IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: 16813/03

DATE: 2007-08-22

I n the matter between

DUDUZILE, MNTAMBO Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

J U D G M E N T

JAJBHAY, J:

[1] In this matter, plaintiff has instituted an action against defendant as a result of a motor collision. The action is in terms of the Road Accident Fund Act 56 of 1996 ("the Act"). The plaintiff alleges that the collision occurred on 9 December 2000. In her Particulars of Claim the plaintiff set out that "(she) duly complied with the provisions of the Road Accident Fund Act prior to the issue of this combined summons".

[2] It is common cause that during January 2002, the plaintiff, in compliance with the provisions of section 17(1) and section 24(1)(a) of the Act read with regulation 3(1) of the regulations made under the Act, lodged a claim for compensation in respect of bodily injuries sustained by her in the said collision.

[3] Subsequently, on 26 June 2003, the plaintiff instituted an action for damages arising out of the bodily injuries sustained in the collision.

The Particulars of Claim however, limited plaintiff's claim to that of past medical expenses, future medical expenses and general damages.

[4] The defendant filed its plea timeously. Thereafter on 16 October 2006 and 15 March 2007 the plaintiff delivered her notice of intention to amend her particulars of claim pursuant to the terms of rule 28 of the rules of this Court. The plaintiff sought to amend her Particulars of Claim, through this notice, by the introduction of two heads of damage, namely past loss of earnings and future loss of earnings.

[5] Subsequent to the pleading of these amendments the defendant in its turn, amended its plea with the introduction of a special plea to the effect that the plaintiff's claim for past and future loss of earnings prescribed in terms of section 24 of the Act, the three-year period having expired.

[6] Section 17 of the Act deals with liability of the Fund and agents and sets out that:

> "(1) The Fund or an agent shall—
>
> (a) 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) ..."

[7] Prescription of a claim is dealt with in section 23 of the Act. This section reads as follows:

> "(1) Notwithstanding anything to the contrary in any law contained, but subject to subsections (2) and (3), 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 either the driver

> or the owner thereof has been established, shall become prescribed upon the expiry of a period of three years from the date upon which the cause of action arose."

[8] The issue that falls to be considered is whether the portion of the plaintiff's claim concerning her past and future loss of earnings has prescribed. The parties agreed at the hearing, that I determine this matter prior to entering into the issue relating to the quantum. The merits were agreed upon. The insured driver was in effect 80% negligent in respect of the collision set out earlier herein. Here, I have to determine whether the plaintiff's claim for compensation concerning her past and future loss of earnings incorporated in the notice of amendment outside the three-year period, has prescribed, or whether the plaintiff's initial institution of this action has had the effect of interrupting the running of prescription in respect of the plaintiff's claim for compensation for loss of earning and/or earning capacity.

[9] The plaintiff's right to recover past and future loss of earnings formed part of her original cause of action to claim for compensation. Therefore, the original summons interrupted prescription, albeit that the interruption was partial; however the partial interruption endured for the benefit of the entire right of actions or claim.

[10] In the present matter, the object of the plaintiff's action is to enable her to recover the difference between the universitas of her rights and duties as it was after the wrongful act, and what it would have been if the act had not been committed. Here, the single wrongful act of the insured driver triggered for the plaintiff one cause of action for all the loss or damage she suffered in consequence of it, including the loss of her past and future loss of earnings. This claim for compensation or right of

action in respect of past and future loss of earnings is included in the diminution of the universitas of her right and obligation resulting from the collision.

[11] "A right of action to recover damages arises from a variety of causes including a delict, a contract or a statute. Under the common law, the applicant has an enforceable right not to be injured unlawfully and culpably against all other persons, including the driver of a hit-and-run motor vehicle. A driver who injures any person is at common law liable to compensate him/her for the patrimonial loss sustained. Success or failure in recovering the loss is another matter."

