THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 873/2019

In the matter between:

JOHAN SEBASTIAAN EKSTEEN **APPELLANT**

and

ROAD ACCIDENT FUND **RESPONDENT**

Neutral citation: *Eksteen v Road Accident Fund* (873/2019) [2021] ZASCA 48 (21 April 2021)

Coram: PETSE AP and MAKGOKA and DLODLO JJA and LEDWABA and POYO-DLWATI AJJA

Heard: Matter disposed of without a hearing in terms of s 19*(a)* of the Superior Courts Act 10 of 2013 on 17 February 2021.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09:45 on 21 April 2021.

Summary: Section 2(1)*(e)*(ii) of the Road Accident Fund (Transitional Provisions) Act 15 of 2012 – whether obligatory for a plaintiff affected by the section to first withdraw the action instituted in a magistrate's court prior to issuing summons in the high court – whether prescription nevertheless commences to run even if action instituted in a magistrate's court has not been withdrawn.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Musi JP, Loubser J and Murray AJ concurring sitting as court of first instance):

1 The appeal is upheld in part with costs.

2 The action is referred back to the high court for trial in accordance with the principles set out in this judgment before a differently constituted court.

3 The order of the high court is set aside and in its place is substituted the following:

'3.1 The defendant's special plea of lis alibi pendens is upheld.

3.2 The court declines to determine the special plea of prescription as the facts contained in the agreed statement of the parties are inadequately stated for a proper determination to be made.

3.3 The costs associated with the determination of the defendant's special pleas shall be costs in the cause.'

JUDGMENT

Poyo-Dlwati AJA (Ledwaba AJA concurring dissenting):

[1] This appeal turns on the interpretation of s 2(1)*(e)*(ii) of the Road Accident Fund (Transitional Provisions) Act 15 of 2012 (the TPA). The preamble to the TPA reads:

'To provide for transitional measures in respect of certain categories of third parties where claims were limited under the Road Accident Fund Act 1996 (Act No. 56 of 1996), prior to 1 August 2008; and to provide for matters connected herewith.' Section (2)(1)*(e)*(ii) of the TPA provides:

'Unless the third party expressly and unconditionally indicates to the Fund on the prescribed form, within one year of this 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: *(e)* A third party who has prior to this Act coming into operation- (ii) instituted an 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.'

[2] The TPA came into effect as a result of the Constitutional Court decision in *Mvumvu*,[1] which declared ss 18(1)*(a)*(i), 18(1)*(b)* and 18(2) of the Road Accident Fund Act 56 of 1996 inconsistent with the Constitution and invalid. Those provisions capped to R25000 various claims of certain categories of claimants.[2]

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[1] *Mvumvu and Others v Minister of Transport and Another* [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC).

[2] Before its deletion Section 18 (1) read: The liability of the Fund or an agent to compensate a third party for any loss or damage contemplated in section 17 which is the result of any bodily injury to or death of any person who, at the time of the occurrence which caused that injury or death, was being conveyed in or on the motor vehicle concerned, shall, in connection with any one occurrence, be limited, excluding the cost of recovering the said compensation, and except where the person concerned was conveyed in or on a motor vehicle other than a motor vehicle owned by the South African National Defence Force during the period in which he or she rendered military service or underwent

[3] On 17 January 2008, the appellant, Mr Johan Sebastiaan Eksteen, instituted an action against the respondent, the Road Accident Fund, in the Bloemfontein magistrate's court. Without withdrawing that action, and on 19 October 2016, the appellant instituted another action against the respondent, in the Free State Division of the High Court (the high court) for damages he suffered as a result of a motor vehicle collision, which occurred on 18 June 2003. According to the appellant's particulars of claim, he was a passenger in a motor vehicle driven by one Mr De Lange which collided with a vehicle driven by Mr Hyde at the intersection of Monument Road and Nico van der Merwe Avenue in Bloemfontein. It was alleged that the sole cause of the collision was the negligence of Mr Hyde.

[4] The respondent defended the action and delivered two special pleas and the main plea disputing liability. The first special plea was one of *lis alibi pendens.* It was pleaded that the appellant had instituted an action in the Bloemfontein magistrate's court based on the same cause of action which was still pending. The second special plea was that the appellant's claim had prescribed, as the action was instituted five years after the collision, contrary to the provisions of the Road Accident Fund Act.[3]

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military training in terms of the Defence Act, 1957 (Act No.44 of 1957), or another Act of Parliament governing the said Force, but subject to subsection (2)(a) to the sum of R25000 in respect of any bodily injury or death of any one such person who at the time of the occurrence which caused that injury or death was being conveyed in or on the motor vehicle concerned: (i) for reward; or (ii)in the course of the lawful business of the owner of that motor vehicle; or . . .

(b) in the case of a person who was being conveyed in or on the motor vehicle concerned under circumstances other than those referred to in paragraph (a), to the sum of R25000 in respect of loss of income or of support and the costs of accommodation in a hospital or nursing home, treatment, the rendering of a service and the supplying of goods resulting from bodily injury to or the death of any one such person, excluding the payment of compensation in respect of any other loss or damage.

[3] Section 23(3) of the Road Accident Fund Act 56 of 1996 as amended reads: Notwithstanding subsection (1), no claim which has been lodged in terms of section 24 shall prescribe before the expiry of a period of five years from the date on which the cause of action arose.

[5] The matter served before Jordaan J for trial. The parties agreed and the court ordered, in terms of Rule 33(1), that the special pleas be adjudicated separately from the main plea. For this purpose, a statement of agreed facts was prepared by the parties. The relevant parts of that statement read:

'1 . . .

2 . . .

3 . . .

4.1 . . .

4.2 The Plaintiff submitted a claim with the Defendant on or about 17 June 2004 in terms of the provisions of the Road Accident Fund Act, 56 of 1996, as amended ("the Act").

