IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE No.: 3701/03

In the matter between:

RENIER ALBERTUS HERMANUS ENGELBRECHT **Plaintiff**

and

THE ROAD ACCIDENT FUND **First Defendant**
MINISTER OF TRANSPORT **Second Defendant**

JUDGMENT DELIVERED: 2 AUGUST 2006

Allie, J:

INTRODUCTION:

[1] Plaintiff was injured in a motor vehicle accident which occurred on 22 February 2002 on the road between Clanwilliam and Citrusdal. The First Defendant will hereafter be referred to as "The Defendant".

[2] Plaintiff testified that he was the driver of a motor vehicle which collided with a truck which had passed him by, while driving in the opposite direction. The truck did not stop but continued and Plaintiff was unable to identify either the truck or its driver. Plaintiff's claim was accordingly governed by Section 17(1)(b) of the Road Accident Fund Act No. 56 of 1996 ("the Act") and the Regulations made in terms of Section 26 of the Act.

[3] Defendant amended its plea by introducing a special plea raising the defence *in limine* that the fund was not liable to compensate Plaintiff because he failed to comply with Regulation 2(1)(c) of the Regulations in terms of which the Road Accident Fund ("the Fund") was not liable to compensate a third party unless the third party submitted, if reasonably possible within 14 days after being in a position to do so, an affidavit to the police in which the particulars of the occurrence concerned were fully set out.

[4] On behalf of Plaintiff it was submitted that the special plea should fail for two reasons namely:-

1) Plaintiff's claim ought to be saved because of the provisions of Section 24(5) of the Act in terms of which the Defendant ought to have timeously objected to Plaintiff's non-compliance with Regulation 2(1)(c); and

2) Plaintiff submitted that Regulation 2(1)(c) violates the Constitution.

[5] On the first day of the trial, Plaintiff testified about the accident and when he first had an opportunity to make an affidavit at the Police Station. It became clear that oral evidence was required on behalf of the Road Accident Fund and the Minister of Transport on the Constitutional point. The case was postponed to enable the Road Accident Fund and the Minister of Transport to lead such evidence. On the postponement date, the Plaintiff agreed to testify on the Regulation 2(1)(c) issue.

[6] In his replication Plaintiff stated that he attested to the affidavit on 10 April 2002 at Clanwilliam and handed it in to the South African Police Services there. A letter written by Plaintiff's Attorney dated 1 March 2002 and sent to the Station Commander at Clanwilliam was handed in. The letter refers to the particulars of the motor collision and describes the unidentified vehicle as a "*wit vragmotor*". In

the letter, plaintiff's attorney states that their client, namely the Plaintiff, would contact the South African Police Services in the following week with the view to lodging a formal complaint. Plaintiff's testimony was that after the collision on 22 February 2002, he remained in hospital for approximately 2 to 3 days and thereafter he went to his parents' home in Durbanville where he convalesced for about two and a half weeks. He said that while he was convalescing, he did not have access to a motor vehicle. After one week of convalescing, he went to consult his attorney.

[7] Professor Meyer, the Ophthalmologist who attended to Plaintiff stated, in his report, that he considered that Plaintiff could have returned to work on 5 March 2002. Plaintiff testified that because of his psychological state after the collision, he was not at first aware that the filing of an affidavit with the Police was an urgent matter and he was too emotionally disturbed to care. Plaintiff later testified that his earlier testimony in which he said that the affidavit was attested to on 10 April at Clanwilliam Police Station was incorrect and that the affidavit was in fact deposed to on 4 May 2002.

[8] On behalf of the Defendant it was argued that the Plaintiff was in a position to submit the relevant affidavit while he was in hospital and it was reasonably possible for him to have done so at the latest by 1 March 2002. At the stage of argument, Plaintiff's counsel, Mr Heunis (SC) abandoned the argument that there had been compliance with Regulation 2(1)(c). Instead he relied on two arguments, namely, the Section 24(5) argument and the argument that Regulation 2(1)(c) is unconstitutional.