See *Renier Albertus Hermanus Engelbrecht v The Road Accident Fund and Another* (an unreported Constitutional Court case under case number CCT57/06 decided on 6 March 2007). It is clear that the Act exists for the exclusive benefit and protection of the victim and not for the benefit or protection of the negligent or unlawfully acting driver or owner of a vehicle. This fundamental principle is supported by our case law. See *Aetna Insurance Company v Minster of Justice*, 1960 (3) SA 273 (A) 285. In the last mentioned case, Ramsbottom JA emphasised that:

" The obvious evil that is designed to remedy is that members of the public who are injured, and the dependants of those who are killed, through the negligent driving of motor vehicles may find themselves without

> redress against the wrongdoer. If the driver of the motor vehicle or his master is without means and is uninsured, the person who has been insured or his dependants, if he has been killed, are in fact remediless and are compelled to bear the loss themselves. To remedy that evil, the Act provides a system of compulsory insurance."

The object of the Act indicates that when provisions of the Act have to be interpreted, such interpretation must be done as extensively as possible in favour of the third party in order to afford the latter the widest possible protection. This is the view adopted by our courts in the interpretation of the predecessors of the Act. See *President Insurance Company v Kruger*, 1994 (3) SA 789 (A) 796E.

[12] At common law, a justiciable claim accrued to an applicant the moment she was injured and suffered loss or damage as a result of the wrongful and negligent driving of the driver of the motor vehicle. The remedy is part and parcel of a right (*ubi ius ibi remedium*). Watermeyer JA held in *Oslo Land Company Limited v The Union Government*, 1938 AD 584 at 592:

> "In negligence cases the cause of action is an unlawful act plus damage, and as soon as damage has occurred all the damage flowing from the unlawful act can be recovered, including prospective damage..."

[1 3] The plaintiff's current claim for compensation has been created by the Act. The Act can be utilised by any person who is injured in consequence of the negligent driving of a vehicle to claim compensation

for any loss that may be incurred. The Act is the culmination in a long line of national legislation beginning with the Motor Vehicle Insurance Act 29 of 1942. The primary concern of our Legislature in enacting these relevant statutes has always been:

> "To give the greatest possible protection ... to persons who have suffered loss through a negligent or unlawful act on the part of the driver or owner of a motor vehicle".

See *Aetna Insurance Company v Minster of Justice; Engelbrecht v The Road Accident Fund and Another*, above.

[1 4] Corbett JA observed in *Evins v Shield Insurance Company Limited*, 1980 (2) SA 814 (A) 842E-F:

> "It is clear that the 'debt' is necessarily the correlative of a right of action vested in the creditor, which likewise becomes extinguished simultaneously with the debt."

The distinction between "right of action" or a “claim” and "cause of action" has been repeatedly emphasised by our courts. See *CGU Insurance Limited v Rumdel Construction (Pty) Ltd*, 2003 (2) All SA 597 (SCA), para [6] at 601C-D. A right of action must be noted to bear a wide and general meaning; and not the technical meaning to given to cause of action, being the phrase ordinarily used to describe the set of material facts relied upon to establish the right of action. In my view, in the present matter, although the summons initially failed to disclose a claim for want of or other averment, it may nevertheless interrupt the running of

prescription. Provided that the right of action sought to be enforced in the summons subsequent to its amendment is recognisable as the same or substantially the same right of action as that disclosed in the original summons. See *Sentrachem Limited v Prinsloo*, 1997 (2) SA 1 (A) 15H-16B; *Churchill v Standard General Insurance Company Limited*, 1977 (1) SA 506 (A) 517B-C; *FirstRand Bank v Nedbank (Swaziland) Limited*, 2004 (6) SA 317 (SCA) 321. Therefore, the question to be asked and ultimately determined in the present matter is whether the right of action relied upon in the Particulars of Claim as amended is recognisable as the same or substantially the same as that relied upon in the Particulars of Claim in its original form.

[1 5] Van Heerden JA in *Truter and Another v Deysel*, 2006 (4) SA 168 (SCA) 174 paragraph [17] stated:

> " In a delictual claim, the requirements of fault and unlawfulness do not constitute factual ingredients of the cause of action, but are legal conclusions to be drawn from the facts:
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> > 'A cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed with his action. Such facts must enable a court to arrive at certain legal conclusions regarding unlawfulness and fault, the constituent elements of a delictual cause of action

being a combination of factual and legal conclusions, namely a causative act, harm, unlawfulness and culpability of fault.'"