4.3 The claim was submitted by the Plaintiff to the Defendant within the prescribed period of time.

4.4 The Plaintiff issued a summons from the Magistrate's Court for the District of Bloemfontein, held at Bloemfontein, under case number 970/2008 on 16 January 2008 ("the Magistrate's Court matter").

4.5 The Magistrate's Court summons was served on the Defendant on or about 18 February 2008.

4.6 The Plaintiff lodged the prescribed RAF 4 claim form with the Defendant on 13 March 2014.

4.7 The Plaintiff issued summons from the High Court of South Africa in Bloemfontein on 19 October 2016 under case 4972/2016 ("the High Court matter").

4.8 The High Court summons was served on the Defendant on 20 October 2016.

4.9 The Defendant filed a plea in the High Court matter on 13 December 2016.

4.10 The Defendant filed special pleas of *lis pendens* and prescription during or about 26 May 2017 ("the special pleas").

5.1 The Defendant contends that this matter is pending in another court, with which averment the Plaintiff agrees.

5.2 The Defendant further contends that the Plaintiff's claim prescribed, due to the fact that the summons was issued on 19 October 2016, which is more than 5 years after the date on which the cause of action arose.

5.3 The Plaintiff contends that as the Plaintiff's claim was duly lodged with the Defendant on 17 June 2004, whilst summons in the Magistrate's Court action was duly served on the Defendant on 18 February 2008, prescription therefore does not play a role.

5.4 The Defendant further contends that the Plaintiff lodged the RAF 4 form with the Defendant on 13 March 2014 and accordingly the Plaintiff's claim for non-pecuniary loss has prescribed.

5.5 The Plaintiff further contends that as the RAF 4 was duly lodged with the Defendant on 13 March 2014, the Plaintiff's claim for non-pecuniary loss has not prescribed.'

[6] The parties further agreed that the high court was to determine the two special pleas and the effect of s 2(1)*(e)*(ii) of the TPA, in particular, whether the appellant was entitled to proceed with the high court action despite the pending action in the magistrate's court. Jordaan J expressed a prima facie view that for a plaintiff who elects to prosecute and institute an action in the high court, to enjoy the protection of the section against prescription, he or she must first withdraw the magistrate's court action and institute an action in the high court within 60 days. However, he did not decide the dispute before him, as his prima facie view differed with an earlier decision of that division on the same issue and with other divisions, but referred the matter to the full bench for a final decision.

[7] The full bench (Musi JP, Loubser J and Murray AJ concurring) found in favour of the respondent and upheld the special pleas. After analysing various decisions relating to proper interpretation of s 2(1)*(e)*(ii) of the TPA, it found, 'that the word "may" in the context of this section meant that a plaintiff had an election. The plaintiff may prosecute the claim in the magistrate's court until it is finalized or he or she may decide to institute the action in the high court. The plaintiff may elect to continue with the claim in the magistrate's court because with or without the cap it may fall within the monetary jurisdiction of that court. He or she may decide to amend the monetary value of the claim so that it is more than the cap but less than

the maximum monetary jurisdiction of the magistrate's court or he or she may abandon the amount which is more than the maximum monetary jurisdiction of that court. "May", in this context, therefore means that the plaintiff has an election to litigate in one of [the] two fora'.

[8] The full bench further observed that the word 'such' in the section had a grammatically intractable meaning and did not have an alternative meaning. It held that the words 'within 60 days of such withdrawal' meant within 60 days from the date of the withdrawal of the action in the magistrate's court. It concluded that, 'there must be an action in the magistrate's court based on the cap. There must be an election to prosecute that action in the high court with jurisdiction over the matter. The plaintiff must first withdraw the action in the magistrate's court and within 60 days after the withdrawal of the action in the magistrate's court institute the action in the high court. If the steps are followed in this sequence the plaintiff would be protected against the special plea of prescription'. It, in the result, dismissed the appellant's claim with costs.

[9] Dissatisfied with this order, the appellant appeals with the leave of the full bench. The respondent does not oppose the appeal, and has filed a notice to abide the decision of this Court.

[10] As I have stated, this appeal has its genesis in the interpretation of s 2 (1) (e) (ii) of the TPA favoured by the full bench. The question to be answered is whether in terms of the provisions of s 2 (1) (e) (ii) of the TPA a claimant is required to withdraw his claim in the magistrate's court prior to instituting an action in the high court. There are various conflicting judgments in the various divisions of the high

court on this issue. For instance, in *Sekwere*[4], the court found that the section was not peremptory and thus did not oblige claimants to first withdraw the magistrate's court summons and only thereafter issue same in the high court. It found that there was no obligation on the plaintiff to have followed a step-by-step process which was not provided for by the TPA.

[11] In *Klaas*[5], the court held, disagreeing with *Sekwere*:

'I do not agree that the legislature did not provide a step-by-step procedure of how the summonses of court actions were to be dealt with. What is to be done is very clear from the provisions of s 2(1)*(e)*(ii) of the TPA. The legislature, quite logically, expected that claimants who had to go to the Magistrate's Court due to the statutory limitations in the *quantum* of their claims had to be offered a transitional mechanism to launch new actions in the High Courts, should there be a need. In my view, the sequence is very clear in the provision. You withdraw the earlier instituted Magistrate's Court action and within 60 days of such withdrawal institute an action in the High Court.'

[12] In *Tshabalala*,[6] the court, agreeing with *Klaas*, held:

'The plaintiff is required to first withdraw the action in the Magistrate's Court. The fact that the plaintiff is allowed merely 60 days thereafter to institute the action in the High Court is indicative of this fact. The 60 day time limit is there for good reason. It would be untenable for a plaintiff to withdraw his/her action and, thereafter, not institute the High Court action for an indefinite period. Legal proceedings need to be certain, and need to end.'

