

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 13/33469

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....
DATE

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SIGNATURE

In the matter between:

SCOTT: LEIGH-ANNE

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

KEIGHTLEY, AJ:

INTRODUCTION

- [1] The plaintiff in this matter is Leigh-Anne Scott (“Ms Scott”). She has instituted a claim for compensation against the defendant, the Road Accident Fund (“the Fund”), in terms of the Road Accident Fund Act 56 of 1996 (“the Act”).
- [2] The Fund raises a special plea in respect of Ms Scott’s claim. When the matter was allocated for trial, the parties were directed to argue the special plea as a preliminary issue. It was directed further that the special plea be determined on the basis of the documents and pleadings filed to date. This judgment is concerned only with the special plea, the details of which I will discuss shortly.
- [3] The following chronology of relevant events provides context to the issues that arise for determination:
- [3.1] On 13 September 2009 Ms Scott was a passenger on a motorcycle driven by one Jonathan Meyer (“the driver”). Ms Scott was 18 years old at the time.
- [3.2] At approximately 11H00, and at or near Erasmus Road, Edenglen, the motorcycle was involved in an accident.
- [3.3] Ms Scott was hospitalized for approximately five days for treatment as a result of injuries she sustained in the accident.
- [3.4] On 26 June 2012 Ms Scott’s attorneys lodged an RAF 1 claim form with the Fund on her behalf (“the claim form”). The claim

form provided details of the police CAS number relating to the accident, and gave the driver's name and address.

[3.5] Ms Scott did not file an affidavit describing how the accident occurred together with her claim form. This fact is significant for purposes of the special plea raised by the Fund.

[3.6] On 31 July 2013, Ms Scott's attorneys wrote to the Fund providing details of the registration number of the motorcycle involved in the accident. They requested that the claim form be amended to include these details.

[3.7] On 19 August 2013 Ms Scott deposed to a short affidavit ("Ms Scott's affidavit"), the pertinent details of which are that she had been a passenger on a motorcycle driven by Mr Meyer on 13 September 2009, they were involved in an accident and she had sustained serious injuries.

[3.8] It seems that this affidavit was provided to the Fund directly, although there is no proof of exactly when this was done. As later events show, a copy was subsequently sent to the Fund's attorneys.

[3.9] On 9 September 2013 Ms Scott's attorneys issued summons in respect of her claim. The particulars of claim allege that the driver was negligent and that he was the sole cause of the accident. They allege further that Ms Scott has been disabled and disfigured

by the injuries, and that she has suffered pain and loss of amenities of life.

[3.10] For reasons that are unknown, the summons was only sent to the sheriff for service on the Fund on 22 January 2014.

[3.11] The Fund filed a plea (excluding the special plea) on 7 March 2014.

[3.12] On 18 June 2014 the Fund's attorneys wrote to Ms Scott's attorneys requesting further details regarding the claim. They requested, among other things, Ms Scott's affidavit in terms of section 19(f)(i) of the Act.

[3.13] In Ms Scott's attorneys response dated 22 July 2014, they advised that the section 19(f)(i) affidavit had already been served on the Fund. However, they enclosed a copy of Ms Scott's affidavit together with their reply.

[3.14] On 21 August 2014 the Fund filed an amended plea, incorporating the special plea.

THE SPECIAL PLEA

[4] The Fund's special plea comprises a main and an alternative plea.

[5] In its main plea, the Fund contends that its obligation to compensate a claimant is limited by section 19(f)(i). Section 19 (f)(i) provides, in relevant part, that:

“The Fund ... shall not be obliged to compensate any person in terms of section 17 for any loss or damage ... if the third party refuses or fails ... to submit to the Fund ..., together with his or her claim form as prescribed or within a reasonable period thereafter and if he or she is in a position to do so, an affidavit in which particulars of the accident that gave rise to the claim concerned are fully set out.”

- [6] The Fund points to Ms Scott’s failure to provide the requisite affidavit together with her claim form. It also points to the fact that Ms Scott’s affidavit (submitted subsequently) was only deposited to on 19 August 2013.
- [7] The Fund contends that in these circumstances Ms Scott’s claim “was completed” only on that date, being some 3 years and 11 months after the collision. Consequently, it submits, Ms Scott’s claim has prescribed under section 23 of the Act, which section provides that a claim must be submitted within 3 years of the accident giving rise to the claim.
- [8] The Fund’s alternative special plea is based on the alleged defective nature of Ms Scott’s affidavit when measured against the requirements of section 19 (f)(i).
- [9] It points out that Ms Scott’s affidavit does not contain a version of the collision or of the negligence of the driver. The affidavit fails to comply with section 19(f)(i) in this regard, which requires that the affidavit must set out fully the particulars of the accident that gave rise to the claim. In the circumstances, submits the Fund, Ms Scott has failed to comply with section 19(f)(i) of the Act, and the Fund is not obliged to compensate her.

