

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

Case Number: A316/2018

**REPORTABLE: NO.**  
**OF INTEREST TO OTHER JUDGES: NO.**  
**REVISED.**  
**2022-06-13**

In the matter between:

**NKWATISENG MELITA BUTHELEZI**  
**(IDENTITY NUMBER: [...])**

Appellant

and

**ROAD ACCIDENT FUND**

Respondent

**JUDGMENT**

**POTTERILL J**

Background

[1] The appellant, Nkwatiseng Melita Buthelezi (Ms Buthelezi) instituted a claim for damages on 29 October 2007 against the respondent, the Road Accident Fund (RAF) pursuant to a motor vehicle accident wherein Ms Buthelezi sustained injuries.

[2] The RAF raised a special plea with the following content:

*“2.1 Summons was served on the Defendant on 08<sup>th</sup> April 2015.*

2.2 *As such, the Defendant pleads that a period of more than 5 (five) years has elapsed from the date on which the claim arose before the summons was served on the Defendant.”*

In answer thereto the plaintiff replicated as follows:

*“The Plaintiff instituted action in the Magistrate’s Court for the District of Pretoria, under Case Number 72/2009, in terms of the Road Accident Fund (Transitional Provisions) Act 15 of 2012, the Plaintiff re-issued Summons in the High Court of South Africa, Gauteng Division, Pretoria under Case Number 87223/2014. Such averment was contained in sub-paragraph 12 of the Plaintiff’s Particulars of Claim under the said Case Number 87223/2014.”*

[3] The court *a quo* was called upon to decide this special plea, without resort to oral evidence. It upheld with costs the RAF’s special plea and dismissed Ms Buthelezi’s claim with costs. The appeal is before us pursuant to leave being granted to appeal by the Supreme Court of Appeal.

#### Common cause facts

[4] When Ms Buthelezi issued the summons on 31 January 2005 her claim was limited to R25 000 (Twenty Five Thousand Rand) in terms of s18(1) and s2 of the Road Accident Fund Act 56 of 1996 (the Old Act).

[5] To avoid prescription under the Old Act Ms Buthelezi had to lodge her claim on or before 30 January 2008. The claim was lodged on 29 October 2007. The summons had to be issued and served on or before 30 January 2010. Ms Buthelezi issued and served the summons from the Magistrate’s Court under case number 72/2009 on 5 January 2009 and served the summons on 6 January 2009.

[6] The Constitutional Court on 17 February 2011 declared sections 18(7)(a)1, 18(1)(b) and 18(2) of the Old Act unconstitutional and invalid in *Mvumvu and Others v Minister for Transport and Another* 2011 (2) SA 473 (CC) (*Mvumvu* judgment). The declaration of invalidity was suspended for a period of 18 months for Parliament to

remedy the impugned provisions. The declaration of invalidity only affected claims against RAF which had not been finalised on the date the Constitutional Court handed down the *Mvumvu* judgment. Ms. Buthelezi's claim was not finalised.

[7] The impugned provisions of the Old Act were remedied with the enactment of the Transitional Provisions Act 15 of 2012 (the Transitional Act) which came into operation on 13 February 2013. Section 2(1) of the Transitional Provisional Act reads as follows:

*“Unless the third party expressly and unconditionally indicates to the Funds on the prescribed form, within one year of the Act taking effect, to have his or her claim remain subject to the Old Act, the claim of such third party is subject to the new Act under the following transitional regime:*

(a) ...

(b) *The right of the third party to claim compensation for non-pecuniary loss is limited to a maximum of R25,000 unless –*

*(i) the third party submits a serious injury assessment report as contemplated in Regulation 3 of the Road Accident Fund Regulation 2008, indicating a serious injury, within two years of this Act taking effect; and*

*(ii) it is determined in accordance with Regulation 3 of the Road Accident Fund Regulations, 2008, that the third party suffered a serious injury.*

(c) ...