And lastly in *Buthelezi*[7] the court agreed with *Klaas* and *Tshabalala* and held:

'The act makes provision for the action to be first withdrawn in the Magistrate's Court and subsequent to that summons be issued in the High Court. It further held, upholding the special plea for prescription, that the section uses the word "may" which means that the third party is not

[4] *M. E Sekwere v Road Accident Fund* [2015] ZAFSHC (FB).
[5] *Klaas v Road Accident Fund* [2015] ZAGPPHC 778 (GP) para 25.
[6] *Tshabalala v Road Accident Fund* [2015] ZAGPJHC 281 (GJ) para 27.
[7] *Buthelezi v Road Accident Fund* [2018] ZAGPPHC 449 (GP).

compelled to withdraw the action, but may only withdraw the action in the Magistrate's Court if he/she has the intention of instituting the action in the High Court.'

[13] Before us, it was submitted on behalf of the appellant that it was not obligatory for the appellant to withdraw the magistrate's court action prior to instituting the high court action. Such an interpretation, so went the contention, would be methodical and would deny claimants such as the appellant their right to equality whose claims were previously limited by the unconstitutional statutory provision.

[14] It is apt to quote what this court had to say about interpreting the RAF legislation in *Pithey v Road Accident Fund*:[8]

'It has long been recognised in judgments of this and other courts that the Act and its predecessors represent social legislation aimed at the widest possible protection and compensation against loss and damages for the negligent driving of a motor vehicle. Accordingly, in interpreting the provisions of the Act, courts are enjoined to bear this factor uppermost in their minds and to give effect to the laudable objectives of the Act.'

[15] The principles applicable to statutory interpretation (or any written document for that matter) are trite. In *Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society and Others*,[9] the Constitutional Court, reiterating the principles laid down in *Endumeni*,[10] held that a contextual and purposive approach must be applied to statutory interpretation. Courts must have due regard to the context in which the words appear, even where the words to be construed are clear and unambiguous.[11] In *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty)*

[8] *Pithey v Road Accident Fund* [2014] ZASCA 55; 2014 (4) SA 112 (SCA); [2014] 3 All SA 324 (SCA) para 18.
[9] *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society and Others* [2019] ZACC 47; 2020 (2) SA 325 (CC); (2020 (4) BCLR 495 (CC) para 41.
[10] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.
[11] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 90.

Ltd,[12] Moseneke DCJ held that a contextual approach requires that legislative provisions are interpreted in the light of the text of the legislation as a whole (internal context).

[16] Bearing the above in mind and taking into account the purpose for which the TPA was enacted, properly construed, the provisions of s 2 (1) (e) (ii)of the TPA demonstrate that a claimant has an election to make; hence the word 'may'. Ascribing meaning to the word 'may' would mean in this context that either the claimant may withdraw the action in the magistrate's court, where, for example, the quantum of the claim sought to be pursued, exceeds the jurisdiction of a magistrate's court. Alternatively, the claimant may decide to forego the amount in excess of the jurisdiction of a magistrate's court and continue to prosecute its claim in such court. Once an election has been made to withdraw the action in the magistrate's court, then the claimant has sixty days within which to institute an action in the high court and no plea of prescription can be raised during that period. If there is no election made, namely the claim remains in the magistrate's court, then the 60 day period does not come into play. In my view, any contrary interpretation would be negating the context upon which this legislation was enacted.

[17] Furthermore, the purpose for the insertion of the 60 day period to institute an action in the high court is to ensure that there is certainty for the period within which to institute such an action. It also protects those claimants from a plea of prescription. The vital role time limits play in bringing certainty and stability to social and legal affairs and maintaining the quality of adjudication has been repeatedly emphasised.[13] The legislature could not have intended that the two actions would run parallel to

[12] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (10) BCLR 1027 (CC); 2007 (6) SA 199 (CC) para 53.
[13] *Road Accident Fund and Another v Mdeyide* [2010] ZACC 18; 2011 (1) BCLR 1 (CC); 2011 (2) SA 26 (CC) para 8.

each other, due to the risk of the plea of *lis alibi pendens*. The 60 day period is triggered only once an election has been made. This clearly demonstrates that if the 60 day period referred to in the text was not catered for, then there would be no time limit within which to institute an action in the high court and this would go against the principle of certainty in legal proceedings.

[18] It is a reasonable and sensible interpretation that s 2(1)(*e*)(ii) contemplates that the magistrate's court action be withdrawn first prior to the institution of the action in the high court. If one has regard to the TPA as a whole, it is clear that it was meant to provide transitional measures for actions that were already instituted in the magistrate's court at the time that the TPA was enacted until they were finalized depending on the election made by the claimant. If one were to adopt the interpretation preferred by the appellant then there would be no end to the transitional period, thus undermining the apparent purpose of the TPA.

[19] Furthermore, as it has happened in this case, the protection afforded by this section does not apply if the election has not been made. There is nothing preventing the respondent from raising the defence of *lis alibi pendens* if the magistrate's court action has not been withdrawn prior to instituting another action in the high court. The same applies with prescription if the high court action has not been instituted within five years from the date of the collision. A claimant has to follow these steps in order to enjoy the full protection of the TPA. In any event, and in line with what was stated in *Pithey*[14] above, the appellant will not be left empty handed as his claim in the magistrate's court is still pending.

[14] See fn 8.

[20] Thus, the reasoning of the full bench cannot be faulted. Accordingly, the appeal must fail. There should be no costs order as the respondent did not participate in the appeal.

[21] In the result, I would have made the following order:

The appeal is dismissed.

pp _____

T P POYO-DLWATI

ACTING JUDGE OF APPEAL

Petse AP (Makgoka and Dlodlo JJA concurring):

[22] I have had the benefit of reading the judgment (first judgment) of my colleague, Poyo-Dlwati AJA. For reasons that follow, I, with respect, disagree with her conclusion in relation to the special plea of prescription. The facts of this case have been canvassed in the first judgment and will not be rehashed in this judgment. However, where necessary for purposes of this judgment, I shall also set out the relevant factual background.