THE RELEVANT PROVISIONS OF THE ACT

[10] I have already set out the provisions of section 19(f)(i). In addition to that section, the provisions set out below are relevant to the issues raised in this matter.

[11] Section 17(1) of the Act provides, in relevant part, as follows:

“The Fund ... 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;

...

be obliged to compensate any person (the third party) for any loss or damage with the third party has suffered as a result of any bodily injury to himself or herself ... caused by or arising from the driving of a motor vehicle by any person at any place within the Republic.”

[12] Section 24 deals with the procedure for a claim for compensation. Section 24 (1) provides, in relevant part, that:

“A claim for compensation ... under section 17(1) shall-

(a) be set out in the prescribed form, which shall be completed in all its particulars;

(b) be sent by registered post or delivered by hand to the Fund”

[13] In terms of section 24(5):

“If the Fund .. does not, within 60 days from the date on which a claim was sent by registered post or delivered by hand to the Fund ... as contemplated in subsection (1), object to the validity thereof, the claim shall be deemed to be valid in law in all respects.”

[14] Section 24(6) places a limitation on the enforceability of legal proceedings. It provides that:

“No claim shall be enforceable by legal proceedings commenced by a summons served on the Fund ...-

(a) before the expiry of a period of 120 days from the date on which the claim was sent or delivered by hand to the Fund ...; and

(b) before all the requirements contemplated in section 19(f) have been complied with.”

[15] Finally, section 23 governs the prescription of claims under the Act. It provides:

“(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 ... in the case where the identity of either the driver or the owner (of a motor vehicle) 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.

...

(3) *Notwithstanding subsection (1), no claim which has been lodged in terms of ... section 24 shall prescribe before the expiry of a period of five years from the date on which the cause of action arose.*”

THE MAIN SPECIAL PLEA

[16] The Fund’s main special plea rests on two fundamental premises:

[16.1] first, that it is a peremptory obligation on all claimants to file an affidavit under section 19(f)(i) of the Act; and

[16.2] second, that the filing of a section 19(f)(i) affidavit is a necessary requirement to “complete” (the language used in the special plea) or “perfect” (as Mr Phillips for the Fund put it in oral argument) a claim. In other words, until the affidavit is filed, the claim has not been “lodged in terms of section 24”, with the result that the three-year prescription period under section 23(1) applies, rather than the five-year prescription period provided for under section 23(3).

[17] Much of counsels’ written and oral argument before me was directed at the first of these premises. Mr Phillips for the Fund submitted that the filing of a section 19(f)(i) affidavit was peremptory. He relied in this regard on the decision by Kroon J in *Nonxango v Multilateral Motor Vehicle Accidents Fund* (2005) 4 All SA 567 (SE), in which it was held that:

“The correct interpretation in my judgment is that like the submission of a claim form the submission of the affidavit required by the article was

(subject to the qualification that the claimant be in a position to submit one) a peremptory requirement; as to what was to be contained in the affidavit, the prescription in the article was directory and substantial compliance therewith would be sufficient.”¹

[18] Kroon J expressly differed in this regard from the conclusion reached by this court in the matter of *Moskovitz v Commercial Union Ins. Co. of SA Ltd* 1992 (4) SA 192 (W). In *Moskovitz*, Burman AJ held that the affidavit requirement was directory only, and that substantial compliance would be sufficient to meet it.²

[19] Mr Van den Baselaar who appeared for Ms Scott pointed out that I was enjoined to follow the precedent set by this court in *Moskowitz* unless I was satisfied that it was clearly wrong. He submitted that I should reject the approach adopted by Kroon J in another Division. In addition, he submitted that it was clear from section 19(f)(i) that not all claimants are required to file an affidavit under that section. He submitted that this was indicated by the inclusion of the clause “*if he or she is in a position to do so*” in section 19(f)(i). He contended that the papers filed in the matter, and particularly the expert reports, indicated that Ms Scott had suffered amnesia and had no recollection of how the accident had occurred. The effect of this was that Ms Scott was unable to give any particulars about how the accident had occurred. Consequently, according to Mr Van den Baselaar, Ms Scott fell into a category of claimants to whom section 19(f)(i) simply does not apply.

¹ Para 25

² At 197J-198A

[20] The Fund does not dispute that Ms Scott has no recollection of the accident. However, in my view, I need not trouble myself with reaching a determination on the question of whether, despite this, Ms Scott was under a peremptory obligation to file a section 19(f)(i) affidavit. In my view, the Fund's main special plea is capable of being determined on the basis of the second premise identified above. For present purposes, and without making any determination on the issue, I will assume that Ms Scott was obliged to file an affidavit under section 19(f)(i).

