IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Case No: 315/2005

Consolidated with:

Case No: 8682/2008

In the matter between:

YUGUSAN GOVENDER Plaintiff

and

CLEOPHAS SHANE MOODLEY First Defendant

ROAD ACCIDENT FUND Second Defendant

JUDGMENT

Delivered on 22 January 2014

Vahed J:

[1] The actions under case number 315/2005 ("the first action") and case number 8682/2008 ("the second action") were consolidated and the trial commenced before me on 4 September 2013. When and the matter was called I was advised by counsel that during the current tranche of the trial I was only required to determine

second defendant's first special plea, with all other issues to stand over, if needs be, for later determination. I might indicate that the second defendant also raised a second dilatory special plea relating to the determination of the plaintiff's injuries as serious. Although that second special plea was discussed only briefly, I was not required to make any determination thereon. The special plea that required determination related to whether the action against the second defendant had been statutorily barred for want of compliance by the plaintiff with section 2(4)(a) of the Apportionment of Damages Act, 34 of 1956. Both the actions prior to consolidation, and the consolidated action, have a long, detailed and sorry history, the minutiae of which I considered to be highly relevant to the determination of the special plea in question. It is necessary for me to recount that history.

[2] The plaintiff, a practising attorney, was during 2003 still a law student. On 29 June 2003 he was a passenger in a motor vehicle driven by the first defendant. A collision occurred allegedly resulting in the plaintiff sustaining serious bodily injury and causing pain and suffering and other *sequelae*.

[3] In the first action the plaintiff issued summons against the first defendant during January 2005 claiming damages of approximately R6,8 million. In his particulars of claim the plaintiff referred to the second defendant (although it was not a party to this action) alleging that the liability of the second defendant was limited to the sum of R25,000 in terms of the provisions of section 18(1)(b) of the Road Accident Fund Act, 56 of 1996 and that accordingly the first defendant was liable to compensate him for such damages that exceeded that amount.

[4] On 21 December 2005 the first defendant delivered his plea in the first action. In that plea he admitted the identities of the parties, the particulars of the collision and that he was the driver of the vehicle, and his failure to compensate the plaintiff. He went on to put the plaintiff to the proof of the remaining allegations, but denied that he had been negligent. In the alternative, and upon proof of his negligence, the first defendant went on to plead that in terms of a policy of insurance with Santam Limited ("Santam") he was indemnified for any liability for damages up to the extent of R3 million. A copy of the policy of insurance was annexed to his plea.

[5] During February 2006, in terms of a notice dated 21 July 2005, the first defendant issued a Third Party Notice to Santam claiming the indemnification referred to in his plea. It appears that nothing further came of this Third Party Notice because Santam's attorneys then took over the conduct of the first defendant's defence by subrogation.

[6] The first action was set down for trial on 14 February 2007. The matter did not proceed on that day because an order was taken by consent declaring the first defendant to be liable to compensate the plaintiff for 100% of the plaintiff's proved or agreed damages. The matter was postponed for the later determination of quantum.

[7] Prior to quantum being determined in the first action, and apparently because his alleged damages far exceeded the upper limit of Santam's indemnification of the first defendant's liability, the plaintiff instituted the second action against the second defendant only. The summons in the second action was issued on 24 June 2008. In the second action the plaintiff alleged that another vehicle was also involved in the collision (in addition to the vehicle driven by the first

defendant) and attributed negligence to the driver of that vehicle as well. Accordingly, he claimed damages from the second defendant in an amount similar to that claimed in the first action, and in the alternative and in the event of the first defendant being found solely negligent, he claimed damages confined to the capped amount of R25,000.

[8] On 15 August 2008 the second defendant delivered its plea in the second action. That plea was nothing more than a bare denial.

[9] On 27 November 2008 second defendant gave notice in the second action of an offer in full and final settlement of the plaintiff's claim against it of payment of the sum of R 25,000 plus costs on the appropriate magistrate's court scale.

[10] The first action was set down for trial on quantum on 24 July 2008 but was removed from the roll.

[11] The second action was set down for trial on 8 December 2008. The matter served before *Van Zÿl* J on that day and in discussion in Chambers, when he was advised of the existence and status of the first action, and when counsel who then appeared for the second defendant raised the question of the non-joinder of the first defendant in the second action, it transpired that joinder appeared to the learned judge to be necessary and the matter was accordingly adjourned.

