions that the Plaintiff went to hospital for medical treatment. The Plaintiff attended hospital on 15 September 2003; 22 September 2003; 29 September 2003; 6 October 2003; and 27 October 2003.

The Plaintiff was driven by his attorney of record to the Police Station to depose to an affidavit on the 28 October 2003. From the date of his discharge to the time that the Plaintiff furnished the relevant affidavit, a timespan of fifty three days elapsed. The Plaintiff explained that his mind was so absorbed with his pain and suffering, coupled with the compelling concern that he was in real danger of losing his leg, that there was simply no "mental space" in his mind to allow him to focus on the matter of reporting the accident to the police earlier.

The Plaintiff did not have access to a private motor vehicle. There was no telephone in his immediate environment. He went to hospital by taxi. His journey to and from hospital was cumbersome, painful and

tiring. He had no choice except to put himself through this ordeal. His doctors warned him that he may lose his leg if he did not comply strictly with his doctor's instructions by presenting himself at hospital regularly for continued medical treatment and remaining at home.

On 29 September 2003 the Plaintiff's external fixator was removed and a plaster cast inserted. The Plaintiff explained that this procedure was excruciating and physically drained him. Doctor Morare explained that when there is no sepsis, an external fixator as severe as the Plaintiff's injury would have remained in place for approximately two months.

The Plaintiff explained that he did not throughout the duration of his life visit a police station. There was no necessity for him to do so. In this instance he did not know that he had to report the incident to the police.

Regulation 2(1)(c) has been held to be expedient to achieve or promote the objects of the Act. It was further held that this regulation does not offend against any provisions of the Constitution: and accordingly was declared to be valid: *Road Accident Fund v Makwetlane 2005 (4) SA 51 SCA; Road Accident Fund v Thugwana 2004 (3) SA 169 SCA. This regulation is a "potestative condition with which it would ordinarily be within the power of a claimant to comply";* Makwetlane supra at paragraph [32]. The regulation does not deprive the victim of a hit and run driver of the protection which the enabling

legislation intended him or her to have. However, it does require the victim to take an important step. This step is normally within the complainant's power to assume, sometimes on regret that if the step is not taken then the complainant will not be compensated by the Fund. In matters such as the present, the Fund does not have a version from the driver of the incident. It is trite that fraudulent claims are an obvious danger in alleged hit and run cases, *Mbatha v Multilateral Motor Vehicle Accidents Fund 1997 (3) SA 713 SCA*: *"The obligation placed upon a claimant by the regulation is obviously intended to discourage fraud and to provide little time for plots to be hatched. How effective it has proved to be or will be or whether there are other and better ways of deterring fraud and insuring bona fides is besides the point. As long as the Regulation has the potential to deter fraud and the potential is not so minimal as to be derisory, it cannot be said to have no rational purpose."* Makwetlane supra at [34] *"The compulsory involvement of the Police soon after the incident is alleged to have taken place, and the injury or injuries sustained, is calculated to make would be fraudsters apprehensive about embarking upon such an enterprise. The involvement of the Police would also mean that there might be a skilled investigation into the alleged incident which might well reveal it to be a fabrication. The need to make a statement by way of an affidavit means that a dishonest claimant would also have to steel him or herself to commit perjury. These are considerations which are conducive towards making potential fraudsters think more than twice before chancing their arms. An early report, although obviously not*

conclusive, also goes some way towards showing bona fides and serves at least to eliminate fabricated claims concocted long after the alleged incident, perhaps at the instigation of co-conspirators." Makwetlane supra [35]. However, the obligation intended is not absolute. There are two significant and gratuitous qualifications: firstly it must have been reasonably possible to do so, and secondly, the period of 14 days commences to run only after the claimant is "in a position to" furnish the required affidavit.