[21] In order to succeed in its main special plea, the Fund must satisfy the court that the process of lodging a claim with the Fund is only completed when the section 19(f)(i) affidavit is submitted. In other words, until the affidavit is submitted, there is no claim that "has been lodged in terms of section ...24", for purposes of determining the relevant prescription period under section 23.

[22] The Act contains no express provision to this effect.

[23] As I have indicated, the process for initiating a claim for compensation is found in section 24. This requires that the claim must be "set out in the prescribed form", completed in all its particulars, and that the form must be hand delivered, or sent to the Fund by registered post.

[24] It is clear from section 19(f)(i) that the requisite affidavit may be filed subsequent to the filing of the claim form under section 24, provided this is done within a reasonable period thereafter. From these provisions it must be inferred that the Legislature did not envisage the affidavit as forming a

necessary part of the claim form. In other words, a “claim in the prescribed form” includes a claim that is not accompanied by a section 19(f)(i) affidavit.

[25] The RAF 1 form, which is the form prescribed in the Regulations under the Act, directs a claimant that: “In an affidavit to be attached to this claim form, please describe how the accident occurred.” This appears in part 5 of the form. Although this direction seems to require that the affidavit must be attached to the claim form, this cannot alter the provisions of the Act which permit the subsequent filing of a section 19(f)(i) affidavit. Counsel for the Fund did not suggest that it did.

[26] Despite the clear wording of section 19(f)(i), the Fund submits that although a claim may be initiated by the submission of the RAF1 form without a section 19(f)(i) affidavit, it is not “completed” or “perfected” until the affidavit is filed. It submits that this is the effect of section 19(f)(i) read with section 24(6) of the Act. As spelled out in more detail earlier, section 24(6) provides that a claim is not “enforceable by legal proceedings commenced by a summons served on the Fund before all requirements contemplated in section 19(f) have been complied with.”

[27] The Fund contends that the effect of these provisions is that a claimant has no valid legal claim until the section 19(f)(i) affidavit is submitted. It says that in this case, Ms Scott did not have a valid claim without submitting her affidavit. By the time she submitted the affidavit, it was too late. Any legal claim she may then have had as a result of the affidavit being filed had

already prescribed under section 23. On this basis, the Fund submits that it is not liable to compensate Ms Scott.

[28] Prior to the adoption of the present Act, the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 (“the 1989 Act”) governed third party compensation claims. Article 48 (f)(i) of the 1989 Act was couched in virtually identical terms to the current section 19(f)(i). The Appellate Division had cause to consider the effect of article 48(f)(i) in *Touyz v Greater Johannesburg Transitional Metropolitan Council* 1996 (1) SA 950 (A). It held that:

“That article (article 48(f)(i)) does not, however, create a limitation on the general liability imposed by art 40. What it does, is to provide for the termination of a claim which has already arisen by virtue of art 40.”³
(emphasis added)

[29] Article 40 under the 1989 Act was the equivalent of section 17 of the present Act. The Appellate Division went on to hold that it was for the defendant in a claim under the Act to prove that the claim was terminated due to non-compliance with article 48(f)(i).⁴

[30] In my view, this authority is directly at odds with the approach adopted by the Fund. On my understanding of the dictum in the *Touyz* case, the submission of a section 19(f)(i) affidavit does not operate, as the Fund submits, so as to “complete” or “perfect” a claim for compensation under section 17(1).

³ At 959

⁴ At 959

Instead, the legal effect of section 19(f)(i) lies in what occurs when it is breached. The legal effect of a failure to comply with section 19(f)(i) is to terminate an existing claim for compensation. The claim comes into existence when a claim for compensation is delivered in accordance with section 24(1). It subsists unless and until the Fund is able to establish that the claimant has acted in breach of section 19(f)(i). Thus, section 19(f)(i) operates so as to terminate a claim, rather than to complete or perfect it.

[31] In my view, section 24(6) does not take the matter further for the Fund. This section forms part of the provisions governing the procedure for claims under the Act. It is not aimed at regulating the substantive validity of a claim for compensation. The purpose of this section appears to me to be to ensure that claims are not pursued by way of litigation until the Fund has been given sufficient opportunity to assess them and to determine whether it should accept liability or defend the matter in court.

[32] In fact, both counsel before me were of the same mind that the effect of section 24(6) in the present case would be to delay Ms Scott's action against the Fund. Of course, this is assuming that I find that Ms Scott is in breach of section 19(f)(i) of the Act. This issue falls for determination under the Fund's alternative special plea, to which I will shortly turn.

