REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: A40/2009

In the matter between:

ROAD ACCIDENT FUND Appellant

and

ANGELIQUE-RENE BEERWINKEL Respondent

Date of hearing:	22 May 2009
Date of judgment:	26 May 2009
For the appellant:	Adv Laureen Abrahams Instructed by R H Stuurman & Company
For the respondent:	Adv P Eia Instructed by Nongogo & Nuku Attorneys

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JUDGMENT

OWEN ROGERS A.J.

[1] The appellant is the Road Accident Fund referred to in the Road Accident Fund Act 56 of 1996 ("the Act"). The appellant was sued as defendant by the respondent as plaintiff for damages arising from injuries suffered by her when she was hit by a passenger bus belonging to Golden Arrow Bus Services (Pty) Ltd ("Golden

Arrow"). For convenience I shall refer to the parties as they were in the court below.

[2] The defendant filed a special plea which raised two special defences in the alternative. In the first special defence the defendant alleged that the plaintiff's claim as lodged was a claim as contemplated in s17(1)(b) of the Act since the claim form disclosed the name of neither the owner nor the driver of the bus. Since the accident occurred on 2 August 2000 and the claim form was submitted only on 19 December 2002, the two-year prescription period for s17(1)(b) claims as specified in regulation 2(3) of the regulations promulgated under the Act had run its course before the claim was lodged. In the alternative the defendant pleaded that in terms of s23(1) the claim prescribed on 2 August 2003 because the plaintiff failed during that period to lodge a valid claim in accordance with s24, her claim form being materially deficient.

[3] The court *a quo* rejected both special defences. As to the first point, the learned magistrate held that the plaintiff's claim fell under s17(1)(a), not s17(1)(b), because although the claim form was silent on the

details of the vehicle which had caused the accident, *"there is no doubt that the vehicle was clearly identified as being a Golden Arrow bus"*. As to the alternative defence, the magistrate said that although the claim was deficient in regard to the vehicle which had caused the accident, the provisions of s24 were directory, not peremptory; that the plaintiff had remedied the defect within the five-year period stipulated in s23(3) by providing the missing details in a letter dated 17 June 2004; and that since the defendant had not objected to the validity of the claim within the 60-day period specified in s24(5), the claim was deemed to be valid.

[4] Mr Eia, who appeared for the defendant in the appeal, submitted that the claim form had clearly been lodged as one in respect of injuries caused by an unidentified vehicle as contemplated in s17(1)(b). In this regard, the plaintiff's case is certainly not helped by the fact that the attorney acting on her behalf used the form MV3 prescribed under the repealed Motor Vehicle Accidents Act 84 of 1986 and that in his covering letter he described the claim as one in terms of section 8 of the *"Motor Vehicle Accident Act of 1989"* (there is and was no such Act – he presumably meant section 8 of the 1986 Act[1]).

[1] There was the intervening Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 but it did not contain a relevant s8.

The claim form did not identify the vehicle which had caused the accident nor its owner or driver. In her accompanying affidavit the plaintiff merely described being hit by a bus at the bus stop on Modderfontein Road in Bellville South.

[5] On the other hand, and however deficient the claim form may have been, the plaintiff cannot be said to have been specifically advancing the claim as one in respect of which the identities of the owner and driver of the offending bus were unknown. The MV3 claim form contained a paragraph 3(d) which was required to be completed if the claimant was making a claim in terms of *"kragtens regulasie 8"*. The said regulation 8 was the regulation under the 1986 Act dealing with claims of the kind mentioned in s17(1)(b) of the current Act. In her response to paragraph 3(d) of the claim form the plaintiff (or her representative) noted "N.V.T" (i.e. *"nie van toepassing"* - not applicable). The circumstances of the accident were such that one would have expected it to be possible to identify the owner, driver and registration number of the bus, even if the information was not known to the plaintiff when completing the form.

[6] Be that as it may, the question is not how the claim was described in the claim form but how it is described in the summons. It is the claim in the summons that the plaintiff advances against the defendant, and the question is whether that claim has prescribed[2]. The summons expressly alleges that the plaintiff's injuries were caused by a passenger bus with registration number CA10596 and belonging to Golden Arrow. The claim she is advancing in the summons is thus one contemplated in s17(1)(a) and the question is whether it has prescribed. The defendant's first special defence was thus correctly rejected (though for reasons different from those given by the court *a quo*).

[7] The alternative special defence is premised on the failure of the claim form to provide details concerning the vehicle which caused the accident. I leave aside the plaintiff's use of the incorrect form, because in all material respects it called for the same information as the correct form (Form 1 annexed to the regulations under the 1996 Act). Mr Eia very fairly made no issue of the incorrect form. The

[2] Cf *Pretorius v SA Eagle Versekeringsmaatskappy Bpk; Pretorius v Multilaterale Motorvoertuigongelukkefonds* 1998 (1) SA 33 (T) at 46I-47E, where Swart J held that in deciding whether liability under the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 lay with the insurance company or the Fund, the question whether the owner and driver were unidentified had to be decided at the time of the trial, not at the time the claim form was lodged. The judgment was upheld on appeal (1998 (2) SA 656 (SCA)) though this particular aspect was not discussed.

prescribed form required particulars to be given of the offending vehicle. There is no factual basis for the court *a quo*'s finding that the vehicle *"was clearly"* a Golden Arrow bus, if by that the learned magistrate meant that the owner of the bus was identifiable from the claim form itself without further investigation. I do not know, and would not be willing to take judicial notice (if such be the fact), that only buses owned and operated by Golden Arrow stop at bus stops in Modderfontein Road. Moreover, the Fund cannot be expected to know whose buses run on what roads in all the cities of South Africa.