Again, in the Makwetlane matter at paragraph [37] the learned Judge of Appeal set out that, *"it is of course so that victims of hit and run drivers may be oblivious of the regulation and may fail to comply with it through ignorance. As against that there is the consideration that anyone who suffers injury and loss as a result of such flagrantly unlawful conduct on the part of a hit and run driver may reasonably be expected to enquire as soon as reasonably possible what remedies might be available. More importantly, as I shall illustrate later, the availability of a claim of this kind represents an act of legislative largesse. Steps taken by regulation to minimise, as far as possible fraudulent exploitation of that largesse should not likely be condemned as unreasonable even if they may sometimes result in a genuine victim not receiving compensation."*

Cloete JA in the Thugwana matter supra, states that the regulation is not a model of clarity. The learned Judge of Appeal sets out at

paragraph [6] of his judgement that *"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."* He further explains that 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. However, once the claimant is in a position to make an affidavit, the 14 days begin to run. The learned Judge of Appeal continues to explain that *"if the affidavit is submitted more than 14 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 14 day period. If so, the Fund will incur no liability. If not, the 14 day period would be extended for so long as it was not reasonably possible for the claimant to have submitted it but no longer."* In the implementation of the above pronouncements the facts of each case must be considered on their own. Against this background, I now turn to analyse the facts of the present matter.

Mr Ebrahim contended that it was reasonably possible, and accordingly the Plaintiff was in a position to submit an affidavit to the police on the date that he was discharged, that is 5 September 2003. This submission cannot be sustained. The uncontradicted evidence

established, in my judgement, that the Plaintiff was physically as well as mentally (in the lay sense of the word) incapable of making an affidavit. At this stage, he simply was not in a position to do so. He was informed by his doctor not to leave home for any reason except to have his injuries attended at the hospital. This he did. His first visit to the hospital as an out-patient was on 15 September 2003 and thereafter he made his way to the hospital as explained earlier herein. In assessing whether the Plaintiff was in a position to physically or mentally depose to an affidavit, the evidence of Doctor Morare is helpful. Doctor Morare was reliable, independent and objective. I see no reason why I should doubt the integrity of his testimony. The Doctor informed the Plaintiff not to leave home unless he had to go to the hospital. All other "outings" were discouraged. He was physically debilitated and bedridden, as well as mentally traumatised. He was informed in no uncertain terms that there was a distinct possibility that he may lose his foot.

The Plaintiff is an unsophisticated, simple human being. He has never reported an incident to the police. There is no evidence as to whether he was employed. He was a minor at the time of the collision. He projected a very favourable impression; there is no reason to disbelieve him. His version that he was run down is verified in the admission report of the hospital. His prolonged, and severe pain curtailed his mobility. He was physically weak throughout his recuperative period. He suffered from fatigue and mental anxiety, certain medical

complications arose in the form of "yellow blood" (sepsis) during his recuperative period. The Plaintiff had no access to telephone facilities. He further explained that his journey to the hospital was inconvenient and tiring.

The sepsis, the premature removal of the external fixator, the osteitis, the external fixator, the plaster cast and the need to keep his leg elevated dictated that he remain at home. He was not able to call upon his parents or his siblings to make a report to the police. All of these factors in my judgement made it physically and mentally impossible for the Plaintiff to make an affidavit to the police. It was not reasonably possible in the circumstances for the Plaintiff to have made such an affidavit. Therefore, the further contention that the Plaintiff could have made the affidavit to the police on the 15th of September 2003 is not convincing.

The first occasion to make the affidavit to the police arose on 28 October 2003 when his attorneys of record volunteered to drive him to the police station to make the affidavit as contemplated in the regulation. It was at this time that the Plaintiff was in a position to make an affidavit and the 14 day period commenced.

The Concise Oxford Dictionary 10th Edition, Revised, defines the word **reasonable** as *"(1) fair and sensible; (2) as much is appropriate or fair"* and the word **possible** *"capable of existing, happening, or being*

achieved." The facts of the present case indicate that the physical and mental circumstances detained the Plaintiff .The affidavit could not have been made to the police prior to 28 October 2003. It was neither fair and sensible, nor capable of being achieved prior to this date.

