

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 70524/16

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

DATE 29.08.2018

In the matter between:

GABUZA, NOMSA SIMA

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

Heard: 15 August 2018

Delivered: 29 AUGUST 2018

JUDGMENT

Coram: VAN DER SCHYFF, AJ

Introduction

[1] This special plea came before me as a stated case argued on a point of law.

[2] The relevant facts are that the plaintiff, an adult person born on 2 January 1975, suffered damage as a result of bodily injury caused by or arising from the driving of a motor vehicle. The accident occurred on 22 March 2012. The claim was lodged with the defendant on 23 March 2015. Plaintiff was a passenger in a motor vehicle. When summons was issued neither the owner nor the driver of any of the motor vehicles involved were identified. During August 2017 plaintiff delivered a notice of intention to amend its particulars of claim to incorporate information of the drivers of both the motor vehicles involved in the accident. It is not evident from the documents filed in the court file whether the proposed amendment of the particulars of claim was thereafter affected, but in light of the fact that the defendant gave notice to amend its plea in terms of Rule 28 and effected the amendment to the plea which contains the special plea of prescription on 25 August 2017, and argued the special plea before me without indicating that the particulars of claim was not properly amended, I proceed on the premise that the particulars of claim was amended.

[3] It was argued on behalf of the plaintiff that Monday 23 March 2015 was the first working day after the claim prescribed and that the lodging of the claim on the first working day after the date on which the claim prescribed should be accepted as in accordance with the provisions of s 23 of the Road Accident Fund Act No. 56 of 1996. The plaintiff relied on the principle of law recently laid down in *Road Accident Fund v Masindi*(586 / 2017) [2018] ZASCA 94 (1 June 2018) . According to the plaintiff's calculation of the prescription period, the three year period would have ended on Sunday 22 March 2015.

[4] Defendant's counsel however argued that the *Masindi*- judgment does not find application because the claim prescribed on Saturday 21 March 2015. The claim could still be lodged with the Fund by registered mail on the Saturday

in accordance with of s 24 of the Road Accident Fund Act, No 56 of 1996 (hereafter " the Act").

Applicable legal principles

[5] The plaintiff's claim is regulated by section 17(1)(a) of the Act since the claim for compensation arose from the driving of a motor vehicle where the identity of the driver has been established.

[6] As such prescription is regulated by s 23 of the Act.

[7] It is evident from the content of s 23 that claims must be lodged with the Fund in accordance with the provisions of s 24 of the Act, and that a claim shall become prescribed upon the expiry of a period of three years from the date upon which the cause of action arose, unless a claim has been lodged in terms of s 24 of the Act. Where the claim has, however, been lodged correctly and timeously, such a claim shall not prescribe before the expiry of a period of five years from the date upon which the cause of action arose (s 23(3)).

[8] Section 24(1) of the Act deals with the manner in which a claim must be lodged with the defendant:

"24. Procedure.-(1) A claim for compensation and accompanying medical report 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 at its principal, branch or regional office, or to the agent who in terms of section 8 must handle the claim, at the agent's registered office or local branch office, and the Fund or such agent shall at the time of delivery by hand acknowledge receipt thereof and the date of such receipt in writing."

[9] Two methods are provided for in terms whereof claims can be lodged with

the Fund. The first is that a claim can be "sent by registered post" and the second that it can be "delivered by hand".

[10] It was held in *Commercial Union Assurance Company of South Africa Ltd v Clarke* 1972 (3) SA 508 (A) (in the context of section 11(2) of the Motor Vehicle Insurance Act, No 29 of 1942 that stipulated that no claim would be enforceable by legal proceedings before the expiry of a period of 60 days as from the date on which the claim was sent to the registered company) that the word "sent" refers to the date on which the documents are despatched by post.

[11] It is necessary at this point to refer to the manner in which the prescripton period is calculated. It is trite that the period is calculated by using the civilian method of calculation - *Kleynhans v Yorkshire Insurance* 1957 (3) SA 544 (A). This means that the first day is included and the last day is excluded - giving rise to the acronym FILO (First day In Last day Out) that is often used in lecture halls to explain the calculation of the prescription period to law students.¹ It has until recently been held that where the last day of the period of prescription that is calculated in accordance with the civil or common law rule, *de die in diem* is a Sunday, the period nevertheless expires on such Sunday - *Somdaka v Northern Assurance Co Ltd* 1961 (4) SA 764 (N). It could be argued that the same principle would govern the situation when the last day of the period of prescription is a public holiday.

[12] The Supreme Court of Appeal, however, developed and introduced a new principle that must be applied where the last day of the period of prescription calculated in accordance with the civil or common law rule is a public holiday.