THE SECTION 24(5) ARGUMENT:

[9] Section 24(5) of the Act provides as follows:-

> *"If the Fund or the agent does not, within 60 days from the date on which a claim was sent by registered post or delivered by hand to the fund, such agent*

as contemplated in subsection (1), object to the validity thereof, the claim shall be deemed to be valid in law in all respects."

[10] On behalf of Plaintiff it was argued that even if Plaintiff did not file his Section 2(1(c) affidavit timeously, his claim is saved by the fact that the Defendant failed to object thereto within 60 days as required in terms of Section 24(5) of the Act. On behalf of Defendant, it was argued that Section 24(5) only applies to formal defects and it was not intended to affect substantial omissions not related to the claim form.

[11] The Supreme Court of Appeal in the case of *Road Accident Fund v Thugwana 2004 (3) SA 169 (SCA)* declined to consider whether Section 24(5) was an answer to the Plaintiff's failure to file an affidavit timeously. The Court did so because counsel in that case, was unable to make considered submissions on the law and facts. The Supreme Court of Appeal afforded the Plaintiff in that case, the opportunity of filing a replication dealing with Section 24(5). The Plaintiff filed the replication and the issue of whether Section 24(5) entitled Plaintiff to claim by virtue of the Fund's failure to object within the requisite 60 days, was determined by the Transvaal Provincial Division in *Thugwana v The Road Accident Fund 2005 (2) SA 217 (T)*. Els J found that Section 24(5) only referred to compliance with the content of the claim and accompanying documents. He held that it would lead to absurdity if Section 24(5) was interpreted to apply to all procedural sections of the Act and the Regulations. On appeal, in the *Thugwana Case*, Mlambo JA, writing for a unanimous Court, held that Regulation 2(1)(c) prescribes a substantive requirement to found liability and failure to comply with it is fatal, while Section 24 has the objective of ensuring, before the commencement of litigation, that the Fund is furnished with sufficient particulars to enable it to make a decision about the claim.

[12] In the circumstances, this Court is bound by the decision of the Supreme Court of Appeal and the Plaintiff's argument that Section 24(5) saves his claim must fail.

THE ARGUMENT THAT REGULATION 2(1)(c) IS UNCONSTITUTIONAL:

[13] On behalf of Plaintiff it was submitted that the Regulation offends against Section 34 of the Constitution which provides as follows:-

> *"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before court or, where appropriate, another independent and impartial tribunal or forum."*

[14] **Mr Heunis (S.C)** on behalf of Plaintiff argued that Section 34 did more than merely prohibit ouster clauses, it also prohibited more subtle restrictions on access to courts. He argued that the objective sought to be attained by Regulation 2(1)(c), namely, to prevent fraudulent claims could in fact be achieved by less restricted means. He argued further that the onus rests on the party asserting the unconstitutionality of the statute to prove that there has been a violation of Constitutional rights and then the onus shifts to the party seeking to uphold the Constitutionality of the statute to prove that such violation is justified under the limitation clause of the Constitution.

[15] Mr Heunis went on to consider the requirements of Section 36 namely, that the limitation of rights should be reasonable and justifiable. He considered that Section 36 required a two stage inquiry. First by the evaluation of the reasons for the law that limits the right. Second, the determination of whether there is a rational relationship between those reasons and the limitation. Third, the determination of whether there is an acceptable degree of proportionality between the benefits to be obtained by the limitation and the harm that the limitation of rights entailed.

[16] He argued that the Supreme Court of Appeal in the *Thugwana-case* found that Regulation 2(1)(c) demanded compliance in all cases governed by it no matter how harsh that may turn out to be. He submitted that the severity of the consequences of Regulation 2(1)(c) meant that many of the claimants that were hit by it would not be afforded an adequate and fair opportunity to seek judicial redress for wrongs done to them.