To my mind, the Plaintiff's age is also an important factor when determining the exact date that the 14 day period commenced. In terms of the Prescription Act 68 of 1969, prescription cannot be completed before a year has elapsed after the day on which the minor attained his or her majority, (section 13(1)(a)(i)). Statutory protection against the operation of extinctive prescription is available to any creditor under the age of twenty one years. There is no reason why this principle should not be extended to the facts of the present matter.

On a strict application of the regulation the Plaintiff whilst he was a minor would lose the protection that he would normally be entitled to invoke. There is merit in the submission made by Ms Goodenough that the Plaintiff was of an age where the law still regarded him as requiring legal protection and recognised the limitations imposed by his youth which must be relevant to the inquiry as to whether the Plaintiff submitted the affidavit within a reasonable time.

The objective of the Act is clear. The provisions of the Act have to be interpreted in a manner that such interpretation is achieved as a extensively as possible in favour of a third party in order to afford the

latter the widest possible protection. This view has been adopted by our courts in the interpretation of the predecessors of the Act, and equally adopted in the interpretation of the present Act; *President Insurance Company v Kruger 1994 (3) SA 789 (A); RAF v Makwetlane supra; RAF v Tugwana supra.*

The Regulation was not promulgated to impose impractical and inconsiderate restrictions on a claimant, *"the Regulation does not purport to deprive, willy nilly, the victim of a hit and run driver of the greatest possible protection which the enabling Legislation intended him or her to have"* (Makwetlane at paragraph[32]). In determining whether the steps envisaged are peculiarly within the complainant's power to take, or whether such steps are reasonably possible within the circumstances of a particular case, our courts must guard themselves from depriving genuine victims the relief that the law envisaged them to enjoy. Again, each case must be determined on its own fact.

We must take into account that we continue to live in a land where poverty and illiteracy remains abound and differences of culture and language are pronounced. The differences and inadequate infrastructure (no convenient transport or telephone facilities in this case) isolate the people who are handicapped thereby from the main stream of what may in normal circumstances be considered reasonably possible. Socio-economic and geographical considerations must be

taken into account to determine whether the Plaintiff's claim is justiciable.

In a matter such as the present, neither the Regulations, nor the enabling Act envisage a passive, armchair and relaxed approach on the part of the Fund. At the very least, the Fund should investigate the physical and mental capability of the claimant. Here, the Fund tendered no evidence to gainsay the Plaintiff's version. The Fund failed hopelessly to investigate the socio-economic and geographical circumstances of the Plaintiff (if it did, then no evidence was tendered to this effect). The Fund simply sat back and tendered the special plea set out earlier herein. To my mind this conduct on the part of the Fund is unacceptable and ought to be criticised. The Fund should have played a more proactive and pragmatic role in the circumstances of the present matter. It is blessed with the skills and resources to do so. Here the Plaintiff is not. There was no allegation that in this matter the Plaintiff was acting fraudulently.

In the circumstances, given the age of the Plaintiff, the nature and sequlae of his injuries and his circumstances at the time, I determine that it was not reasonably possible for the Plaintiff to submit an affidavit to the police any earlier than on 28 October 2003.

In the circumstances I make an order in the following terms:

1. The Defendant's special plea is dismissed with costs.
2. The merits relating to the collision and the question of negligence, as well as the question of the quantum is postponed sine die.

M JAJBHAY
Judge of the High Court of South Africa

DATES OF TRIAL:	26 and 27 July 2005
DATE OF JUDGEMENT:	29 July 2005
ON BEHALF OF PLAINTIFF:	ADVOCATE GOODENOUGH INSTRUCTED BY NORMAN BERGER AND PARTNERS INC 84-6TH AVENUE CNR LOIUS BOTHA AVENUE HIGHLANDS NORTH
ON BEHALF OF THE DEFENDANT:	ADVOCATE S EBRAHIM INSTRUCTED BY ROUTLEGDE-MODISE 5TH FLOOR, NORTH WING SCHREINER CHAMBERS 94 PRITCHARD STREET JOHANNESBURG