¹ Kloppe HB *The Law of Third Party Compensation* LexisNexis 2008, 276 fn 42 explains as follows: "In practice this means that one day is subtracted from the date on which the claim arose and three years (identified claim) or two years (hit -and-run) is added to the year in which the claim or cause of action arose. For example, where a person was injured on 14 July 1999 by the negligent driving of Mr R the day on which his or her claim will prescribe (no claim having being lodged) is 13 July (last day out) at 0:00 hours. The year will be 1999 plus three years being the year 2002. Accordingly, such a claim will prescribe on 13 July 2002. If a claim has been lodged prescription will occur on 13 July 2004 at 0:00 hours- two years after the initial date of prescription making a total of 5 years."

[13] In *Road Accident Fund v Masindi* (586/2017) [2018] ZASCA 94 (1 June 2018) paragraph 20 the court held:

"... on a proper interpretation of section 23(3) of the RAF Act where the five year period for bringing a claim ends on a day when the court is closed, so that summons cannot be issued and served on that day, the five year period should end on the next working day"

[14] The argument of counsel acting for the plaintiff in the current matter, is that I must apply the principle developed and introduced by the Supreme Court of Appeal in *Masindito* find that the delivery of the claim to the Fund on Monday 23 March 2015 is sufficient to interrupt prescription, because the claim prescribed on 22 March 2015, the preceding Sunday.

[15] If it is considered that the accident occurred on 22 March 2012, and that the prescription period must be calculated in accordance with the civil or common law method represented by FILO, it is evident that the claim had to be lodged with the Fund on or before 21 March 2015, and not on or before 22 March 2015 as contended on behalf of the plaintiff. 21 March 2015 was a Saturday and defendant's counsel correctly argued that the claim could still be lodged by sending it with registered post since the Post Office is open on a Saturday.

[16] In order to determine whether the principle developed and introduced by the Supreme Court of Appeal in the *Masindi* judgment finds application, the principle as set out in the precedent needs to be analysed.

[17] The SCA, through Mocumie JA, explained in paragraph 12 that "[i]n considering the proper interpretation of s 23(3) of the RAF Act, this case requires this court by means of statutory interpretation to strike a balance between an infringement of the guaranteed right of access to courts and the objective of statutory time limits whose function it is 'bringing certainty and stability to social and legal affairs and maintaining the quality of adjudication'. The court took into consideration the fact that *"the RAF Act is social legislation, the primary concern*

of which is to give the greatest possible protection to persons who have suffered loss through negligence or unlawful act(s) on the part of a driver or owner of a motor vehicle' .

[18] However, the court was very careful to emphasise in paragraph 14 "This exercise should not be viewed as extending the period prescribed by the legislature but rather as determining the period intended by the legislature so as to avoid an injustice which the legislature could not have contemplated".

[19] With reference to the English Law principle set out in *Pritam Kaur v S Russel and Sons Ltd*[1972] 1 All ER 306 where Lord Denning concluded "... *I am prepared to hold that, when a time is prescribed by statute for doing any act, and that act can only be done if the court office is open on the day when the time expires, then, if it turns out in any particular case that the day is a Sunday or other dies non, the time is extended until the next day on which the court office is open.*"; and the reality that due to the fact that 16 June 2014 was a public holiday and that "*[i]t was therefore a question of impossibility to perform ' ; the SCA developed a similar rule pertaining to the prescription of road accident claims instituted in terms of the **Act**.*

[20] The practical reality of the plaintiff not being able to issue, and subsequently, serve summons on a public holiday to interrupt prescription was further emphasised in paragraph 21 when the court explained: "*Thus had the court been open on Sunday (weekend) or Monday (public holiday), it would have been possible for the respondent to have issued and served the summons on that very day without the risk of being out of time'*

[21] A plaintiff who wants to lodge a claim with the Fund, do not need access to a court office. Claims are lodged by sending the claim by registered post or delivering the claim by hand. Both methods of delivery have the inherent limitation created by the reality that the Post Office and the office of the Fund will only be open during office hours. It would be novel to argue, for example, that where summons must be served on or before 20 August 2018 (Monday) in order

to interrupt prescription but the summons has not been issued on 20 August 2018 by 15h30 when the court office closes, that the claim will only prescribe on 21 August 2018 because the plaintiff does not have access to the court after 15h30 on a weekday. For this reason, the question that needs to be answered is whether this court can find that the plaintiff failed to enjoy the full benefit of the three year period provided in s 23 of the Act because the Post Office closes on a Saturday at 13h00.

[22] It can be accepted that the legislature was well aware of the fact that a Post Office functions within certain defined office hours, and that no letter can be mailed after the Post Office closed. When the legislature thus determined that claims can be sent by registered mail, the legislature was cognisant of the inherent limitation associated with sending mail by registered post.