See *Laubser Extinctive Prescription*, (1996) para 4.6.2 at pp 80-1 and the other authorities cited therein. Cause of action for the purpose of prescription therefore would mean:

" ... every fact which it would be necessary for the plaintiff to prove, it traverse, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

See Maasdorp JA in *McKenzie v Farmer's Cooperative Meat Industries Limited*, 1922 AD 16 at 23 cited with approval by Corbett JA in the *Evins* case at 38D-F.

[1 6] Here, the plaintiff's cause of action was completed as soon as she suffered damage as a result of the negligence of the insured driver. Therefore, to my mind, her claim to the loss already sustained by her has surfaced, and in addition her claim to future loss of income is also triggered. The single wrongful act of the insured driver vested in the plaintiff one single right or claim to compensation, to sue for all loss or damage caused to her by such wrongful act, whether such loss or damage resulted from her claim that related to past medical expenses, future medical expenses, general damages or past loss of earnings and future loss of earnings. There is no justification for distinguishing between the right to recover for compensation in respect of the claims set out in the initial summons, and the claim as set out in the amended summons. In fact, section 17 of the Act sets out that the Fund or an agent shall subject to this Act in the case of a claim for compensation under this section arising from the driving of the motor vehicle where the identity of the owner or the driver thereof has been established, be obliged to

compensate the third party for any loss or damage which the third party has suffered as a result of any bodily injury to herself caused or arising from the driving of the motor vehicle by any person at any place within the Republic, if the injury is due to the negligence or other wrongful act of the driver or the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee. This section, embodies in a single cause of action all the third party's rights to recover compensation. Therefore, when the plaintiff had one single right to claim compensation for all loss or damage that she suffered as a result of the collision, the first summons interrupted prescription for the entire claim of the plaintiff. See *Erasmus v Grunow*, 1978 (4) SA 245F-G.

[1 7] I did not understand counsel acting for the defendant to argue that the claim set out in the amended summons was separate and distinct from the claim set out in the original summons. Even if it were to be argued that the claims were in fact separate, this can be gainsaid by the proposition that it is the injury to the plaintiff which has been accepted by the defendant that entitles the plaintiff to succeed in her claim for past and future loss of income. As I have already stated, the plaintiff's essential cause of action in the present matter was that the wrongful act of the driver of the insured vehicle had caused her loss or damage. The dictum of De Kock J in the matter of *Lampert-Zakiewicz v Marine and Trade Insurance Company Limited*, 1975 (4) SA 597 (C) provides a useful guide in the analysis of the law on this particular question. The learned judge sets out that:

> "... the contention was also put forward in this regard that
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> a claim for loss of earnings, for example, was a separate
>
> and distinct claim which became prescribed after the
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> period laid down in the Act unless it was properly set out
>
> in form MVA13 within the period of prescription.

I do not agree with any of these submissions. As far as the latter part of the argument is concerned it seems clear from cases like *Schnellen v Rondalia Assurance Corporation of SA Limited*, 1969 (1) SA 517 (W), and *Custom Credit Corporation (Pty) Ltd v Shembe*, 1972 (3) SA 462 (AD) at P472, that a plaintiff who claims compensation for bodily injury under the Act has but one cause of action. The various items that make up these claims, for example, in respect of loss of earnings, do not constitute separate claims or separate causes of action ... I am unable to agree therefore with the proposition that amendments to the pleadings, which vary the amount claimed or the items in respect of which damages are

claimed, cannot be granted after the period of prescription has elapsed..."