[12] On 7 October 2009 the plaintiff applied for the two actions to be consolidated. On 22 October 2009 the order consolidating the two actions was granted by consent. It is necessary to repeat the terms of that order in full:

'1. It be hereby ordered that the actions in Case No. 315/05 between Yugusen Govender as Plaintiff and Cleophas Shane Moodley as Defendant and Case No. 8682/08 between Yugusen Govender as Plaintiff and Road Accident Fund as Defendant be consolidated and hereafter proceed as one action with Cleophas Shane Moodley as First Defendant and the Road Accident Fund as Second Defendant.

2. In as much as it was ordered on 14 February 2007 that Cleophas Shane Moodley was declared liable to compensate the Plaintiff for one hundred percent of his proved or agreed damages including general damages suffered as a result of injuries sustained by him in a collision which occurred at Pietermaritzburg on 29 June 2003 and the matter was postponed to a date to be arranged for the determination of the quantum of the Plaintiff's claim

2.1 The issue of the liability of the Road Accident Fund to compensate the Plaintiff for damages be determined before the determination of the quantum of the Plaintiff's damages.

2.2 That Cleophas Shane Moodley be given notice of any hearing or [sic] the determination of the liability of the Road Accident Fund as aforesaid.

2.3 That if the said Moodley wishes to contend that as between the said Moodley and the Road Accident Fund the damages payable should be apportioned inter se the said Moodley shall give notice to the Plaintiff and the said Fund to that effect and shall in such notice state the facts upon which such contention is based.

3. That after the determination of the question of liability as set out in paragraph 2 of this order the quantum of damages shall be determined on a date to be arranged.

4. The costs of this application for consolidation form part of the costs of the consolidated action.'

[13] On 26th January 2010, and in the consolidated action, the second defendant issued a conditional Third Party Notice against the first defendant claiming, in the event of it being held liable to the plaintiff, a contribution from the first defendant.

[14] The consolidated trial was set down for hearing on 22 February 2010. The matter did not proceed on that date because the pleadings relative to the Third Party Notice issued in January had not closed. It seems that nothing more came of this third party notice as well. No plea has been delivered by the first defendant.

[15] On 8 December 2010 the second defendant effected substantial amendments to its plea in the second action. The effect of those amendments was the following. Firstly, a special plea relating to compromise was introduced. The second defendant alleged that the plaintiff's claim had become compromised by the agreement and subsequent order of court on 14 February 2007 in the first action. In that regard the second defendant alleged that the plaintiff did not reserve his rights to proceed against the second defendant at all or against the first defendant for those damages that exceeded the limit of Santam's liability. Secondly a special plea of res judicata was introduced. The second defendant alleged that the order of court on 14 February 2007 finally determined the issue of any claim for damages that arose from the collision. Thirdly a special plea relating to estoppel was introduced. The second defendant alleged that in electing to sue the first defendant in the first action, alleging that the first defendant was the sole cause of the collision, the plaintiff was estopped

from contending that the second defendant was liable to him for any damages in excess of R25,000. In addition the amended plea then went on to deal with the substance of the claim in sufficient detail, concluding with the concession that the second defendant was liable to be plaintiff in the limited sum of R25,000.

[16] On 29 August 2013 the second defendant delivered a further amended plea, this time under the consolidated action. It became common cause that the earlier three special pleas were abandoned. The special plea referred to in paragraph 1 of this judgment was raised for the first time. That special plea reads as follows:

'Non-compliance with sections 2(2)(a) and 2(4)(a) of Act 34 of 1956, as amended:

1.

Second Defendant was, at all material times hereto, a joint wrongdoer in relation to Plaintiff and First Defendant for the purposes of sections 2(1), 2(2)(a), and 2(4)(a) of the Apportionment of Damages Act 34 of 1956, as amended, as read with section 3 of that Act.

2.

Plaintiff sued First Defendant under case number 315/05 in respect of the same damages for which he subsequently sued Second Defendant under case number 8682/08, and neither:

2.1 Joined Second Defendant as a defendant under case number 315/05, nor

2.2 Gave Second Defendant notice in accordance with section 2(2)(a) of Act 34 of 1956 before the close of pleadings in case number 315/05, nor

2.3 Prior to suing Second Defendant under case number 8682/08 did Plaintiff procure the leave of the court so to sue, on good cause shown as to why notice was not given accordance with section 2(2)(a) of that Act.

