REPORTABLE JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case no. 385/2007

THERESA WILHELMINA BLAAUW	Plaintiff
v	
THE ROAD ACCIDENT FUND	First Defendant
WEST COAST DISTRICT MUNICIPALITY	Second Defendant
MR THOMAS VAN WYK	Third Defendant

JUDGMENT GIVEN THIS MONDAY, 10 DECEMBER 2007

CLEAVER J:

[1] This is an application by the plaintiff to effect certain amendments to her particulars of claim which is opposed by the second defendant on the basis that by doing so the plaintiff is seeking to claim a debt from the second defendant that was extinguished by prescription.

[2] The particulars of claim contain, in summary, the following averments which are relevant to the application:

2.1 Those cited as defendants are:

* The Road Accident Fund as first defendant
* West Coast District Municipality as second defendant; and
* Mr Thomas van Wyk as third defendant.

2.2 On 22 January a motor vehicle accident occurred when a vehicle, driven at the time by the third respondent and in which the plaintiff was a passenger, overturned as a result of the negligent driving of the third respondent. No

other vehicles were involved.

2.3 The plaintiff suffered bodily injuries as a result of the accident, details of which, together with the *sequelae* of the injuries and the damages claimed are set out.
2.4 Under the heading *"COMPLIANCE WITH STATUTORY REQUIREMENTS,"* the following averment is made:-

> *"By virtue of section 17(1) of the Act, the Defendants is (sic) obliged to compensate the Plaintiff for the above damages."*

2.5 The relevant prayers are set out in the following manner:

2.5.1 *"An order declaring the insured driver to have been 100% negligent in causing the collision;"*

2.5.2 *"As against the First Defendant: payment in the amount of R25 000.00;"*

2.5.3 *"Not as against the Second Defendant and Third Payment: payment in the amount of R725 000.00;"*

[3] Not surprisingly, an exception to the particulars of claim was noted by the second defendant. This was on the basis that the summons lacked averments necessary to sustain an action and on the ground that the summons and particulars of claim were vague and embarrassing. By agreement between the parties, an order was made in terms of which the exception was upheld with costs and the plaintiff was given leave to amend her pleadings provided that an appropriate notice was served and filed before 31 October 2007.

[4] The application to amend the plaintiff's particulars of claim was filed timeously and is now before me. The effect of the amendment is in the main to insert in the particulars of claim, with a few consequent further amendments, an allegation

that at the time of the accident the third defendant was employed by the second defendant and was acting within the course and scope of his employment. The necessary averment is made that the plaintiff's claim against the first defendant is limited to R25 000 and the joint and several liability of the second and third defendants is now recorded as being for the balance of any claim which the plaintiff may prove. The prayers are recast so as to provide for claims of:-

a) R25 000 against the first defendant; and
b) R725 000 against the second and third defendants, jointly and severally, the one paying the other to be absolved.

[5] Section 17(1) of the Road Accident Fund Act, No 56 of 1996 ("the Act") provides:-

> *"17 Liability of Fund and agents (1) The Fund or an agent shall – (a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established …, be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver … of the motor vehicle."*

[6] As I understand the submissions by counsel for the second defendant, they are the following:

6.1 Plaintiff's claim against the second defendant stems from the allegation which I have already quoted, namely

> *"By virtue of section 17(1) of the Act, the Defendants is obliged to compensate the Plaintiff for the above damages."*

6.2 Since the reference in the above paragraph is to 'defendants' (plural), it

must mean that the claim against the second defendant is based on its alleged liability as agent for the first respondent.

6.3 Since the plaintiff's right of action against the second respondent is based on the provisions of section 17(1), the plaintiff cannot substitute her claim with a different claim based on a different cause of action.

[7] The reference to 'defendants' in the plural in the particulars of claim followed by 'is' is in keeping with the inelegant and inept manner in which the particulars were drafted.

[8] In the applicant's reply, the deponent says:-

> " In this regard, I point out first of all that paragraph 36 of the Particulars of Claim uses the word 'is*' after the words* 'the Defendants*' (indicating a singular subject) and should therefore be read to mean only one Defendant which could refer either to the First or the Second Defendant. Clearly the use of the plural is a typographical error. Furthermore, since the Second Respondent knew it was not an agent appointed in terms of Section 8 of the RAF Act, it could not reasonably have understood paragraph 36 of the Particulars of Claim to mean that it was being held liable in terms of Section 17(1) of the RAF Act. And neither was this so."*

[9] Counsel for the second defendant referred me to a number of cases which were in general to the effect that an amendment of particulars of claim substituting a new cause of action for a cause of action previously pleaded would not be allowed. I have no quarrel with this approach, but as will be seen, I consider that the principle referred to by counsel is not applicable in the current matter.

[10] The meaning of the word 'debt' in section 12(1) of the Prescription Act, Act 68 of

1969 ("Prescription Act"), which provides that extinctive prescription commences to run as soon as the debt is due has been explored in many reported cases. In a number of cases it has been held that the term must be given a wide and general meaning[1].

