THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 586/2017

In the matter between:

ROAD ACCIDENT FUND **APPELLANT**

and

KHATHUTSHELO GLADYS MASINDI **RESPONDENT**

Neutral citation: *Road Accident Fund v Masindi* (586/2017) [2018] ZASCA 94 (1 June 2018)

Bench: Shongwe ADP, Majiedt, Swain and Mocumie JJA and Rogers AJA

Heard: 18 May 2018

Delivered: 1 June 2018

Summary: Road Accident Fund Act 56 of 1996 as amended by the Road Accident Fund Amendment Act 19 of 2005 – s 23(3) of the RAF Act – statutory interpretation – s 4 of the Interpretation Act 33 of 1957 – regulation 1 under the RAF Act – whether a claim that was due to be served on the last day of the five

year prescription period which last day fell on a public holiday had prescribed – application of s 34 and s 39 of the Constitution – consideration of foreign law.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Mbongwe AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Mocumie JA (Shongwe ADP, Majiedt, Swain, JJA and Rogers AJA concurring):

[1] This appeal concerns the question of how the five year prescription period applicable to the respondent's claim should be computed, in circumstances where the last day of the five year period, strictly calculated, falls on a day when the court is closed so that summons cannot be issued and served. In the present case, the last day fell on Monday, 16 June 2014, a public holiday, so the court was closed. The court was also closed on the preceding Saturday and Sunday. The last day on which the court was open during the five-year period, strictly computed, was Friday, 13 June 2014.

[2] Before I proceed to deal with the merits there is one preliminary issue that requires attention first: the application for the late filing of the notice of appeal by

the appellant. On 12 June 2015, the high court dismissed the special plea of the appellant with costs. On 31 July 2015, the high court granted leave to appeal. On 19 April 2017 (21 months later), the one month prescribed by rule 7 of the Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal for lodging/filing the notice of appeal, the appellant filed its notice of appeal and application for condonation citing numerous unsatisfactory reasons. The respondent was unhappy about this lateness. However, because of the importance of the issues in this matter and the fact that this court is not in agreement with the reasoning of the high court – although in agreement with the order granted – the application for condonation is granted.

[3] The factual background is as follows. On 17 June 2009, the respondent, Ms Khathutshelo Gladys Masindi, had her minor daughter on her back when she was hit by the insured vehicle. As a consequence of the negligence of the insured driver, she and her minor child suffered severe bodily injuries. Subsequently, in June 2014, the respondent (as plaintiff) instituted an action against the appellant in the high Court for compensation arising out of the accident in terms of s 17(1) of the Road Accident Fund Act 56 of 1996 (the RAF Act). It was alleged in her particulars of claim that she had suffered severe bodily injuries and consequently suffered damages estimated at R 1 950 000. Initially the appellant filed a plea to the respondent's particulars of claim. But it subsequently added a special plea of prescription. The appellant conceded the merits and reached a settlement on both the merits and quantum, slightly adjusted to one million rand. Thereafter, the high court only adjudicated upon the special plea of prescription. On 12 June 2015, the special plea came before the high court for determination. The high court dismissed the appellant's special plea with costs. It found that the strict and literal interpretation of s 23(3) of the RAF Act propounded by the appellant did not

accord with justice; that it could not have been the intention of the legislature to deprive the plaintiff of her full prescription period of five years. It applied s 4 of the Interpretation Act 33 of 1957 (the Interpretation Act) citing in support of its approach this court's judgment in *Nedcor Bank Ltd v The Master of the High Court (Pretoria) & others*.[1]

Aggrieved by the dismissal of its special plea, the appellant appeals with leave of the high court.

[4] The appeal turns on the correct interpretation of s 23(3) of the RAF Act and the essential issue in this court, as it was in the high court, is how the five year prescription period applicable to the respondent's claim should be computed.

[5] It is convenient to set out the relevant provisions of the RAF Act which are contained in ss 17 and 23. It is also apposite at this stage to refer to s 4 and regulation 1 under the RAF Act. The gateway for compensation under the RAF Act is s 17(1) which establishes the liability of the appellant to compensate third parties for damages arising from the driving of a motor vehicle.[2] Section 23 of the RAF Act regulates the prescription of claims under the Act. Section 4 of the Interpretation Act sets out the reckoning or computation of a period expressed in a number of days; contrasted to other methods.[3] Regulation 1 under the RAF Act[4] explains what 'a day' entails when interpreting s 4 of the same Act.