3.

Accordingly, and by virtue of the provisions of section 2(4)(a) of the said Act, Plaintiff was statutorily precluded from instituting action under case number 8682/08, against Second Defendant, and his claim is fatally defective.'

[17] Accordingly, the second defendant sought an order dismissing the plaintiff's claim against it under case number 8682/08.

[18] I pause to mention that it appears that at least three pre-trial conferences were convened and held for the purposes of dealing with the issues in the consolidated action. They were all attended by one or more representatives of the second defendant. Two of those conferences were attended by the parties' representatives and were convened on 3 December 2008 and 21 January 2010, and the third, also attended by the parties' representatives was convened before *Gyanda* J on 31 May 2013. The substance of the special plea in issue was not raised or even alluded to at any of those conferences.

[19] The Apportionment of Damages Act, 34 of 1956 provides as follows:

'**2 Proceedings against and contributions between joint and several wrongdoers**

(1) Where it is alleged that two or more persons are jointly or severally liable in delict to a third person (hereinafter referred to as the plaintiff) for the same damage, such persons (hereinafter referred to as joint wrongdoers) may be sued in the same action.

(2) Notice of any action may at any time before the close of pleadings in that action be given-

(a) by the plaintiff;

(b) by any joint wrongdoer who is sued in that action,

to any joint wrongdoer who is not sued in that action, and such joint wrongdoer may thereupon intervene as a defendant in that action.

(3) The court may on the application of the plaintiff or any joint wrongdoer in any action order that separate trials be held, or make such other order in this regard as it may consider just and expedient.

(4) *(a)* If a joint wrongdoer is not sued in an action instituted against another joint wrongdoer and no notice is given to him in terms of paragraph *(a)* of subsection (2), the plaintiff shall not thereafter sue him except with the leave of the court on good cause shown as to why notice was not given as aforesaid.

...

3 Application of provisions of section 2 to liability imposed in terms of Act 29 of 1942

The provisions of section *two* shall apply also in relation to any liability imposed in terms of the Motor Vehicle Accidents Act, 1986 (Act 84 of 1986), on the State or any person in respect of loss or damage caused by or arising out of the driving of a motor vehicle.'

[20] Mr *Hunt* SC, who appeared for the second defendant, submitted, on the authority of *Smith v Road Accident Fund* 2006 (4) SA 590 (SCA), that notwithstanding the reference in section 3 to the 1986 Act, those provisions nevertheless still applied insofar as the second defendant was concerned. He is undoubtedly correct in that submission.

[21] The Road Accident Fund Act, 56 of 1996 ("the RAF Act") was amended on 1 August 2008. Prior thereto an injured party who was being conveyed gratuitously as a passenger in a vehicle was entitled to claim damages from either or both of the driver of his vehicle and the second defendant, save that with regard to the claim against the second defendant damages were capped at R25,000 in respect of special damages. After the 1 August 2008 amendments, and with the introduction

in 2012 of certain transitional provisions, the driver of the vehicle was absolved from liability to such a passenger where the claim against the second defendant is dealt with in terms of the 2008 amendments to the RAF Act. It is no doubt that that amendment, coupled with the 2012 transitional provisions, which prompted the plaintiff, on 16 August 2013, to deliver the appropriate notice indicating his election to have his claim determined in terms of the post amendment provisions of the RAF Act.

[22] When the second action against the second defendant was instituted, and indeed when the first action against the first defendant was instituted, the RAF Act in its unamended form (i.e. prior to 1 August 2008) applied to the plaintiff's claims. Accordingly, so Mr *Hunt* submits, the second action against the second defendant was statutorily barred, and remains so because the plaintiff has not obtained the leave of the court to institute that action.