[11] The courts have made it clear that 'debt' for the purposes of prescription does not refer to *"a cause of action"* but rather to the claiming of a debt by means of a right of action. This is particularly important when regard is had to section 15 (1) of the Prescription Act which provides for the interruption of prescription by the service on the debtor of any process whereby the creditor claims payment of a debt. In a judgment of the Supreme Court of Appeal[2], Scott JA reaffirmed the position in the following terms:

> " As observed by Corbett JA in Evins v Shield Insurance Co Ltd *1980 (2) SA 814 (A) at 842E-F, 'it is clear that the "debt" is necessarily the correlative of a right of action vested in the creditor, which likewise becomes extinguished simultaneously with the debt'. The distinction between 'right of action' and 'cause of action' has been repeatedly emphasised by this Court. More recently in* CGU Insurance Ltd v Rumdel Construction (Pty) Ltd *[2003] 2 All SA 597 (SCA), para [6], at 601*c-d *'debt' (and hence its correlative 'right of action') was noted to bear 'a wide and general meaning'; and not the technical meaning given to 'cause of action', being the phrase ordinarily used to describe the set of material facts relied upon to establish the right of action. Even a summons which fails to disclose a cause of action for want of one or other averment may therefore interrupt the running of prescription provided only that the right of action sought to be enforced in the summons subsequent to its amendment is recognisable as the same or substantially the same right of action as that disclosed in the original summons. (See* Sentrachem Ltd v Prinsloo *1997 (2) SA 1 (A) at 15H-16B;* Churchill v Standard General Insurance Co Ltd

1 *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 909A-B
The Master v I L Back & Co Ltd 1981 (4) SA 763 (C) at 777 – 778
Stockdale v Stockdale 2004 (1) SA 68 (C) at 72D-E

2 *Firstrand Bank v Nedbank (Swaziland) Ltd* 2004 (6) SA 317 at 320I-221D

> *1977 (1) SA 506 (A) at 517B-C.) If it is, the running of prescription will have been interrupted and it will not matter that the effect of the amendment is to clarify or even expand the claim. (As to the expansion of the claim, see eg* Schnellen v Rondalia Assurance Corporation of SA Ltd *1969 (1) SA 517 (W) at 520H-521G.) The sole question in the present appeal is therefore whether the right of action relied upon in the particulars of claim as amended is recognisable as the same or substantially the same as that relied upon in the particulars of claim in its original form."*

[12] In *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd*[3] the court referred to *Drennan Maud & Partners v Pennington Town Board*[4] and explained that the kind of scrutiny to which a cause of action is subjected in an exception is inappropriate when examining an alleged 'debt' for the purposes of prescription. In the *CGU* case it was also explained[5] that it is settled law that a summons which sets out an excipiable cause of action can interrupt the running of prescription provided the debt is recognisable in the summons and is identifiable as substantially the same debt as the debt in the subsequent amendment.

[13] The second defendant's case rests on the submission that the right of action relied upon was that the second defendant was a duly appointed agent of the first defendant and the amendment introduces a new and separate right of action, in fact a cause of action, namely that the second defendant is to be held responsible for the damages suffered by the plaintiff caused by the negligent driving of the third respondent acting within the course and scope of his employment with the

3 [2003] 2 All SA 597 (SCA)
4 1998 (3) SA 200 (SCA) at 212G-I
5 At p601d-e

second defendant.

[14] I do not consider that the inept drafting of paragraph 36 in the particulars of claim is conclusive. The second defendant's counsel submitted that the use of the plural *"defendants"* indicated that the second defendant was being held liable (on the strength of s 17(1) of the Act. However, the use of the word 'is' may equally be an indication that only one defendant was being held liable by virtue of the Act. If so, surely that party would be the first defendant. Furthermore, there is no positive averment in the particulars of claim that the second defendant was the appointed agent for the first defendant.

[15] Counsel for the second respondent relied to a considerable extent on the judgment in *Mokoena v SA Eagle Insurance Co Ltd*[6]. That was a case in which the plaintiff, relying on the predecessor to the Act (Compulsory Motor Vehicle Insurance Act 56 of 1972) sought to recover damages from the insurer of a vehicle which had been involved in an accident. The plaintiff had been a passenger in the vehicle and had initially sued on the basis that he was being conveyed on the business of the owner of the vehicle who was named, alternatively as an employee of the owner and in the course and scope of his employment. The allegation was also made that the injuries which he sustained in the accident had been caused by the negligence of the driver of the vehicle. Two amendments to the particulars of claim were thereafter sought, the first

6 1982 (1) SA 780 (O)

being to alter the name of the alleged owner and in the alternative, the plaintiff alleged that he had been conveyed in the course of the business of the driver and not the owner as previously alleged. The last averment was ultimately relied on. A special plea to the effect that the particulars of claim, as amended, had introduced a new cause of action which had prescribed was dismissed, the court pointing out

> " Once it is established that the claimant third party, while a passenger in the insured vehicle, was (a) *conveyed for reward or* (b) *was conveyed in the course of the business of the driver or owner of the motor vehicle or* (c) *was being conveyed in the course of his employment as servant of the driver or owner of the motor vehicle, the obligation which is created by s 21 operates and the insurer is compelled to pay compensation, ie after proof of the facts required by s 21."*[7]

The right of a passenger to claim against the Fund, when the negligence of the driver of the vehicle in which the passenger was being conveyed is relied upon, has of course been altered in the current legislation.