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[1] *Nedcor Bank Ltd v The Master of the High Court (Pretoria) & others* [2001] ZASCA 106; [2002] 2 All SA 281 (A).

[2] *Road Accident Fund v Abrahams* (276/2017) [2018] ZASCA 49.

[3] According to Joubert ed *The Law of South Africa* vol 27 paras 225, 227 and 229 there are generally three methods which can be employed to determine a period expressed in a number of days:

i) the statutory method enacted by s 4 of the Interpretation Act;

ii) the civilian method; and

iii) the clear days method.[3]

[4] Regulation 1 of the regulations promulgated in terms of the RAF Act : R770 published in Government Gazette 31249 of 21 July 2008.

[6] Section 17(1) reads:

‘ 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 employee’s duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum…’

[7] Section 23 reads:

‘(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.

(2) …

(3) Notwithstanding subsection (1), no claim which has been lodged in terms of section 17(4)(a) or 24 shall prescribe before the expiry of a period of five years from the date on which the cause of action arose.’[5]

[8] Section 4 of the Interpretation Act provides:

‘When any particular number of *days* is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless

[5] Subsection (3) substituted by section 10 of Act No. 19 of 2005 with effect from 1 August 2008.

the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.'(My emphasis)

[9] Regulation 1 under the RAF Act provides that 'a day' means any day other than a Saturday, Sunday or public holiday. This is the regulation which according to counsel for the respondent, this court could invoke to interpret s 23(3) of the RAF Amendment Act. I disagree with this submission. It is trite that regulations are subordinate to Acts of Parliament. As a general rule, regulations cannot be used to interpret any piece of legislation where there is ambiguity. In any event, the regulations do not purport to regulate how 'day' must be interpreted in any setting other than the regulations themselves. We are not concerned in this case with any act performed in terms of the regulations, but with the interpretation of s 23(3) of the RAF Act, a section which, does not even use the word day.

[10] In this court, counsel for the appellant contended that the respondent's claim was based on an accident that occurred on 17 June 2009. She had to serve the summons prior to midnight on 16 June 2014 to interrupt prescription. The high court was wrong, so the argument went, when it relied on s 4 of the Interpretation Act because that section only applies to periods expressed in days whereas s 23(3) expresses a period in years. Flowing from that, counsel contended further that because s 23(3) of the RAF Act stipulates that 'no claim which has been lodged in terms of s 17(4)(a) or s 24 shall prescribe before the expiry of a period of five years from the date on which the cause of action arose;' this meant that the claim prescribed on the last day of the period of five years from the date on which the cause of action arose. For that reason, he argued that the respondent had to do everything that had to be done, such as issuing and serving the summons, on or before the last day of the five years ie 16 June 2014; if necessary by ensuring that

the summons was served by not later than 13 June 2014. He contended, that the clear and unambiguous language of the legislature could not be departed from unless the plain meaning would result in an absurdity not intended by the legislature.[6] He submitted further, that the mere issuing of a summons has no effect on the prescription period as prescription can only be interrupted by service of the summons. He submitted further that the respondent could have effected service of the summons on Monday regardless of the fact that Monday was a public holiday. This is so because service in the high courts in South Africa is provided for in terms of rule 4 of the Uniform Rules of Court. The rule provides that service can be effected in different ways, including affixing to the principal door of the place of the business of the appellant. The appellant's offices need not have been open on the public holiday in order for service to have been effected, provided the respondent had by then procured the issue of summons, if she issued same on any other day including 13 June 2014 to beat the deadline of the five year prescription period.

[11] I agree with counsel for the appellant that the high court should not have invoked s 4 the Interpretation Act to come to the rescue of the respondent. Nor should it have used the definition of 'a day' as defined in regulation 1 to come to the conclusion that even though s 23(3) of the RAF Act specifically refers to years, to avoid any injustice to the respondent, this section can be interpreted to include Sundays and public holidays. The high court also erred in relying on the analogy which this court drew between s 23(3) of the RAF Act and s 40(2) of the Insolvency Act in *Nedcor* for reasons not relevant for purposes of this matter.

[6] See *Kleynhans v Yorkshire Insurance Co Ltd* 1957 (3) SA 544 (*A*) at 549F.