[17] He argued that the limitation imposed by Regulation 2(1)(c) is too restrictive for the purpose it was designed to achieve when due regard is had to the nature of the right which it infringes. He submitted that the requisite of deposing to an affidavit as a pre-condition to being able to institute legal proceedings is an obstacle by itself. He submitted further that the time period of 14 days was exceedingly short. He believed that failure to comply absolutely negated the claim and that no condonation for any failure to comply was provided for.

[18] He pointed out that what made the Regulation even more unjust, was that the majority of the claimants were probably unaware of the requirement and would only find out after having received legal advice.

[19] In the case of *Thugwana*, the argument was advanced that the purpose of the Regulation was to combat fraudulent claims. Mr Heunis pointed out that in the present case, the testimony of Mr C. Muller, a training officer of claim handlers employed by Defendant, was that he had found a document from the Minister of Transport at the time when he introduced Regulation 3(1)(a)(iii), the predecessor of the present Regulation 2(1)(c). In that document, it appeared that the Regulation was introduced as a counter balance for the right to sue the Road Accident Fund directly, as opposed to proceeding against the individual insurers. Mr Heunis argued that the purpose of the regulation was clearly therefore not to combat fraud. Mr Muller's point of departure was that he believed in the case of unidentified vehicles, the claimant would ordinarily not

have a right to claim and that the Regulation sought to give an injured person the right to claim while also restricting it.

[20] The testimony advanced on behalf of Plaintiff was that the South African Police Services did not investigate civil cases. The fact that a statement on oath was presented to the South African Police did not necessarily trigger a criminal investigation. The South African Police Services would merely visit the scene of the accident to draw up an accident report.

[21] Mr Heunis pointed out that a victim of a hit-and-ran accident does have a claim against the wrongdoer even though the victim may have difficulty identifying that wrongdoer. He argued that the common law right for the victim to claim against the wrongdoer was therefore removed by the Legislature who then granted the victim a right to claim against the Road Accident Fund only.

[22] He pointed out that a hit-and-run accident is not one by definition where there are no eyewitnesses. He argued that it is one where the driver or owner of the vehicle could not be identified.

[23] In the present case, the South African Police Services opened a docket after receiving the attorney's letter requesting an investigation but the investigation was not proceeded with after Mr Engelbrecht, the Plaintiff, said that he did not personally require it and the docket was then closed.

[24] Mr Van Wyk, an attorney, who testified on behalf of Plaintiff said that despite the South African Police Services having instructions to do so, he found in his experience of investigating hit-and-run cases, that dockets were rarely opened. According to the evidence of the Director of the South African Police Services, Ms Macala, there is a standing order dated 21 August 1995 dealing with the manner in which the South African Police Services should act when a road traffic collision is brought to their notice.

[25] The evidence of the attorneys, Messrs Kruger, Van Wyk and Kelder were, that in their experience, the police more frequently than not failed to act according to these standing orders. It became clear that the South African Police Services did not adopt the practice of forwarding the affidavit to the Road Accident Fund and it is not obliged to do so. The South African Police Services are under no obligation to preserve the affidavit and only the police station in whose district the accident occurred would open a docket and would perhaps wish to keep the affidavit on file.

[26] Messrs Kruger and Van Wyk ,on behalf of Plaintiff, testified that the Regulation 2(1)(c) was often not accepted by the South African Police Service when tendered for submission. They also testified that when such affidavits were submitted, the South African Police Services could not retrieve them when requested to do so.

[27] However, Ms Macala testified that when she visited the Khayelitsha and Nyanga Police Stations, she was able to retrieve affidavits that had been sent there by post. She found them all in the correspondence file and not as part of the dockets. She also confirmed that from the documents placed before her, she could conclude that often dockets were not opened. Her evidence showed that the South African Police Services often make serious mistakes concerning whether accidents are reported or not. She admitted that she did not know about the provisions of Regulation 2(1)(c) prior to meeting with Defendant's counsel. Ms Macala testified that in her search she did not find any letter from the Road Accident Fund requesting a copy of such affidavit.