[23] The appellant instituted an action in the Free State Division of the High Court, Bloemfontein, for damages arising out of a collision that had occurred on 18 June 2003. This action was instituted pursuant to the provisions of s 2(1)*(e)*(ii) of the Road Accident Fund (Transitional Provisions) Act 15 of 2012 (the TPA). The first judgment sets out how it came about that the TPA was enacted.[15] When the TPA came into effect, the appellant had already instituted an action in the Magistrate's Court, Bloemfontein (first action), arising out of the same collision, which was still pending when the high court summons for substantially the same relief, barring the quantum of the claim, was issued.

[24] It is common cause, as emerges from the record, that the first action had not been withdrawn before the high court action was instituted. The first action was therefore still pending when the matter served before the Full Bench. This appeal lies against the judgment of the Full Bench. Because the appellant elected to also litigate in the high court, relying on the same cause of action, whilst his first action was still pending in the magistrate's court, the Road Accident Fund (the Fund) unsurprisingly raised a special plea of *lis alibi pendens*, which the high court rightly upheld.

[15] See paragraph 1 of the first judgment.

[25] The crux of the special plea of prescription was that the appellant issued summons in the high court on 19 October 2016, whereas his cause of action (ie the collision from which he sustained serious bodily injuries) had arisen on 18 June 2008. This summons was served on the Fund on 21 October 2016, 'which [was] more than 5 years after the date on which the cause of action arose'.

[26] As indicated in the first judgment, both special pleas came before the Full Bench, whose judgment was penned by Musi JP, in which Loubser J and Murray AJ concurred. In essence, the high court held that the prescription point was well-founded. In the result, it upheld the special plea of prescription and dismissed the action with costs. Hence the present appeal with its leave.

[27] In reaching this conclusion, the high court, directing its focus on s 2(1)*(e)*(ii) of the TPA, reasoned thus:

'The section should therefore be interpreted as follows. There must be an action in the Magistrate's Court based on the cap. There must be an election to prosecute that action in the High Court with jurisdiction over the matter. The plaintiff must first withdraw the action in the Magistrate's Court and within 60 days after the withdrawal of the action in the Magistrate's Court institute the action in the High Court. If the steps are followed in this sequence the plaintiff would be protected against a special plea of prescription.

The reason why there must first be a withdrawal is to ensure that the same action is not prosecuted in two different *fora*. Even if the new claim in the High Court shall have prescribed, the plaintiff is afforded a shield for 60 days against a special plea of prescription. If the claim is withdrawn in the Magistrate's Court and it is not prosecuted in the High Court within 60 days, then the plaintiff would be without Legislative protection against a special plea of prescription. When the claim is instituted in the High Court within 60 days after the withdrawal of the Magistrate's Court action, then only the High Court would be seized of the matter. The withdrawal of the action in the Magistrate's Court and within 60 days thereafter instituting it in the High Court, are therefore conditions precedent to the protected institution of the claim in the High Court.

The interpretation to the effect that the plaintiff may litigate against the same defendant in different *fora* at the same time based on the same causa renders the 60 days nugatory. The interpretation that the true meaning of the section is to have only one forum seized of the matter at any given time, means that the defence of *lis alibi pendens* will not arise.

. . .

The Legislature has granted the plaintiff the right to institute the action in the High Court without the possibility of a special plea of prescription being raised, during the window period. It has, however, also directed that certain formalities or conditions should precede to the exercise of that right. The formalities or conditions must therefore be rigorously observed. In *Munro v Dranklisensieraad, Welkom* the learned Judge quoted Maxwell with approval where the latter said the following:

". . . Where powers, rights or immunities are granted with a direction that certain regulations, formalities or conditions shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred, and it is therefore probable that such was the intention of the Legislature . . ."

Moreover, this section [ie proviso to s 2(1)*(e)*(ii)] takes away the defendant's right to raise the defence of prescription whilst it gives the plaintiff the right to sue after the claim has prescribed. The defendant is therefore prejudiced, albeit for a noble reason. This is a further reason why there should be strict compliance with the formalities and conditions in the section.'

It bears mentioning that the high court's reasoning has, in substance, been endorsed in the first judgment.

[28] At the risk of stating the obvious, I emphasise that the enquiry here is directed at ascertaining the meaning of the provisions of s 2(1)*(e)*(ii) of the TPA, in the light of the language employed in this section, taking into account both the context and the purpose to which the TPA is directed. This exercise is essentially one of statutory interpretation. On this score, *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA); [2012] 2 All SA 262 (SCA) (*Endumeni*) reminds us that:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by

reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context, it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'[16]

[29] As noted in the first judgment, *Endumeni* was cited with approval in *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society and Others* [2019] ZACC 47; 2020 (2) SA 325 (CC); 2020 (4) BCLR 495 (CC). There, the Constitutional Court stated the following:

'This canon is consistent with a contextual approach to statutory interpretation. It is now trite that courts must properly contextualise statutory provisions when ascribing meaning to the words used therein. While maintaining that words should generally be given their ordinary grammatical meaning, this Court has long recognised that a contextual and purposive approach must be applied to statutory interpretation. Courts must have due regard to the context in which the words appear, even where "the words to be construed are clear and unambiguous".'[17]

[30] Thus, it is a well-established principle of statutory interpretation, reinforced by a plethora of decisions of our courts, to give effect to the object or purpose of the legislation being interpreted. As Schutz JA in *Standard Bank Investment*

[16] Paragraph 18.
[17] Paragraph 41. See also: *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (10) BCLR 1027 (CC); 2007 (6) SA 199 (CC) para 53.

Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others [2000] ZASCA 20; [2000] 2 All SA 245 (A); 2000 (2) SA 797 (SCA), put it:

'Our courts have, over many years, striven to give effect to the policy or object or purpose of legislation. This is reflected in a passage from the judgment of Innes CJ in *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 543.'[18]

[31] It is as well to remember that the legislation under consideration here is what has for a long time now been described as 'social legislation'. Thus, we are enjoined to interpret such legislation in a manner that will afford the widest possible protection and compensation to third parties against loss and damages arising out of the negligent driving of motor vehicles to the extent that the language used in the provision can reasonably bear.[19]

[32] In endorsing the conclusion reached by the high court, the first judgment, in substance, says the following. First, that a third party who has instituted action in a magistrate's court 'has an election to make' as to whether he or she wishes to rather pursue the claim in the high court.[20] With this statement, I have no qualms. Second, that '[O]nce an election has been made to withdraw the action in the magistrate's court . . . the claimant has 60 days within which to institute an action in the high court'.[21] Third, that '[I]f there is no election made, namely the claim remains in the magistrate's court, then the 60 day period does not come into play'.[22]

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[18] Paragraph 16. See also, *Inland Revenue v Sturrock Sugar Farms (Pty) Ltd* 1965 (1) SA 897 (AD) at 903G-H in which it is stated that '. . . even where the language is unambiguous the purpose of the Act and other wider contextual considerations may be invoked in aid of a proper construction.'

[19] See, for example, in this regard: *Aetna Insurance Co v Minister of Justice* 1960 (3) SA 273 (A) at 286 E-F; *Multilateral Motor Vehicle Accidents Fund v Radebe* 1996 (2) SA 145 (SCA) at 152 E-I; *Road Accident Fund v Mtati* [2005] ZASCA 65; [2005] 3 All SA 340 (SCA) para 12; *Bezuidenhout v Road Accident Fund*; [2003] 3 All sa 249 (SCA); 2003 (6) SA 61 (SCA) para 7 and the authorities therein cited.

[20] Paragraph 16.

[21] Ibid.

[22] Ibid.

[33] The first judgment then proceeds to say that the rationale for the insertion of the 60 day period, within which the high court action must be instituted, is to promote certainty and protect third parties from a plea of prescription.[23] To my mind, the issue under consideration in this case should be approached from a broader perspective having regard to the language of the relevant section and its manifest purpose.

[34] It is convenient at this juncture to quote s 2 of the TPA. It reads, in relevant parts, as follows:

'2 Transitional arrangements for certain third parties

(1) Unless the third party expressly and unconditionally indicates to the Fund on the prescribed form, within one year of this 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) Subject to the remaining provisions of this Act, the cause of action of the third party is deemed to have arisen on 1 August 2008 for purposes of section 12 of the Road Accident Fund Amendment Act, 2005 (Act 19 of 2005), and section 17 (4A)*(b)* of the new Act.

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

(i) the third party submits a serious injury assessment report as contemplated in Regulation 3 of the Road Accident Fund Regulations, 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) lodged a claim with the Fund on the prescribed claim form in terms of the old Act, shall not be required to lodge an RAF1 form in terms of the new Act; and

(ii) instituted an 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

[23] Paragraph 17.

> with appropriate jurisdiction over the matter: Provided that no special plea in respect of prescription may be raised during that period.'

[35] The manifest purpose of the TPA, as its preamble clearly indicates, was to 'provide for transitional measures in respect of certain categories of third parties whose claims were limited under the Road Accident Fund Act, 56 of 1996 (the RAF Act) prior to 1 August 2008 . . .'. Section 18 of the RAF Act – as it then stood – provided that the right of the third party to claim compensation for non-pecuniary loss was limited to a maximum amount of R25 000. Thus, it had the effect of putting a cap on the maximum amount that a third party could claim for non-pecuniary loss, regardless of the severity of the bodily injuries suffered by such third party. But, since the enactment of the TPA, this is no longer the case, provided certain requirements have been satisfied. And because the appellant's claim for non-pecuniary loss was capped at R25 000, it fell within the jurisdiction of a magistrate's court.

[36] However, since the TPA took effect, a third party, who wishes to claim damages for non-pecuniary loss in excess of R25 000 – which is the amount to which the claim is as a general rule limited[24] – may do so provided two prerequisites have been met. First, the third party must submit a serious injury assessment report as contemplated in regulation 3(1)*(a)* of the Road Accident Fund Regulations.[25] Second, the Fund must determine in accordance with regulation 3(3)*(c)* and *(d)* that the third party suffered serious injury. Once these two prerequisites have been met, the provisions of s 2(1)*(e)*(ii) of the TPA would be triggered. Accordingly, a third party who had, prior to the TPA coming into effect,[26] already instituted an action in a magistrate's court, had an election, to withdraw such action and, within 60 days of

[24] Section 2(1) of the TPA.
[25] The Regulations were made by the Minister of Transport and published in GN R770, GG 31249, 21 July 2008.
[26] The TPA came into effect on 13 February 2013.

such withdrawal, institute an action in a division of the high court with appropriate jurisdiction over the matter.

[37] Self-evidently, being desirous of taking advantage of the benefits brought about by the TPA, the appellant instituted an action in the high court in which he, amongst others, claimed a sum of R600 000 in respect of non-pecuniary loss. But where the appellant went wrong was to institute a fresh action in the high court without first withdrawing the one pending in the magistrate's court, as contemplated by the clear provisions of s 2(1)*(e)*(ii) of the TPA. Hence my agreement with the first judgment that the special plea of *lis alibi pendens* raised against the appellant's summons in the high court was rightly upheld.