The submission by counsel was that since the court in *Mokoena* had found that the amendment still flowed from the allegation that the defendant was obliged to compensate the plaintiff by virtue of s 21 of the previous act, it followed that because the plaintiff had in the present matter relied on s 17(1) of the Act, only an amendment which was based on s 17(1) could be permitted. Since the amendment introduced a new course of action it ought not to be allowed. To my mind, the argument overlooks the fact that unlike the *Mokoena* case in which only the insurer was sued, the second and third defendants are being sued in the present matter in addition to the Fund. Furthermore, as will appear from para

7 At 787A-B

[17], there are certainly indications in the existing particulars of claim that broadly speaking separate claims are envisaged.

[16] To return to the basic enquiry, can it be said that broadly interpreted the debt in the amended particulars of claim is substantially the same as that set out in the original particulars of claim.

In *Frol Holdings (Pty) Ltd v Sword Contractors CC*[8] the following was said:

> *"Accordingly, in deciding whether the summons before amendment was directed at enforcing substantially the same right as that set out in the amended particulars of claim, the Court should look at the substance and basis of the claim rather than the form in which it has been clad or the technicalities of its expression in pleadings. Both the relief claimed and the grounds on which it is based must be broadly interpreted, making provision for factual errors, ambiguity and obtuseness of language, as well as possible incompetence of legal practitioners to see if the right now being enforced is basically that, or substantially similar to what was demanded in the original summons. For this purpose a comparison of the two pleadings is necessary."*

In the *CGU* case the judge applied an objective comparison between the original particulars of claim and the particulars of claim[9].

[17] The initial particulars of claim contain the following averments:

17.1 The second and third defendants are cited as defendants.
17.2 The accident occurred as a result of the negligent driving of the third defendant.
17.3 The plaintiff was a passenger in the vehicle driven by the third defendant.
17.4 No other vehicles were involved in the accident.
17.5 The claim against the first defendant is restricted to R25 000 (i.e. the maximum amount which may be claimed from the Fund by a passenger).

8 1996 (3) SA 1016 (O) at 1021F-H
9 At 602b-d

17.6 An additional amount of R725 000 is claimed. Although the reference is by no means clear, there is a reference in this regard to the second defendant, and perhaps also the third defendant.

[18] I agree with counsel for the plaintiff that broadly interpreted, the original particulars of claim seek to enforce a right of action against the second defendant arising from the negligent driving of the third defendant. The remarks in the *Frohl Holdings* case (para 16 *supra*) as to the provision which should be made for factual errors, ambiguity and obtuseness of language, as well as the possible incompetence of legal practitioners are particularly apt in this case.

[19] The 'debt' that is due is the patrimonial loss suffered by the plaintiff. The amended particulars of claim seek to enforce precisely the same right of action or debt. In my view, the fallacy in the approach adopted on behalf of the second defendant stems from the conflation between a *"cause of action"* and a *"debt"*. It would also seem that while counsel refers to a right of action, what he actually has in mind is a cause of action, which is not a correct way of assessing the pleading.

[20] It is trite that a summons served before prescription has run its course may nevertheless interrupt the running of prescription under the Prescription Act, even if it discloses no cause of action or is otherwise excipiable. In *Rooskrans v Minister van Polisie*10 the plaintiff sued the Minister of Justice for damages

10 1973 (1) SA 273 (T) at 274

arising from alleged unlawful arrest and assault by two policemen. The declaration did not contain an allegation that the policemen had acted within the course and scope of their employment. The learned judge found that the summons did not amount to a nullity and approved the view expressed in *Van Vuuren v Boshoff*11, that *"The Prescription Act is designed to penalise inaction, not legal ineptitude."*

He concluded that even though the summons was excipiable, it had nevertheless interrupted prescription in respect of the summons which had in the mean time been amended to include the allegations that the policemen had acted within the course and scope of their employment. Inasmuch as the ***Rooskrans*** matter is on an almost an identical footing with the present matter, I consider that the approach adopted in that matter should also be followed in the matter now under consideration.

[21] Counsel for the second defendant submitted that in the event of me finding for the plaintiff, I should not award costs against his client as his client's objection to the amendment was not unreasonable. I regret that I find no basis for departing from the normal principle that costs should follow the event.

[22] In the circumstances:

1) The applicant/plaintiff is granted leave to amend her particulars of claim in accordance with the proposed amendment as set out in her notice of

11 1964 (1) SA 395 (T) at 403G

amendment dated 25 July 2007.

2) The second defendant is ordered to pay the plaintiff's costs.

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R B CLEAVER