[8] Section 24(4)(a) of the Act states that a form not completed in all its particulars shall not be acceptable as a claim form under the Act. This does not derogate from the principles developed by our courts under successive kindred statutes regarding substantial compliance (cf the judgment of the Supreme Court of Appeal in the *Pretorius* case, cited in an earlier footnote, at 662G-663D). In *Pretorius* the claimant had furnished the make and registration number of the offending vehicle but had not stated the name of the owner or driver (such information was not known to the claimant when submitting the form). In rejecting a complaint by the insurance company that

the claim form had been materially defective, Swart J in the court *a quo* found on the facts of the case that the information in the form had been sufficient to meet the statutory purpose of enabling the insurer to investigate the claim and assess whether to oppose it, that the Fund had been able to identify the owner and driver from the information furnished in the form, and that the insurance company could have done the same investigations (43F-I). On appeal Smalberger JA, who delivered the majority judgment, upheld Swart J's decision (though he observed that the matter was not free from difficulty).

[9] In the present case the claim form did not even contain the make and registration number of the vehicle. On the other hand, the vehicle was identified as a bus operating on a particular road and scheduled to call at a bus stop on that road. The claim form fixed the time of the accident at 08h20 on 2 August 2000, named the police station to which the accident had been reported and gave a police case number. There is thus merit in the submission by the plaintiff's counsel that the claim form passed muster and provided the Fund with enough information to investigate its liability.

[10] However, it is not necessary to reach a final decision as to whether there was substantial compliance with the requirements of the claim form. I shall assume in the defendant's favour that there was not substantial compliance and that the Fund would have been entitled to reject the claim form as invalid. The fact is that the Fund did not object to the claim form's validity. Section 24(5) states that if the Fund does not, within 60 days from the date on which the claim form was sent by registered post or delivered by hand, object to the validity of the claim, *"the claim shall be deemed to be valid in law in all respects"*. The defendant did not object to the validity of the claim within that period (and the said 60 days ran its course prior to the expiry of the three-year prescription period). Only on 13 September 2004 did the Fund repudiate the claim (on the basis that the claim fell under s17(1)(b) and had not been lodged within two years).

[12] Mr Eia submitted on the strength of *Thugwana v Road Accident Fund* 2006 (2) SA 616 (SCA) that the defendant's failure to object within the specified period did not breathe life into the claim.

Thugwana is, in my view, plainly distinguishable. The plaintiff there had issued summons for injury caused in a collision with an unidentified vehicle. One of the prerequisites for such a claim is the timeous submission of an affidavit to the police with certain particulars (regulation 2(1)(c)). The plaintiff had not met this requirement. This was a requirement extraneous to the claim form specified in s24. What the court in *Thugwana* held was that s24(5) could not assist a plaintiff in respect of non-compliance with matters not specified in s24 itself (para 8).

[13] In the present matter, by contrast, the potential obstacle to the plaintiff's claim is the alleged invalidity of the claim lodged by her in terms of s24: particulars required by the s24 form were not given. But since the defendant did not object to the validity of the claim form within 60 days, the claim form was deemed by statute to be valid in law for all purposes. I do not see what other purpose and effect s24(5) could have. Where a claim form does not comply exactly with the prescribed requirements but there is sufficient (substantial) compliance, the form is valid and the Fund's attitude to the form is irrelevant. Section 24(5) is only needed for those cases

where, but for the Fund's failure to object, the claim form would be invalid (e.g. because of a material non-compliance). This appears clearly from what Els J said in *Thugwana* in the court *a quo* (reported at 2005 (2) SA 217 (T)) at paragraphs 6 and 7, and the judgment of the Supreme Court of Appeal upholding Els J's decision is entirely consistent with the latter's exposition.

[14] The decision in *Krischke v Road Accident Fund* 2004 (4) SA 358 (W), which was cited with approval in *Thugwana*, is likewise distinguishable. There a claim form (apparently valid in itself) had been lodged outside the three-year prescription period specified in s23(1). The Fund had not *"objected"* in terms of s24(5) to the lateness of the claim form. Jajbhay J held that s24(5) did not apply to the substantive provision in s23 that a claim prescribed three years from the date on which the cause of action arose. That decision, if I may say, seems to me to have been obviously right but it has no bearing on the present case. Here the claim form (albeit defective) was submitted within the three-year period, and if the claim form has acquired deemed validity through the defendant's failure to raise a

timeous objection in terms of s24(5) the plaintiff is entitled to the benefit of the five-year extension specified in s23(3).

[15] Accordingly, and while I disagree with the magistrate's suggestion that the belated furnishing of details of the vehicle on 17 September 2004 has any relevance, I think the court *a quo* was right to reject the alternative special defence on the strength of s24(5).

[16] I would thus dismiss the appeal with costs.

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OWEN ROGERS AJ

[17] I concur and it is so ordered.

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DLODLO J