[12] I however do not agree with the approach and construction of s 23(3) of the RAF Act which is propounded by counsel for the appellant. In 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[7] and the objective of statutory time limits whose function is 'bringing certainty and stability to social and legal affairs and maintaining the quality of adjudication'.[8] A good place to start is the Constitution. Section 34 enshrines the right of access to courts and states that 'everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.' Section 39(1)(b) of the Constitution provides that when interpreting the Bill of Rights, a court must consider international law. Section s 39(1)(c) provides that a court may consider foreign law when engaged in the interpretation of the Bill of Rights.

[13] On the facts of this matter, the crucial date is the date of the service of the summons on the appellant (17 June 2014). Viewed in isolation, there is a plausible basis in the argument of counsel for the appellant that the clear and unambiguous language of s 3(3) dictates that the last day of the five year period fell on 16 June 2014. This approach may well be consistent with the language of the section and the concern to ensure certainty[9] but such a strict and literalist approach may defeat the very protection afforded by s 34 of the Constitution to the respondent. 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. In *Mtokonya v*

[7] Section 34 of the Constitution.
[8] *Road Accident Fund and another v Mdeyide* [2010] ZACC 18; 2011 (1) BCLR 1 (CC); 2011 (2) SA 26 (CC) para 8.
[9] *Mdeyide* above para 8.

Minister of Police[10] the Constitutional Court observed that 'the process of interpreting statutes was described in detail in *Makate.*[11]It entails giving a statutory provision a meaning that does not only avoid limiting rights guaranteed by the Bill of Rights but also prefers a meaning that promotes those rights.' In this context, we are bound to give a more purposive interpretation than that propounded by the appellant.

[14] However, a search for South African precedents or even similar authorities on this crisp issue yielded no results. Sections 39(1)(b) and (c) of the Constitution enjoin this court to consider foreign and international law. Whereas s 39(2) provides for the development of common law or customary law to promote the spirit, purport and object of the Bill of Rights. Although the English law and practices are different from ours, we can still draw some lessons from English authorities by interpreting the law to afford the respondent a benefit of striking the balance between the various legislations and practices. 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.

[15] In such exercise, two judgments of the English courts bear reference: *Pritam Kaur v S Russel & Sons*[12]and the recent case of *Nottingham City Council and Calverton Parish Council*[13] in which the court surveyed the cases since *Pritam Kaur*. Among the intervening cases is the decision of the House of Lords in

[10] *Mtokonya v Minister of Police* [2017] ZACC 33; 2017 (11) BCLR 1443 (CC) para 111.
[11] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016(4) SA 121 (CC) paras 87-93.
[12] *Pritam Kaur v S Russel & Sons* Ltd [1973] 1 QB 336; [1973] 2 WLR 147; [1972] 1 ALL ER 306.
[13] *Nottingham City Council v Calverton Parish Council* [2015] EWHC 503 (2 March 2015); [2015] WLR (D) 99 [2015] PTSR 1130.

Mucelli v Government of Albania [2009] UKHL 2; [2009] 1 WLR. 276 where Lord Neuberger in paras 83-84 specifically endorsed *Pritam Kaur*.

[16] *Pritam Kaur*[14] concerned a statutory time limit relating to a claim under the Fatal Accidents Act 1846. In this case the plaintiff sought damages following the death of her husband when working for the defendant. The limitation period expired on Saturday 5th September 1970. The writ was issued on the following Monday. The question was whether the law maker intended, in such a case, that the period would only expire on the next day on which the court offices were open. Lord Denning found that the arguments of both sides were evenly balanced that it could come down either way. He concluded:

'…I am prepared to hold that, when a time is prescribed by statute for doing any, and that act can only be done if the court office is open on the day when the expires, then, if it turns out in any particular case that the day is a Sunday or any other dies non, the time extended until the next day on which the court office is open.'[15]

By so doing, he opined, 'we make the law consistent in itself; and avoid confusion to practitioners.'[16]

[17] In *Nottingham,* the City Council brought an application to strike out a claim instituted by Calverton Parish Council in terms of s 113 of the Planning and Compulsory Purchase Act 2004 for an order quashing a development plan document which contains the Core Strategy adopted by the City Council. In terms of the section, the application needed to be made within six weeks from the date of the adoption of the plan. The central issue was whether, when the last day for making an application falls on a date when the relevant office is closed so that the