[33] For the reasons set out above, I am unable to uphold the Fund's main special plea. I find that it was not necessary for Ms Scott to submit her affidavit in order to "complete" or give legal validity to her claim against the Fund. Once she delivered her claim to the Fund, albeit without her affidavit,

it had been “lodged ... in terms of section 24”. In terms of section 23(3), Ms Scott had five years from the date of the accident within which to file her summons. Ms Scott proceeded to file summons within this five-year period. At that time the Fund had not established any breach of section 19(f)(i) by Ms Scott. In the circumstances, her claim had not been terminated, and the summons interrupted the running of prescription.

[34] In the circumstances, the Fund’s main special plea is dismissed.

THE ALTERNATIVE SPECIAL PLEA

[35] In the alternative, the Fund submits that Ms Scott’s affidavit does not comply with the requirements of section 19(f)(i) of the Act in that it fails to include particulars of the accident that gave rise to her claim. The Fund submits that the affidavit does not contain a version of the accident, nor does it ascribe any negligence to any party.

[36] For this reason, the Fund pleads that it is not liable to compensate Ms Scott.

[37] Counsel for Ms Scott conceded in oral argument before me that his client’s affidavit is deficient in terms of what the Act requires an affidavit under section 19(f)(i) to contain. However, what is contended for on behalf of Ms Scott is that she was unable to give a version in her affidavit as to how the accident occurred because she had no memory of the accident. It was submitted that the expert neurologists’ reports filed during the course of litigation by both Ms Scott and the Fund established that she had suffered amnesia as a result of her injuries.

[38] Insofar as the affidavit falls short of what is required by section 19(f)(i), it is submitted on behalf of Ms Scott that there was no “refusal or failure” on her part to provide the requisite information in her affidavit within the meaning of that section.

[39] In support of these contentions, reference was made to a line of Appellate Division authority establishing that in the context of similar provisions in the statutory predecessors to section 19(f)(i) of the Act the term “fails” means a deliberate failure rather than a mere omission or deliberate inaction. In *Union and South-West Africa Insurance Co Ltd v Fantiso* 1981 (3) SA 293 (A), it was held that:

*“In view of the severity of the penalty, a final loss of claim, one has to consider the failure to furnish copies of reports in a restrictive manner, restrictive in the sense that a court will not deprive the plaintiff of his right to claim compensation unless he can be said to have obstructed the insurer from getting the information which he is entitled to.”*⁵

[40] The Appellate Division subsequently upheld this interpretation of “fails” in the *Touyz* case, which was decided under the 1989 Act. It held that there must be a deliberate withholding of the requisite statement or document before it can be found that a claimant has failed to furnish it.⁶

[41] The Fund does not dispute that Ms Scott suffered amnesia, and that she had no memory of how the accident occurred. In fact, in his written heads of

⁵ At 301B-D

⁶ At 958

argument Mr Phillips expressly states that the Fund is not alleging a deliberate failure on the part of Ms Scott to provide the affidavit. The Fund contends instead that the purpose of the requirement in section 19(f)(i) is to provide the Fund with the necessary information to enable it to assess the claim. In particular, the Fund points to the fact that in the absence of a version in Ms Scott's affidavit, her claim was devoid of an averment of negligence on the part of the driver.

[42] It is so that the purpose of the section 19(f)(i) requirement is to place the Fund in possession of information for assessment purposes. In the present case, Ms Scott's affidavit did not give the Fund very much, if any, information on which an assessment of her claim could be made. However, on the common cause facts, this was not a deliberate strategy on her part. It arose from the fact that she could not give first hand evidence of what had caused the accident. If Ms Scott had explained this in her affidavit, it may have made the absence of an account of the accident clearer. Nonetheless, an explanatory paragraph to this effect still would not have served the purpose of section 19(f)(i). The Fund would have remained in the dark on how the accident occurred.

[43] In my view, and in light of the established jurisprudence placing a restrictive meaning on the term "failure", I conclude that despite the fact that Ms Scott's affidavit does not set out fully the particulars of the accident, this does not amount to a refusal or a failure to do so in terms of section 19(f)(i). It follows that Ms Scott is not in breach of that section, and the Fund's liability is not excluded on this basis.

[44] For these reasons, the Funds alternative special plea is dismissed.

ORDER

[45] I make the following order:

The Defendant's special plea is dismissed with costs.

**R KEIGHTLEY
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Date Heard: 8 June 2015

Date of Judgment: 11 June 2015

Counsel for the Applicants: Adv B K Phillips

Instructed by: Lindsay Keller Attorneys

Counsel for Respondent: Adv M van den Baselaar

Instructed by: Joe Hubbart Attorneys