(d) ...

(e) *A third party who has, prior to this Act coming into operation –*

*(i) ...*

*(ii) instituted on action against the Fund in a Magistrate's court may withdraw the action and, within 60 days of such withdrawal, institute*

*an action in a High Court with appropriate jurisdiction over the matter: Provided that no special plea in respect of prescription may be raised during that period.”*

[8] The “third party” in the Transitional Act is defined as a person who has a right to claim compensation from the RAF in terms of section 17 of the Old Act whose claim is subject to the limitations imposed by section 18(1) or (2) of that Act, and whose claim had upon this Act taking effect, not prescribed or been finally determined by settlement or judgment. It can be safely accepted that any reference to the “third party” in the Transitional Act refers to Ms Buthelezi in this matter.

[9] Ms Buthelezi issued summons in the High Court, Gauteng Division, Pretoria on 8 December 2014 and she withdrew the claim in the Magistrate’s Court on 5 January 2016.

#### The judgment of the court *a quo*

[10] The court *a quo* defined the issue as to whether Ms Buthelezi’s claim against the RAF has prescribed for non-compliance with the Transitional Act. The court *a quo* found that “*section 2(1) of the Transitional Act requires a third party to express (sic) and unconditionally indicate to the Fund within one year of the Act taking effect whether he/she wants his/her claim to remain with the Old Act or not, failing which his/her claim will automatically be subject to the Transitional Act. In the current matter the Plaintiff failed to express and unconditionally indicate to the Fund what are her wishes meaning that her claim automatically became the subject of the Transitional Act. As a consequence section 2(1) gives the Third parties option to choose whether their claim should be dealt with in terms of the Road Accident Fund Act or in terms of the Transitional Act, subject to the Amendment Act.*

*Section 2(1) spells out the duration of operation of the Transitional Act which provides for a period of one year. The Act came into effect on the 13<sup>th</sup> February 2013 and ceased to operate by midnight on the 12<sup>th</sup> February 2014. Meaning that the plaintiff should have issued her summons against the Defendant on or before the*

*12<sup>th</sup> February 2014. The Plaintiff failed to comply with the provisions of section 2(1) of the Transitional Act.”*

[11] The court *a quo* also distinguished this matter from the *Klaas v Road Accident Fund* case number 25693/2013 matter decided in the Gauteng High Court Pretoria by Manamela AJ. The court made the distinction on the following basis:

*“A distinction ought to be made between the current matter and the Klaas matter. Summons in the Klaas matter was issued i.e. in the High Court on the 30<sup>th</sup> April 2013 and that is within the period of a year from the time the Transitional Act took effect. In the current matter summons was issued on the 8<sup>th</sup> December 2014 which is outside the period of one year of the Transitional Act taking effect.”*

[12] The court thus found that the claim fell under the Transitional Act and s2(1) of the Act spelt out that the duration of the Act was for a period of one year only resulting in Ms Buthelezi's claim to have prescribed as she did not issue the summons against RAF before 12 February 2014.

#### The argument on behalf of the RAF

[13] Mr Naidoo appeared on behalf of the RAF. He had filed heads at 18:00 the day before the hearing of the appeal. There was no application for condonation for the late filing of the heads of argument. The reason for the late filing of the heads coupled with the fact that no condonation was sought is frowned upon by this Court. Oral argument was permitted, but only to expedite the appeal that had been postponed twice before. However, this Court warns that heads of argument filed late can be disregarded to prevent such further conduct and show the court's displeasure, alternatively the matter can be postponed with costs on a punitive scale for payment by the party who filed the heads late.

[14] The attorney for the RAF supported the order and reasons therefore of the court *a quo*. This court was implored to exercise its inherent jurisdiction to overcome any legislative short-coming or lack of clarity. It was argued that if the court did not

dismiss the appeal there was a danger of “*invisible claimants manifesting themselves and opening up the floodgates of liability ...*” In oral argument it was also argued that *lis pendens* was applicable and this court should also on that basis dismiss the appeal.