[14] *Pritam Kaur* above.
[15] Reference is made by the court in *Pritam Kaur* to *Hughes v Griffiths* (1862) 13 CBNS at 333 and some earlier more equivocal decisions.
[16] *Pritam Kaur* above.

application cannot be made on that day, s 113(4) is to be interpreted so that the period of six weeks for making an application ends on the next working day when an application in this case would end on Monday 20 October 2014 and the claim would be barred by s 113(4). Endorsing the judgment of *Pritam Kaur*, the court held that, on a proper interpretation of s 113(4), where the six week period for bringing a claim would end on a day when the court is closed, so that an application to quash a development plan document cannot be made on that day, the six week period will end on the next working day. The statutory provision is to be interpreted as permitting the proceedings to be brought on the next day when the court office is open…'

[18] Based on his survey of the cases, Lewis J expressed his conclusion thus (para 33):

'In my judgment, the approach set out in *Kaur* and approved and followed in other cases, sets out a general approach to the interpretation of statutory provisions prescribing periods within which proceedings must be brought. I recognise that the precise provisions of a particular statute may be such that a different approach is called for in relation to that particular statute. In general terms however, where a statutory provision provides that proceedings must be brought no later than the end of a specified period, and the bringing of proceedings requires that the court office be functioning, and the last day of the prescribed period falls on a day when the court office is closed, then the statutory provision is to be interpreted as permitting the proceedings to be brought on the next day when the court office is open.'

[19] The principle set out in these two cases provides the answer which ties in with the protection afforded to the respondent in s 34 and in general, the interpretation provided in ss 39(1)(b)(c) and (2) of the Constitution. Applying this approach to the facts of this matter, the respondent could not have issued the summons on 16 June 2014 as it was a public holiday. It was therefore a question of an impossibility to perform. The impossibility was not of her own doing nor

created by her but by law; the court was closed on the public holiday. To interpret the law with the result that the respondent fails to enjoy the full benefit of the five year period – as she is entitled to – would result in an injustice and prejudice to her.

[20] To sum up, I hold that, on a proper interpretation of s 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. To hold otherwise would deprive the respondent of her right to claim which is an absurdity which the legislature could not have contemplated. [17]In this case, the consequences would be too harsh to the respondent as opposed to the appellant. The approach and exercise embarked upon in this case, must be on a case by case basis.

[21] Unlike the English authorities, on which jurisprudence counsel for the appellant relied, in South Africa, nothing stops one from issuing and serving summons on the same day. Thus, had the court been open on Sunday (weekend) or Monday (the 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. In conclusion, the high court was correct to dismiss the special plea of prescription.

[22] With regards to costs, it is trite that a party that is successful is entitled to its costs. The respondent is the successful party as the appeal is dismissed. It follows as a matter of principle that costs should follow the result.[18] In so far as the

[17] See *Stopforth v The Minister of Justice & others; Veenendal v The Minister of Justice & others* 1999 (2) SACR 529 (SCA) at 536 D-H with reference to *Venter v R* 1907 TS 910 at 914-5.
[18] *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529

entitlement of the *amicus curiae* to costs, there is no basis for such an order. First, the facts of the matter which the *amicus curiae* relied upon (*Munene Christina Ntsandeni vs Road Accident Fund*[19]) to show its interest in this matter, are distinguishable from the facts of this matter. The interpretation this court was bound to adopt in respect of the social legislation under discussion in this matter, the RAF Act, had to be based on the Constitution (ss 34 and 39). The *amicus curiae* did not raise any novel point. The English cases which this court has found helpful were raised by the court itself, not by the parties or by the *amicus curiae*. Therefore it is not entitled to any costs order in its favour.

[23] It is for the reasons set out above that I am of the view that, the order of the high court should be confirmed albeit for different reasons. In the result, I grant the following order.

Order

The appeal is dismissed with costs.

B C Mocumie
Judge of Appeal

(CC) para 138; *Biowatch Trust v Registrar; Genetic Resources & another* 2009 (6) SA 232 (CC) paras 21-23.
[19] *Munene Christina Ntsandeni v Road Accident Fund* Case No 19158/2015; GJ 21738/2014 (16 March 2015).

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