[38] Bearing in mind that the appellant instituted his high court action without having first withdrawn the action pending in the magistrate's court, the pertinent question that now arises is whether the high court action had, in the light thereof, truly become prescribed. In considering this question, it is as well to pay heed to the warning of Wessels AJA in *Stellenbosch Farmers' Winery Ltd v Distillers Corporation (SA) Ltd and Another* 1962 (1) SA 458 (A) at 476 E-F that:

'. . . it is the duty of the Court to read the section of the Act which requires interpretation sensibly, i.e. with due regard, on the one hand, to the meaning or meanings which permitted grammatical usage assigns to the words used in the section in question and, on the other hand, to the contextual scene, which involves consideration of the language of the rest of the statute as well as the "matter of the statute, its apparent scope and purpose, and, within limits, its background".

In the ultimate result, the Court strikes a proper balance between these various considerations and thereby ascertains the will of the Legislature and states its legal effect with reference to the facts of the particular case which is before it.'

It is to that exercise that I now turn.

[39] It is noteworthy that unlike the other parts of s 2, subsec 1*(e)*(ii) does not stipulate any time frame within which a third party must withdraw an action pending in a magistrate's court if the third party desires to claim more than R25 000 in respect of non-pecuniary loss. For example, s 2(1) explicitly provides that 'unless the third party expressly and unconditionally indicates to the Fund on the prescribed form, within one year of the [TPA] 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 . . .'.[27] Absent an unconditional indication to the Fund within the stipulated time, the third party's claim is, by the operation of the law, made subject to the new Act in terms of the regime contained in the TPA. Subsection (1)*(b)* in turn provides that if the third party wishes to claim compensation for non-pecuniary loss in excess of R25 000, he or she must submit a serious injury assessment report indicating a serious injury. Again, this step must be taken within two years of the TPA taking effect. Then there is subsec (1)*(e)*(ii), which stipulates that once the action pending in a magistrate's court is withdrawn –undoubtedly with a view to instituting another action in the high court – the high court action is required to be instituted within 60 days of such withdrawal. In that event, the third party is immunised from a special plea of prescription that the Fund would otherwise have been entitled to raise but for the proviso to s 2(1)*(e)*(ii).

[40] Interestingly and most significantly, nowhere does the TPA expressly or by necessary implication provide that the third party, if he or she elects to withdraw the magistrate's court action – in order to institute an action in the high court – must do so within a prescribed period of time from the TPA taking effect. All that subsec (1)*(e)*(ii) contemplates is, first, the withdrawal of the one action – pending in a magistrate's court – and thereafter the institution of another in the high court, the latter to be instituted within 60 days of the withdrawal. Quite clearly therefore, it

[27] Section 1 of the TPA defines the 'new Act' to mean 'the Road Accident Fund Act, 1996 (Act 56 of 1996), as it stood from 1 August 2008 onwards'.

seems to me that the decision as to whether or not to withdraw, and if so when, is at the absolute discretion of the third party. This is, however, not to suggest that the third party, as plaintiff, would be justified in taking an extraordinarily long period of time to make an election one way or other. In terms of the rules of the magistrate's court, a plaintiff is obliged, at the risk of his or her claim becoming superannuated, to prosecute his or her claim to finality within a reasonable period of time. And what would be a reasonable period can only be determined with reference to the facts of each case.

[41] It bears mentioning that in his action in the magistrate's court, the appellant claimed a sum of R25 000 in respect of non-pecuniary loss. But in the high court action this claim was augmented exponentially to a sum of R600 000, some R575 000 more than what was claimed in the magistrate's court. The effect of the high court's judgment, therefore, is that the appellant will now have to forego the latter amount and be content with R25 000, which is the maximum amount recoverable in a magistrate's court in terms of the old Act.[28] Whilst cognisant of the fact that the extent of the appellant's non-pecuniary loss would be a matter for a trial court to determine, sight should, however, not be lost of the fact that we are here dealing with social-security legislation, a fact also recognised by the Constitutional Court in *Mvumvu and Others v Minister of Transport and Another* [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC) (*Mvumvu*).[29] The high court did not advert to this important consideration in its judgment.

[42] The first judgment says that '[O]nce an election has been made to withdraw the action in the magistrate's court, then the claimant has 60 days within which to

[28] The 'old Act' is defined in s 1 of the TPA to mean 'the Road Accident Fund Act, 1996 (Act 56 of 1996) as it stood prior to 1 August 2008'.
[29] Paragraph 20.

institute an action in the high court'.[30] It then goes on to say that '[T]he 60 day period is triggered . . . once an election has been made'.[31] I do not agree. These statements do not, with respect, take into account the full purport of s 2(1)*(e)*(ii). In my view, not only must the third party make an election to withdraw the action, he or she must as a matter of fact do so. Only then would the 60 day prescription period commence to run. On the interpretation of s 2(1)*(e)*(ii) espoused in the first judgment, it matters not whether the action has actually been withdrawn, thus implying that a mere election to do so suffices. Such an interpretation is tenable only if one ignores the words 'within 60 days of such withdrawal' contained in this section, to which effect must be given. But to ignore these crucial words would plainly be impermissible. And yet this is precisely what the first judgment has done.

[43] It is a well-entrenched rule of statutory interpretation that all the words used in a statute must be given effect to. Thus, superfluity of the words used in a statute is not lightly presumed. For, as Davis AJA observed in *Wellworths Bazaars Ltd v Chandler's Ltd* 1947 (2) SA 37 (A); [1947] 2 All SA 233 (A) at 43 with reference to an old Privy Council decision in *Ditcher v Denison* (11 Moore PC 325 at 357):

'It is a good general rule in jurisprudence that one who reads a legal document whether public or private, should not be prompt to ascribe – should not, without necessity or some sound reason, impute – to its language tautology or superfluity, and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use.'

[44] In *S v Weinberg* 1979 (3) SA 89 (A); [1979] 2 All SA 137 (A), Trollip JA, in the course of considering the argument advanced by counsel for the appellant as to the meaning of the word 'gathering' in s 9(1) of the Internal Security Act 44 of 1950, had the following to say (at 98D-E):

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[30] Paragraph 16.
[31] Paragraph 17.

