25/97

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 29/96

In the matter between:

JACOB MBATHA — Appellant

and

MULTILATERAL MOTOR VEHICLE ACCIDENTS FUND — Respondent

CORAM: HEFER, NIENABER, HARMS, OLIVIER and SCOTT, JJA

HEARD: 14 MARCH 1997

DELIVERED: 26 MARCH 1997

J U D G M E N T

HARMS JA/

HARMS JA:

The appellant claimed compensation from the respondent (the "Fund") by virtue of the provisions of the Schedule to the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 (the "current Act"). An allegation in the particulars of claim that he was unable to ascertain the identity of the owner or the driver of the vehicle that had collided with him gave rise to a special plea in which the Fund relied upon the appellant's failure to have complied with the provisions of Regulation 3(2)(a)(i) (promulgated in terms of s 6 of the current Act). The regulation subjects the liability of the Fund to a so-called condition – a claim for compensation in the prescribed form must be delivered to the Fund within two years from the date on which the claim arose. The appellant's replication was to the effect that the regulation is *ultra vires* the empowering s 6. (There is also an alternative reply to which I shall return towards the end of this judgment.)

At the trial in the Witwatersrand Local Division, Eloff JP agreed to first dispose of the special plea and the replication thereto. Apparently, it was not in dispute that the prescribed claim had in fact been lodged after the lapse of two years. In the event, the special plea was upheld and the appellant's claim was dismissed with costs. Subsequently, Eloff JP granted leave to appeal to this Court.

So-called third party insurance was introduced in 1942, but it was only in 1964 that provision was made for payment of compensation from a fund to victims of motor vehicle accidents where the identity of the driver or owner of the other vehicle could not be established (hereinafter referred to as the case of the "unidentified vehicle"). The obligation of that fund was subject to regulations made by the relevant Minister and these could limit or control the right of any person to such payment, and could prescribe the conditions to be complied with and the

procedure to be adopted by a claimant[1]. The next statute concerning third party claims also made separate and special provision for the case of the unidentified vehicle, but the detail is not necessary[2].

The last-mentioned Act was replaced by the Motor Vehicle Accidents Act 84 of 1986. A juristic person to be known as the Motor Vehicle Accident Fund was established (s 3(1)). This fund could appoint agents. The fund or its agent, "as the case may be", was obliged to compensate third parties (s 8(1)). The *agent* would be liable if the claim arose "from the driving of a motor vehicle in the case where the identity of the owner or driver thereof has been established" – hereinafter called the "identified vehicle" – (s 6(1)(a)(i)); the Fund would be liable, "subject to the provisions of the regulations" if the claim

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[1] S 2 quat(1)(b) read with s 32(1)(b) of the Motor Vehicle Insurance Act 29 of 1942 introduced by, respectively, s 4 and s 20(1) of the Motor Vehicle Insurance Amendment Act 60 of 1964.

[2] See *Verster v Motor Vehicle Assurance Fund* 1978 (3) SA 691 (A) for the provisions relating to the Compulsory Motor Vehicle Insurance Act 56 of 1972.

arose from the driving of an unidentified motor vehicle (s 6(1)(b)). The prescription provision related solely to identified vehicles (s 14) but the regulations, as was the position since 1964, dealt with prescription in unidentified vehicle cases. In both cases it was two years with a sixty day suspension period.

Reverting to the current Act, it suspends Act 84 of 1986 (s 3); statutory force is given to the Multilateral Agreement contained in the Schedule (s 2(1)); the State President is empowered to amend the Schedule by proclamation (s 2(2)), and the Minister of Transport Affairs to "make regulations to give effect to any provision of the Agreement as applicable in the Republic" (s 6(1)).

The Agreement establishes the respondent Fund as a juristic person. As originally framed, the Agreement bears close resemblance to the 1986 Act: the Fund can appoint agents (art 3(c) and 13(a)); the Fund or its

appointed agent, "as the case may be", is obliged to compensate third parties (art 40); these agents are competent to investigate and settle claims involving identified vehicles (art 3(c) and 13(b)), and the Fund those claims "as prescribed" concerning unidentified vehicles (art 3(b)). There are also provisions relating to prescription, but they concern only claims against agents (arts 55-60). The prescription period is two years plus a ninety day suspension period.