[23] It seems to me that Mr *Hunt's* submission places form above substance. It seems also that if the second defendant wanted to avail itself of the defence that the action against it was statutorily barred, it ought to have done so at the earliest possible moment. From the recount of the facts outlined by me above it did not do so but, instead, left the raising of the special plea concerned until the "eleventh" hour. Having not raised this special plea when it was opportune to do so, it seems to me that the second defendant acquiesced in the action against it. The view I hold in that regard is not unlike the attitude taken when dealing with special pleas relating to jurisdiction. In *Moodley v Nedcor Bank Ltd* (85/06) [2007] ZASCA 27 (RSA) (27

March 2007) the Supreme Court Of Appeal dealt with the concept of acquiescence thus:

'[15] There is another reason why I think it was competent for the court below to have exercised jurisdiction over this matter. The facts show that the matter commenced in the Pretoria High Court where the appellant objected to the jurisdiction of that court. Appellant concedes that the objection was ill-founded. It was however a consequence of this objection that the respondent thereafter instituted proceedings in the court below and only shortly before the trial was to commence, and pleadings had closed, that the respondent again objected to its jurisdiction. Apart from the fact that the appellant has an insurmountable hurdle to overcome before he can escape the inference that by his conduct he had acquiesced in the court's jurisdiction, I think that every consideration of convenience and common sense required the court below to assume jurisdiction over the matter. This conclusion makes it unnecessary to deal with the issue of the waiver any further.'

[24] There seems to me to be no logical argument as to why a similar line of reasoning cannot be adopted in the present case. The clear purpose of the Apportionment of Damages Act was set out in *Absa Brokers (Pty) Ltd v RMB Financial Services & Ors* 2009 (6) SA 549 (SCA):

'[15] We agree with the court below that the clear purpose of the Act is to avoid a multiplicity of actions arising from a single loss-causing event. The scheme of the Act contemplates a single determination of liability by multiple wrongdoers and the apportionment of liability amongst of them in single proceedings. Thus a plaintiff who alleges that two or more persons are liable for the damage that is in issue is permitted by s 2(1) to sue them all in the same action. A defendant who alleges that another person is also liable to the plaintiff is capable of joining him or her in the proceedings under rule 13 of the Uniform Rules. And if the plaintiff and the defendant choose not to join that person in the action, then that person must at least be given the opportunity to intervene by being notified of the action. The clear purpose of ss (4)(a) and (b) is to encourage the resolution of all claims in single proceedings by barring further proceedings against parties who have not been given such notice (except with the leave of the court).'

[25] In the holding, as I do, that the second defendant has acquiesced in the action brought against it I cannot see how that clear purpose has been defeated or interfered with in any way. Particularly when, in the circumstances of this case, the second defendant had every opportunity to raise the barring provision but did not (or chose not to) until the last possible moment. It firstly raised a plea of a bare denial. Then it introduced the special pleas (compromise, estoppel and res judicata) which were subsequently abandoned. Then also it issued a third party notice against the first defendant. Thereafter, it consented to the consolidation of the actions. During that time, and at three different pre-trial conferences, it had an opportunity to raise the question but did not do so.

[26] The problem can also be looked at through a different prism. When the second defendant consented to the actions being consolidated that consent can also be viewed as being an indication that notice in terms of the Apportionment of Damages Act was no longer required. The action was thereafter proceeding as a single action dealing with the consequences of a single loss-causing event. Against that observation to still require notice in terms of the Apportionment of Damages Act would appear to be an exercise in futility. It is difficult to imagine in those circumstances what prejudice the second defendant can allege to have been caused to it.

[27] At the hearing the plaintiff was represented by Mr *Choudree* SC who appeared with Mr *Manikam*, and the first defendant was represented by Mr *Joubert*. The matter was on the roll to proceed as a trial and it transpired that the decision to proceed only with the determination of the second defendant's first special plea took place late in the day. Indeed, the document embodying the special plea was dated

and delivered but three court days before the hearing. As such there was nothing that could be done to exclude the first defendant from the hearing and to save him from incurring the attendant costs, although Mr Joubert, with no disrespect to him, played no meaningful role on the day of argument.

[28] In the event that I was with the plaintiff, Mr *Choudree* asked for the costs of two counsel and I can think of no reason to deprive the plaintiff of those costs. It will also be realised that the parties prepared for and dealt only with the special plea concerned. I was not advised of any trial preparation that had taken place and the day in court was confined to argument on the special plea. For the assistance of the taxing master I record that the argument took no longer than two and a half hours of court time.

[29] The second defendant's first special plea is dismissed with costs, such costs to include those incurred consequent upon the employment by the plaintiff of two counsel.

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Vahed J

CASE INFORMATION

Date of Hearing:	4 September 2013
Date of Judgment:	22 January 2014
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