'I think that the starting point in considering this argument is to emphasize the general well-known principle that, if possible, a statutory provision must be construed in such a way that effect is given to every word or phrase in it: or putting the same principle negatively, which is more appropriate here: "a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant . . .".'

[45] Accordingly, when interpreting a statutory provision one must proceed from the fundamental premise that meaning must be given to every word where the context lends itself to such meaning. The rationale for this principle is that a statute is taken not to use words without meaning. In *Attorney-General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421, Kotze JA pointedly remarked that to regard words occurring in a section as having been inserted *per incuriam* does not accord with the well-established canon of statutory interpretation for:

'"A statute," says Cockburn, R.J, "should be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant." *The Queen v Bishop of Oxford* (4 Q.B.D at 261). To hold certain words occurring in a section of an Act of Parliament as insensible, and as having been inserted through inadvertence or error, is only permissible as a last resort. It is, in the language of Erle, C.J: "the *ultima ratio*, when an absurdity would follow from giving effect to the words as they stand." *Reg. v St. John* (2 B and S. 706) in the Exchequer Chamber affirming the judgment of the Queen's Bench.'[32]

[46] It cannot be suggested in this case that the Legislature used the words 'within 60 days of such withdrawal' through inadvertence or error. On the contrary, it is manifest that the wording of s 2(1)*(e)*(ii) was carefully chosen specifically to cater for instances where, as has happened in this case, a third party who wishes to claim compensation for non-pecuniary loss in excess of R25 000 in order to recover the full extent of his or her damages may do so without the risk of being met with a special plea of prescription that the Fund would, in the ordinary course, be entitled

[32] At 436.

to raise.[33] This was designed to meet the declaration of constitutional invalidity of ss 18(1)*(a)*, 18(1)*(b)* and 18(2) made by the Constitutional Court in *Mvumvu*, which had hitherto capped claims for non-pecuniary loss at R25 000 regardless of the severity of the third party's bodily injuries or extent of the loss suffered. And, as the high court rightly noted, the third party must first withdraw the action pending in the magistrate's court and thereafter institute a fresh action in the high court within 60 days of such withdrawal. When this is done, the Fund may not raise a special plea of prescription to an action instituted during the 60 day window period.

[47] The interpretation favoured in this judgment does not occasion any violence to the plain and unambiguous language of the provision under consideration in this case. For, as Innes CJ remarked more than a century ago:

'A Judge has authority to interpret, but not to legislate, and he cannot do violence to the language of the lawgiver by placing upon it a meaning of which it is not reasonably capable, in order to give effect to what he [or she] may think to be the policy or object of the particular measure.'[34]

In truth, it does no more than ascribe a proper meaning to the words used in s 2(1)*(e)*(ii).

[48] Thus, in the context of this case, two things must happen before the commencement of the 60 day prescriptive period is triggered. First, there must be an intention evinced by the third party to withdraw the action instituted in a magistrate's court. Second, that intention must then translate into an overt act of carrying out the intention by actually withdrawing such action. Differently put, absent the withdrawal of the action first, there can be no question of the 60 day prescription period having commenced to run.

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[33] In this case the appellant claimed damages for non-pecuniary loss in the sum of R600 000 when the TPA came into operation.

[34] *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 543.

[49] Something needs to be said about the agreement of the parties in the high court, in terms of rule 33(1) of the Uniform Rules, that the two special pleas in issue should be determined separately from the other issues. To this end, the parties prepared a statement of agreed facts the relevant terms of which have been quoted in paragraph 5 of the first judgment. Paragraph 4.6 of the statement of agreed facts states that the appellant submitted the prescribed RAF4 claim form on 13 March 2014. Presumably, this must be a reference to the serious injury assessment report contemplated in regulation 3[35] of the Road Accident Fund Regulations. Paragraph 5.4 of the statement of agreed facts goes further to say that the [appellant's] RAF4 form, having been lodged on 13 March 2014, the appellant's claim for non-pecuniary loss has prescribed. This assertion by the Fund entirely overlooks the provisions of s 2(1)*(b)*(ii) which contemplates that a serious bodily injury assessment report, once it has been submitted by the third party to the Fund, must thereafter be 'determined in accordance with regulation 3 of the Road Accident Fund Regulations, 2008, that

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[35] Regulation 3, to the extent relevant, reads:

'3 Assessment of serious injury in terms of section 17(1A)

(1)*(a)* A third party who wishes to claim compensation for non-pecuniary loss shall submit himself or herself to an assessment by a medical practitioner in accordance with these Regulations.

(b) The medical practitioner shall assess whether the third party's injury is serious in accordance with the following method:

(i) The Minister may publish in the *Gazette*, after consultation with the Minister of Health, a list of injuries which are for purposes of section 17 of the Act not to be regarded as serious injuries and no injury shall be assessed as serious if that injury meets the description of an injury which appears on the list.

(ii) If the injury resulted in 30 per cent or more Impairment of the Whole Person as provided in the AMA Guides, the injury shall be assessed as serious.

(iii) An injury which does not result in 30 per cent or more Impairment of the Whole Person may only be assessed as serious if that injury:

(aa) resulted in a serious long-term impairment or loss of a body function;

(bb) constitutes permanent serious disfigurement;

(cc) resulted in severe long-term mental or severe long-term behavioural disturbance or disorder; or

(dd) resulted in loss of a foetus.

. . .

(3)*(a)* A third party whose injury has been assessed in terms of these Regulations shall obtain from the medical practitioner concerned a serious injury assessment report.

. . .