Pursuant to the provisions of s 6 of the current Act, regulations were originally promulgated on 27 October 1989 with effect from 1 May 1989[3]. Reg 3 deals with the liability of the Fund. Considering the terms of the Agreement, it is not surprising to note that this regulation concerns unidentified vehicles only. The liability of the Fund is made subject to a number of conditions, such as the negligence of the driver,

[3] GN R2314 published in GG 12151 of 27 October 1989.

reasonable steps having been taken by the claimant to identify the driver, the submission by the claimant of an affidavit to the police within 14 days of the collision, and the requirement of physical contact with the unidentified vehicle (reg 3(1)(a)).

Reg 3(2) goes further and states that:

> "(t)he liability of the MMF [the Fund] in respect of claims which arise in terms of this regulation shall be subject to the following further conditions:
>
> (a) (i) A claim for compensation for loss or damage suffered by the claimant shall be delivered to the MMF within two years from the date of the occurrence which gave rise to the said bodily injury or death *mutatis mutandis* the provisions of Article 62 of the Agreement.
>
> (ii) The provisions of subparagraph (i) shall also apply to all third parties and claimants, irrespective of whether they are subject to any legal disability.
>
> (b) No such claim shall be enforceable by legal proceedings commenced by a summons served on the MMF before the expiration of a period of 90 days as from the date on which the claim was sent or delivered by hand, as

the case may be, to the MMF as provided for in paragraph (a)(i):

Provided that ...

(c) (i) The MMF shall not incur any liability unless the summons arising from the provisions of paragraph (b) above has been properly served on the MMF within two years and 90 days from the date of the occurrence which gave rise to the aforesaid bodily injury or death. Provided that ...

(ii) The provisions of subparagraph (i) shall also be applicable to all third parties and claimants, irrespective of whether they are subject to any legal disability.

(3) The MMF shall ... be entitled to require any person who has suffered bodily injury giving rise to the claimant's claim to submit ... to interrogation ... to make a sworn statement setting out in full the circumstances of the alleged occurrence on which his claim is based. ..."

It is convenient at this stage to consider first whether the Minister acted *ultra vires* s 6 of the current Act by promulgating reg 3(2)(a)(i) in its original form. That depends upon the question, to use the wording of s 6,

whether the regulation gives "effect to any provision of the Agreement". Relevant are arts 2 and 3(b): the Fund has as its task the payment of compensation for *certain* loss or damage caused by the unlawful driving of *certain* vehicles and for this purpose it has the power and function to investigate and settle claims, *as prescribed*, arising from unidentified vehicle cases. (My emphasis.)

I find it difficult to formulate counsel's argument on why this regulation is *ultra vires*, but it is probably fair to say that it was ultimately based on a statement by Goldblatt J in the belatedly reported *Zeem v Mutual & Federal Insurance Co Ltd* 1996 (4) SA 476 (W) at 482D-F. *Zeem* concerned regulations under the 1986 Act. Counsel relied upon a rather sweeping statement by the learned Judge to the effect that the intention of the Legislature could never have been to give the Minister the right to prevent injured parties from claiming and recovering damages if they failed timeously to file certain

documents. No consideration was given to the general rule that the right to prescribe time limits within which procedural acts must be done is inherent in the right to regulate (*Hoosain v Van der Merwe NO and Others* 1953 (3) SA 535 (C) 542A-B). If Goldblatt J were correct, it would in the present case mean that no conditions for the liability of the Fund could have been prescribed. Since it is inherent in a time limit that a failure to comply therewith leads to the loss of the relevant right, any time limit would have been *ultra vires*. Claims concerning unidentified vehicles would be in a far better position than those relating to identified vehicles, eg no claim forms need be lodged and there could not be any prescriptive period. Confronted with this, counsel submitted that although a time limit for the submission of a claim could have been prescribed, it had to be the same as that prescribed for identified vehicle claims. Taking into consideration that there are good reasons for having

stricter requirements for unidentified vehicle cases, the argument has to fail. 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; 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 stead 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) 470B-C). But the argument also fails on the facts – the two-year time limit for the lodging of claims applied when the regulation was promulgated in 1989 to both cases.