[23] In *Masindi (supra)* paragraph 5 the court stated: "*The approach and exercise embarked upon in this case, must be on a case by case basis*" In the case before me, no evidence was lead and no explanation was provided in terms whereof I can make any finding in relation to the existence of any specific or peculiar facts unique to the matter that needs to be adjudicated. It is not possible to determine whether the plaintiff or her attorneys' conduct (or lack thereof) caused the current situation. In any event, I am of the view that a finding must be made pertaining to the principle in issue, and that a principled decision can be taken without having to consider any facts unique to this case.

[24] It is trite that in accordance with a strict application of the FILO method of calculation that applies to the calculating of prescription periods in terms of the Act, the claim *in casu* had to be lodged on or before 21 March 2015. It can also not be disputed that the claim could have been lodged by sending the claim by registered mail on 21 March 2015 before 13h00.

[25] However, as indicated in the *Masindi-judgment* paragraph 13, the clear and unambiguous language of the statute should not be viewed in isolation for fear of defeating the protection afforded by s 34 of the Constitution to any

potential plaintiff.

[26] The court's approach in *Masindi* will affect the calculation of prescription periods in all cases where the civil or common law method of calculation applies when the period for extinctive prescription is determined. A principle has now been incorporated in South African law that when a time is prescribed by statute for doing any act, and that act can only be done if the court office is open on the day when the time expires, then, if it turns out in any particular case that the day is a Sunday or other *dies non*, the time is extended until the next day on which the court office is open.

[27] The ripple effect of the *Masindi* judgment will impact on the calculation of prescription of ordinary delictual claims because the calculation of prescription periods in terms of the Prescription Act, No 68 of 1969, is also done in accordance with the civilian method of calculation.

[28] It is trite, that in claims where the driver of the insured vehicle is identified, the claimant would, but for the provision of s 21 of the Act, 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. // - Mahambo v Road Accident Fund* 2005 (6) SA 475 (T).

[29] The Fund thus substitutes the delictual wrongdoer, and where a delictual claim will prescribe after three years after the debt became due (s 11 read with s 12 of the Prescription Act), a statutory claim in terms of the Act prescribes after the expiry of a period of five years from the date on which the cause of action arose, on condition that the claim was lodged with the Fund before the expiry of a period of three years from the date on which the cause of action arose.

[30] If the calculation of the period of three years within which a claim must be lodged with the Fund is interpreted without taking the *Masindi-principle* into consideration and the three years for extinctive prescription for other delicts in terms of the Prescription Act is calculated while considering the *Masindi-principle*,

and the last day of the period falls on a Saturday, the claimant would be in a worse position that he would have been if he had recourse to a common law claim. Such an interpretation will not accord with the primary objective of road accident compensation to ensure the greatest possible protection to persons injured, or the dependants of persons killed, through the negligent driving of motor vehicles - *Aetna Insurance Co v Minister of Justice* 1960 (3) SA 273 (A) 285E-F; *Bezuidenhout v RAF* 2003 (6) SA 61 paragraph 7.

[31] In light hereof I am therefore of the view that the Masindi-principle must also be applied to the calculation of the period determined ins 23(1) of the Act pertaining to the lodging of claims with the Fund.

[32] However, if I am wrong in holding that the *Masindi-principle* will apply when the prescription period of ordinary delictual claims in terms of the Prescription Act is determined, cognisance must be taken of the fact that a claimant whose claim prescribes on a Saturday, does not have the full extent of the last day available to lodge the claim by sending it with registered post because the Post Office closes at 13h00.

[33] In light of the fact that section 34 of the Constitution entrenches the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, and the imperative to interpret legislation in such a manner that the spirit, purport and objects of the Bill of Rights are promoted, the limitation of a claimant's rights occasioned by the practical reality that Post Offices in South Africa closes on a Saturday at 13h00 and the ensuing impossibility to lodge a claim for the remainder of the day that would equal the normal hours of an ordinary work-day, invites the application of the Masindf principle.

[34] I am also of the view that common sense and logic dictate that the same principles must apply when the prescription period relating to the two respective stadia at which prescription can occur when s 23 of the Act applies, are calculated.

Order

In the circumstances it is ordered that:

[1] The defendant's special plea is dismissed with costs.

[2] The defendant is to pay the costs of this part of the hearing.

E VAN DER SCHYFF

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on:

15 AUGUST 2018

For the Plaintiff/Applicant: Instructed by:

ADV B MATLHAPE

Instructed by

M A SELOTA ATTORNEYS

For the Defendant/Respondent:

ADV THUMBATHI

Instructed by:

DIALE MOGASHOA ATTORNEYS

Date of Judgment:

29 AUGUST 2018