#### The issue to decide

[15] Did Ms Buthelezi have to issue and serve the summons in the High Court on the RAF within a period of one year from the date when the Transitional Provisions Act came into operation on 13 February 2013.

#### Analysis

[16] The Transitional Act came into operation on 13 February 2014 and had as its purpose to facilitate claims that were previously limited within the Magistrate’s Court’s monetary jurisdiction, to transition to the High Court as unlimited claims giving effect to the *Mvumvu* judgment. It is common cause that Ms Buthelezi did not expressly and unconditionally on a RAF TP1 form indicate that her claim was subject to the New Act. Ms Buthelezi could elect to remain in the Magistrate’s court or issue a new summons in the High Court.

[17] The only reference to a one year period in the Transitional Act refers specifically to the period that Ms Buthelezi had to elect to claim under the Old Act or the New Act. Interpreting s2 of the Transitional Act in the light of the purpose of the Transitional Act and the circumstances surrounding its enactment, the ordinary grammatical reading and understanding thereof is clear and unambiguous.<sup>1</sup> The argument on behalf of RAF that there is lack of clarity in the Act is unfounded and rejected. The court *a quo* was thus incorrect in finding that Ms Buthelezi should have issued summons in the High Court on or before 12 February 2014. In terms of the Transitional Act, the date of 12 February 2014 only related to the period to exercise the choice to claim under the New or Old Act. Only after 12 February 2014 did Ms Buthelezi have to elect to issue summons in the High Court or the Magistrate’s Court. The reasoning of the Court *a quo* is tantamount to requiring a third party to

---

<sup>1</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)

exercise the rights given to the third party under the Transitional Act before it came into operation.

[18] The Transitional Act did not create a basis for new claims not previously instituted in terms of the Old Act; the claims had to have been instituted. The only purpose was to give those claimants a right to choose to claim an unlimited amount by exercising a choice. If the claimant neglected to exercise the choice provided then the claim automatically fell under the New Act. If the claimant claimed an unlimited amount the claimant was afforded an opportunity to withdraw the summons in the Magistrate's Court and proceed in the High Court, within 60 days of such withdrawal. Ms Buthelezi served the summons in the High Court on 8 April 2015, thus timeously after 12 February 2014, the last date on which she had an election to choose between the Old and New Act. The claim had thus not prescribed.

[19] At the time of the hearing *lis pendens* could not be raised as the summons in the Magistrate's Court had been withdrawn. The argument on *lis pendens* thus requires no further comment.

[20] "Opening the floodgate" if the Transitional Act is interpreted as not being in operation from 13 February 2013 to 12 February 2014 is inconceivable. Only claims that had been instituted could conceivably automatically fall under the New Act. The summons had to be issued in the High Court. If a claimant had not issued a summons in the High Court pursuant to the transitional regime the transitional regime did not apply. Put differently, the Transitional Act and its provisions only commenced when the summons was issued in the High Court, after 12 February 2014. This does not imply that prescription could not run, but only from 12 February 2014.

[21] I accordingly propose the following order:

21.1 The appeal is upheld with costs.

21.2 The special plea is dismissed with costs.

**S. POTTERILL**  
**JUDGE OF THE HIGH COURT**

I agree

**N.V. KHUMALO**  
**JUDGE OF THE HIGH COURT**

I agree

**D.S. MOLEFE**  
**JUDGE OF THE HIGH COURT**

CASE NUMBER: A316/2018

HEARD ON: 20 April 2022

FOR THE APPELLANT: ADV. M.C.C. DE KLERK  
INSTRUCTED BY: Röntgen & Röntgen Inc.

FOR THE RESPONDENT: MR. T. NAIDOO  
INSTRUCTED BY: State Attorney, Johannesburg

DATE OF JUDGMENT: 13 June 2022