The Agreement was amended[4] on 1 November 1991. The amendment did not concern unidentified vehicles, but in relation to claims against appointed agents (identified

[4] by Proclamation 102 of 1991 (GG 13597).

vehicle cases) the prescription period was extended from two to three years with the proviso that if the prescribed form was lodged (obviously within three years), the prescription period is five years. Reg 3 was amended on the same day[5]. Reg 3(2)(a)(i), the regulation in issue, was amended cosmetically, the two-year period for the lodging of the prescribed claim remaining unaltered. It now reads:

> "(2) The liability of the MMF (the Fund) in respect of claims which arise in terms of this regulation shall be subject to the following further conditions:
>
> (a) (i) A claim for compensation of loss or damage 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.
>
> (ii) ..."

Notwithstanding the failure to amend this two-year limit,

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[5] GN R2618 GG13599 of 1 November 1991.

reg 3(2)(c)(i) – quoted earlier – was also amended in line with the amendment to the Agreement to provide that, if the claim is lodged in good time, the prescriptive period is five years.

This was then the position on 6 December 1991, the date the collision occurred in which the appellant was injured.

On 16 July 1993[6] the Agreement was again amended. The main object of the amendment was to empower the Fund to deal with identified vehicle claims and thereby to reduce the role of appointed agents. For this reason art 3(b) was amended to enable the Fund, additionally, to investigate and settle claims, "as prescribed", in relation to identified vehicles. So, too, the prescription provisions (arts 55 and 56) were amended to include a reference to the Fund in relation to identified vehicle cases – the period remaining three years with the possible

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[6] by Proclamation 62 of 1993 (GG 15004)

extension to five years if the prescribed form is filed in time.

Because of the Fund's reliance on reg 3(2)(a)(i), the effect of its case is that the appellant's claim became "prescribed" on 5 December 1993 (ie two years after the collision) by reason of the appellant's failure to have lodged a prescribed claim before that date. Lodging took place during September or October 1994 and summons was issued on 27 December 1994. For purposes of this case we are thus not concerned with amendments subsequent to 5 December 1993. The Fund's right vested, at the latest, on this date (cf *Minister of Safety and Security v Molutsi and Another* 1996 (4) SA 72 (A) 98C-D).

Having earlier reached the conclusion that when the regulation in issue was promulgated, it was *intra vires*, the question now is whether it became *ultra vires* because of the 1991 and 1993 amendments to the Agreement. Put differently, is the regulation inconsistent with any

amended provision of the Agreement? Counsel did not point to any. The amendments did not concern unidentified vehicles and it is therefore difficult to infer a legislative intent to amend the provisions relating to them. The difference between the two prescriptive periods is not an inconsistency, simply because it is the result of different situations. Counsel, quite correctly, did not suggest that the two-year limit is inherently so unreasonable that the regulation is *ultra vires* on the ground that the Legislature could not have intended to give authority to make unreasonable regulations. It follows that, as far as the *ultra vires* argument is concerned, the appeal has to fail.

That brings me to the alternative reply alluded to at the outset of this judgment. The appellant's case is that, assuming the regulation to be valid, by virtue of art 57 of the Agreement, and in view of the fact that a claim in terms of art 62 was lodged some 2 years and 9

months after the collision, the claim could not become prescribed before the expiry of 5 years from the date on which the claim arose.

The reply was misconceived. Art 57 forms part of chapter XVIII of the Agreement. The chapter, as a whole, deals with identified vehicles. What arts 55 to 57 in effect state, is that such a claim becomes prescribed within three years; prescription is "interrupted" by the lodging of a claim in terms of art 62; if interrupted, the claim shall not become prescribed before the expiry of a period of five years from the date on which the claim arose. A similar scheme in relation to unidentified vehicles is to be found in reg 3(2), the only difference being (as stated before) that the primary prescriptive period is two years. That means that interruption can only take place if the art 62 form is lodged within the initial two-year period. Since that did not happen, the appellant was not entitled to the benefit of the extended period.

As to costs, I am of the view that this appeal justified the employment of two counsel.

In the result the appeal is dismissed with costs, including the costs consequent upon the employment of two counsel.

L T C HARMS
JUDGE OF APPEAL

HEFER JA)
NIENABER JA) Agree
OLIVIER JA)
SCOTT JA)