[28] The evidence advanced on behalf of Defendant is that the primary purpose of Regulation 2(1)(c) was to afford the police an opportunity to establish whether an accident occurred, the identity of the driver or the owner and whether the driver should be prosecuted. The evidence was that it is necessary to file an

affidavit in terms of Regulation 2(1)(c) within the requisite period so that the Defendant can eliminate the possibility of fraud in “hit-and-run” cases.

[29] On behalf of Plaintiff, evidence was adduced that the police generally did not know of the existence of Regulation 2(1)(c). They often refused to accept the affidavit presented to them in terms of the Regulation. They sometimes sent it back to the attorney. They often did not open a docket and investigate when they received the affidavit. Where they do open a docket, the affidavit is not placed in it. Ms Macala testified that she was able to find Regulation 2(1)(c) affidavits in the correspondence file at the Police Stations that she visited. Her ability to trace the affidavits has to be viewed against the obvious co-operation that the police would give to its Director.

[30] Messrs Van Wyk and Kruger confirmed that fraud sometimes occurred in alleged “hit-and-run” claims. They however, believed that the affidavit did not prevent fraud. Mr Van Wyk said that “*touts*” who intended to submit fraudulent claims were aware of the provisions of Regulation 2(1)(c) and often complied with it even when the claim was fraudulent.

[31] Mr Kruger said that because of the police’s failure to investigate at an early stage and because the Road Accident Fund did not request the affidavit from the police at an early stage, the stated purpose of the Regulation was not achieved.

THE APPLICABLE LAW:

[32] In the case of *Road Accident Fund v Makwetlane 2005 (4) SA 51 (SCA)* Marais, JA in discussing whether the Regulations defeat the object of the Act, i.e. to provide compensation to a victim of a hit-and-run” accident, held that while the consequence of non-compliance can non-suit a genuine claimant, so too can

other provisions of the Act such as the failure to file a claim timeously. He considered that neither of those provisions frustrated the objects of the Act.

[33] On behalf of Plaintiff, it was argued that Regulation 2(1)(c) can be said to effectively deny a litigant his/her rights of access to justice as provided for in Section 34 of the Constitution. Section 34 reads as follows:-

> *"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum."*

[34] De Waal, Currie and Erasmus in their work entitled The Bill of Rights Handbook (4th edition, 2001) at 558 – 559, argue that Section 34 is designed to prohibit more subtle limitations on access to courts.

[35] If Regulation 2(1)(c) affidavits were accepted by the South African Police Services within the requisite 14 days and if the allegation of a motor vehicle accident in those affidavits were investigated by the South African Police, the Regulation may well have had the effect of exposing contrived claims. It would seem that the Road Accident Fund has not sought to implement the provisions of Regulation 2(1)(c) for the purpose of establishing whether a "hit-and-run" accident did in fact occur. If they were intent on arriving at the true position, they would request that the police investigate and they would request the affidavits from the police as a matter of routine.

[36] The Regulation *per sé* does not non-suit litigants. It is the failure to investigate the allegation of hit-and-run cases at an earlier stage that results in a denial of access to the courts.

[37] The Road Accident Fund was content with deriving the maximum benefit from the ignorance and inaction of the South African Police Services. It is this

conduct which runs contrary to the object and purpose of the Act as read with Section 34 of the Constitution. The Road Accident Fund Act has a social aim of facilitating claims for personal injury even where the wrongdoer cannot be identified.

[38] I am not persuaded that the Regulation falls foul of section 34 of the Constitution. At best for the Plaintiff, it can be said that the failure of the South African Police Services to investigate accidents involving unidentified vehicles and the Fund's failure to take reasonable measures to facilitate investigation of these accidents, could cause an infringement of Section 34.