The Court in the *Lampert* case, was confronted with a situation similar to the one on the present matter. There, the plaintiff had inserted the word "nil" after the words "estimated future loss of earnings" in filling in the MVA13 form and subsequently, in his claim for damages claimed an amount of R7 000 as part of his future loss of earnings. The defendant pleaded in that case that the plaintiff should be precluded from enforcing that claim whereupon the plaintiff excepted to the plea as disclosing no defence. The *Lampert* decision was followed by the Appellate Division in the matter of *Evins v Shield Insurance Company*, 1980 (2) 814 (A). There, Corbett JA stated the following:

> " ... another aspect of the concept of the single cause of action in the realm of prescription relates to the amendment of the plaintiff's claim as originally pleaded by him. Where the plaintiff seeks by way of amendment to augment his claim for damages, he will be precluded from doing so by prescription if the new claim is based upon a new cause of action and the relevant prescriptive period has run, but not if it was part and parcel of the original cause of action and merely represents a fresh quantification of the original claim or the addition of a further item of damages..." p 836C-E.

[1 8] Here, the plaintiff's counsel correctly submitted that the claim for

loss of earnings does not constitute a new cause of action inasmuch as it is "part and parcel of the original cause of action and merely represents a fresh quantification of the original claim and the addition of a further item of damages". Corbett JA in the *Evins* case thereafter proceeded to set out what would in the ordinary cause constitute a single cause of action and refers to three examples, namely:

1 8.1 A situation such as the one that arose in *Green v Coetzee*, 1958 (2) SA 697 (W) in which the plaintiff had, in the same accident sustained bodily injuries and damage to his property. Those claims for damages were held to constitute one indivisible cause of action because both were founded upon *lex aquillia* aimed at compensation for losses suffered in the claimant's property;

1 8.2 The situation that arose in *Schnellen v Rondalia Assurance Corporation of SA Limited*, where the Court held that for purposes of an application to amend the plaintiff's pleading, a claim for compensation for bodily injuries sustained by the plaintiff and a claim by the plaintiff for compensation for medical expenses incurred by him in respect of his minor son who was injured in the same accident, constituted part of a single cause of action;

1 8.3 A plaintiff who suffers bodily injury will at common law and under legislation have a single cause of action in respect of the damages claimable by him whether such damages relate to patrimonial loss or constitute a *solatium* for pain and suffering, disfigurement, disability, et cetera.

[1 9] A plaintiff in circumstances such as the present, who suffers bodily injury has a single cause of action in respect of the damages claimable by her notwithstanding that such damages may relate to

patrimonial loss or *solatium* for pain and suffering, disfigurement, disability, et cetera. In *Dladla v President Insurance Company Limited*, 1982 (3) SA 198 (W) Goldstone J refused to uphold an objection to a proposed amendment on the basis that it introduced a new cause of action which had become prescribed on the ground that the amendment did not introduce a new cause of action which had become prescribed. In *Dladla's* case, the plaintiff sought to amend the allegation that he was a fare-paying passenger in the said motor vehicle, and substituted that with the allegation that he was in the vehicle during the course and scope of his employment as a servant of the owner of the vehicle. The Court having found that the claim as mentioned introduced no new cause of action allowed such amendment. The learned judge in *Dladla's* case stipulated as the essential ingredients a cause of action of a plaintiff who sues for compensation for bodily injury sustained by reason of a collision the following:

1 9.1 That the plaintiff suffered bodily injury;

19.2 That such injury was caused by or arose out of the negligent driving of a motor vehicle; and

19.3 That such motor vehicle was duly insured by the defendant.

[20] Here, plaintiff's counsel correctly submitted that these are the selfsame ingredients upon which plaintiff's claim for loss of earnings is founded. In the present matter, I believe that the amendment introduced by the plaintiff simply sought to amend a claim which is part and parcel of the original cause of action and merely represents a fresh quantification of

the original claim and the addition of a further item of damages. The introduction of the claim in the amendment, did not detract from the fact that the plaintiff was utilising the one single all-embracing action that she was entitled to, to recover all her loss, howsoever resulting, caused by the negligence and unlawful action of the insured driver for which the Fund is responsible. To my mind, the Act gives the third party only one single, indivisible right of action. The claim for compensation envisaged in section 17 of the Act refers to the totality of the rights to claim compensation.

[21] It is therefore my determination that the amendment did not introduce a new claim for compensation and accordingly the plea of prescription is bad in law and falls to be dismissed with costs.

DATE OF HEARING	—	14 AND 15 AUGUST 2007
DATE OF JUDGMENT	—	22 AUGUST 2007
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