(c) The Fund or an agent shall only be obliged to compensate a third party for non-pecuniary loss as provided in the Act if a claim is supported by a serious injury assessment report submitted in terms of the Act and these Regulations and the Fund or an agent is satisfied that the injury has been correctly assessed as serious in terms of the method provided in these Regulations.

the third party suffered a serious injury'. Accordingly, the question whether such a claim has prescribed can only be determined not with reference to the date on which the third party submitted a serious injury assessment report, but rather with reference to the date on which the Fund determined that the third party suffered a serious injury. For as this Court made plain in *Road Accident Fund v Duma and three related cases (Health Professions Council of South Africa as Amicus Curiae)* [2012] ZASCA 169; 2013 (6) SA 9 (SCA); [2013] 1 All SA 543 (SCA), that:

'[u]nder regulations 3(3)(c) and (d), . . ., the Fund must not only determine the procedural validity of the RAF 4 form. It must also determine the substantive issue as to whether or not the report correctly assessed the claimant's injuries as serious.'[36]

[50] Curiously, after the Fund had determined that the appellant had suffered a serious injury, nowhere did the statement of agreed facts, for example, state that the appellant's high court action was instituted pursuant to s 2(1)*(e)*(ii) of the TPA. And, crucially, when such determination by the Fund was made. The impression created by the statement of agreed facts is that the high court action bears no connection to these historical facts. And yet, the fact that the appellant had: (a) instituted action in the magistrate's court arising out of the same collision because his claim for non-pecuniary loss was limited to R25 000 by s 18 of Act 56 of 1996, as it stood before the enactment of the TPA; (b) section 18(1) of the Road Accident Fund Act of 1996 as it then stood was declared unconstitutional by the Constitutional Court; (c) the TPA was enacted pursuant to that declaration of invalidity; and (d) the latter enactment is what gave rise to the appellant's high court action, without which it would never have seen the light of the day, were not canvassed at all in the statement of agreed facts. It was, therefore, not possible in my view, for the high court to determine whether the special plea of prescription was well-founded without these critical facts being placed before it.

[36] Paragraph 22.

[51] Moreover, paragraph 4.6 of the agreed statement of facts is not harmonious with paragraph 4.2, which records that the appellant submitted a claim with the Fund on 17 June 2004 in terms of the provisions of the Road Accident Fund Act 56 of 1996. The cumulative effect of these shortcomings in the parties' agreed statement of facts ineluctably leads to one conclusion, namely that the facts of the agreed statements were either equivocal or discordant, and thus inadequate for the purpose for which they were intended. In *Minister of Police v Mboweni and Another* [2014] ZASCA 107; 2014 (6) SA 256 (SCA); [2014] 4 All SA 452 (SCA), Wallis JA made some pointed remarks in regard to the need to ensure that an agreed statement of facts in terms of rule 33 of the Uniform Rules of Court is adequate for its intended purpose and said the following:

'It is clear therefore that a special case must set out agreed facts, not assumptions. The point was re-emphasised in *Bane v D'Ambrosi*, where it was said that deciding such a case on assumptions as to the facts defeats the purpose of the rule, which is to enable a case to be determined without the necessity of hearing all, or at least a major part, of the evidence. A judge faced with a request to determine a special case where the facts are inadequately stated should decline to accede to the request. The proceedings in *Bane v D'Ambrosi* were only saved because the parties agreed that in any event the evidence that was excluded by the judge's ruling should be led, with the result that the record was complete and this court could then rectify the consequences of the error in deciding the special case.'[37]

In this instance, the agreed statement of facts is, as already indicated, singularly lacking in the requisite details necessary for a proper determination of the special plea of prescription raised by the Fund. Accordingly, it is not possible for this Court to salvage the situation on appeal.

[52] Finally, it is necessary briefly to say something about the plea of *lis alibi pendens*. Whilst noting that this plea was 'properly and meritoriously taken', the

[37] Paragraph 8.

high court did not spell out what the consequences of this conclusion should be. As a general rule, a plea of *lis alibi pendens* is not an absolute bar to the proceedings in which such plea has been raised. When a court upholds a plea of *lis alibi pendens* it has a discretion to stay one or other of the two actions. A court is vested with such a discretion because it is prima facie vexatious to bring two actions in respect of the same subject matter. In this case, the appellant, by instituting the high court action, was self-evidently motivated by a desire to recover as much as possible of his non-pecuniary loss that was, until the TPA took effect, limited to R25 000.

[53] The high court before which the second action was pending undoubtedly enjoyed a wide discretion to determine whether the interests of justice dictated that the second action should be allowed to proceed.[38] The high court did not delve into this aspect in its judgment. Instead, it considered that the special plea of prescription was 'dispositive of the matter'. Hence the dismissal of the action with costs.

[54] For the aforegoing reasons, I find myself in respectful disagreement with the interpretation ascribed to s 2(1)*(e)*(ii) in the first judgment. In my view, a scrutiny of s 2 as a coherent whole in the light of its general tenor and the object of the TPA, as well as the circumstances attendant upon its enactment, all support the interpretation embraced this judgment.

[55] In the result the following order is made:

1 The appeal is upheld in part with costs.

2 The action is referred back to the high court for trial in accordance with the principles set out in this judgment before a differently constituted court.

[38] See in this regard: *Cook and Others v Muller* [1973] 2 All SA 34 (N); 1973 (2) SA 240 (N) at E-G; *Sikatele and Others v Sikatele and Others* [1996] 1 All SA 445 (Tk) at 448.

3 The order of the high court is set aside and in its place is substituted the following:

‘3.1 The defendant’s special plea of lis alibi pendens is upheld.

3.2 The court declines to determine the special plea of prescription as the facts contained in the agreed statement of the parties are inadequately stated for a proper determination to be made.

3.3 The costs associated with the determination of the defendant’s special pleas shall be costs in the cause.’

X M PETSE
ACTING PRESIDENT
SUPREME COURT OF APPEAL

APPEARANCES

For appellant:	N Snellenburg SC Instructed by: Honey Attorneys, Bloemfontein
For respondent:	No appearance