[39] Mr Werner, on behalf of the Defendant, was unapologetic about the role of Regulation 2(6) interrogations. He saw it as an opportunity to exploit any differences, no matter how minute, in a claimant's version so that his staff could make adverse credibility findings. He was prepared to make serious negative findings concerning the credibility of a claimant, merely on a person's demeanor or failure to co-operate.

[40] Overzealous employees of the Fund seemed intent on using the existence of the Regulation to non-suit the claimants.

[41] The Defendant's attitude toward claimants during interrogations coupled with its approach in not using Regulation 2(1)(c) as an investigative tool harks back to a pre-Constitutional era where intimidation was rife.

[42] The Defendants have advanced no justifiable reason for its conduct in seeking to non-suit claimants without thorough investigation in "hit-and-run" cases.

[43] The Supreme Court of Appeal has held that the Regulation is necessary to combat fraud. [See *Road Accident Fund v Thugwana 2005 (4) SA 51 (SCA)* and *Mbatha v Multilateral Motor Vehicle Accidents Fund 1997 (3) SA 713 (SCA)*].

[44] On behalf of Plaintiff it was argued that the same objective, namely, combatance of fraud, could be achieved by less restrictive means because the reason for the regulation is not rationally connected to the limitation that it imposes.

[45] There is however, a rational relationship between the object and purpose of the regulation and the limitation that it imposes. Once motor vehicle accidents involving unidentified vehicles are routinely reported to the police, on the assumption that a statement on oath is taken from each complainant and the incidents are investigated so that collateral evidence is gathered to either prove or disprove the existence of a collision, it would be a perfectly justifiable step for the Road Accident Fund to refuse a claim in cases where no Regulation 2(1)(c) affidavit is filed.

[46] In *Mbatha's case*, the court found that stricter requirements were necessary to avoid the possibility of fraud. The court also found that the later the claim is lodged, the worse are the chances of disproving the claim.

[47] Although the evidence in the present case is that "touts" will adapt their *modus operandi* so that they do not fall foul of Regulation 2(1)(c) when lodging fraudulent claims, the court in *Makwetlane's case* has held that whether the Regulation is effective or not, is not relevant because as long as it has the potential to combat fraud and that potential is not *de minimus*, it has a rational purpose.

[48] The parties agree that fraudulent claims are lodged in "hit-and-run" cases, although they disagree on how widespread they are.

[49] While the Regulation 2(1)(c) affidavits have found their way into correspondence files at police stations, no evidence was led to show that their existence in a correspondence file, ever result in an investigation. In this way, we see compliance with the Regulation in form but not in substance.

[50] The question of whether the Defendant carries the duty to ensure compliance with Regulation in substance, has not been canvassed. It has also not been argued that the Defendant can be estopped from relying on the benefits conferred on it by Regulation 2(1)(c) because it has taken no steps to ensure that where Regulation 2(1)(c) affidavits are made, the accident is investigated at an early stage.

[51] Regulations cannot be struck down when their intended purpose is not achieved because of the conduct of the functionaries tasked with ensuring the attainment of its objectives.

[52] It is the conduct of the South African Police Services and that of the Defendant in not utilizing the opportunity created by Regulation 2(1)(c) to investigate a claim at an early stage, that may require further scrutiny in due course.

[53] It follows that I am not persuaded that Regulation 2(1)(c) is unconstitutional and unjustifiable, nor that it constitutes a limitation on the rights of access to the courts. It is accordingly not necessary to decide whether its objectives can be achieved by less restrictive means.

[54] The Plaintiff, *in casu*, has conceded that he has not complied with Regulation 2(1)(c).

In the circumstances, the following order is made:-

(i) The Plaintiff's claim is dismissed with costs.

(ii) Plaintiff shall pay the costs including the costs of two counsel.

ALLIE J