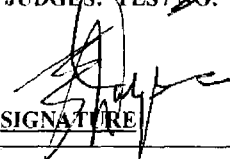




IN THE NORTH GAUTENG HIGH COURT, PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED.	
DATE <u>15/5/2013</u>	SIGNATURE 

CASE NO: 76591/09

DATE: 16/5/2013

IN THE MATTER BETWEEN

ZINTOMBI MAGDALINE MAPHANGA

PLAINTIFF

AND

THE ROAD ACCIDENT FUND

1ST DEFENDANT

PUTCO LIMITED

2ND DEFENDANT

JUDGMENT

MAKGOBA, J

- [1] This case concerns the meaning to be attached to the phrase "the Road Accident Fund Act, 1996 (Act no 56 of 1996) as it stood prior to

1 August 2008" as such phrase appears in the definition of "*the old Act*" in section 1 of the Road Accident Fund (Transitional Provisions) Act, 2012 (Act no 15 of 2012).

[2] The parties have resolved to argue this matter on the basis of agreed facts and a stated case.

[3] The statement of agreed facts and stated case are the following:

- "1. *The plaintiff is Zintombi Magdaline Maphanga, a 61 year old major female born on 2 February 1952. The first defendant is the ROAD ACCIDENT FUND, a legal persona by virtue of the provisions of section 2 of the Road Accident Fund Act, No 56 of 1996. The second defendant is PUTCO LTD, a public company duly registered and incorporated according to the laws of the Republic of South Africa.*
2. *The 'old Act' means the Road Accident Fund Act, 1996 (Act no 56 of 1996), as it stood prior to 1 August 2008.*
3. *On 24 January 2008 in the afternoon on the Cullinan Road within the RSA, the plaintiff sustained bodily*

injuries in a single vehicle accident that occurred whilst she was being conveyed as a passenger for reward (fee-paying passenger) in a motor vehicle negligently driven by P O Nkwana, an employee of the second defendant acting as such within the course and scope of that driver's employment and in the execution of his duties and for whose negligence the second defendant is vicariously liable, which bodily injuries were caused exclusively by or arose exclusively out of the negligent driving of that motor vehicle by the driver thereof.

4. *As a result of the foregoing, the plaintiff at all relevant times had the right to claim compensation from the first defendant in terms of section 17 of the old Act subject to the limitations imposed by section 18(1) or (2) of that Act, which claim had neither prescribed nor been finally determined by settlement or judgment, upon the date of the Road Accident Fund (Transitional Provisions) Act, 2012, Act No 15 of 2012 (hereinafter called the Transitional Act), taking effect on 13 February 2013 by virtue of Proclamation No 3 of 2013 published in*

Government Gazette No 361412, or at all; and the plaintiff is consequently a 'third party' as defined in section 1 of the Transitional Act.

5. *The plaintiff has expressly and unconditionally indicated to the first defendant as prescribed by the Minister (of Transport) and in compliance with The Road Accident Fund (Transitional Provisions) Regulations of 2013 (Regulation No R92) as published in Government Gazette 36142 by way of the submission to the first defendant of the duly completed TP1 form on 13 March 2013, within one year after the Transitional Act taking effect, her election to have her claim remain subject to the old Act.*
6. *In the premises, the claim of the plaintiff falls to be dealt with under and in terms of the old Act.*
7. *In this action, the plaintiff alleging consequential damages in the total sum of R1,056,777.00 has sued:*
 - 7.1 *the first defendant for the maximum amount of its statutory liability of R25,000.00 as contemplated by virtue of the limitation imposed in section 18(1) of the old Act and simultaneously the second*

defendant at common law for the balance of her damages in delict;

7.2 alternatively, the first defendant for all her damages.

8. The sole issue for determination at this stage is whether, on the proper interpretation of the provisions of the Transitional Act and more particularly of the definition in section 1 of the Transitional Act, of the old Act as 'the Road Accident Fund Act, 1996 (Act No 56 of 1996), as it stood prior to 1 August 2008', the aforesaid claim of the plaintiff under and in terms of the old Act:

8.1 is subject to the limitations by section 18(1) of the old Act; or

8.2 is not subject to such limitations.

9. If the plaintiff's claim is subject to the limitation imposed by section 18(1) of the old Act her claim remains lies against both defendants, the first defendant being liable for R25,000.00 of the damages she suffered and the second defendant for the balance thereof. If the plaintiff's claim is not subject to the limitation imposed

by section 18(1) of the old Act the second defendant will be excused from liability and the first defendant will be liable for all the damages suffered by the plaintiff."

[4] It is common cause that the plaintiff's claim is subject to the Road Accident Fund (Transitional Provisions) Act 15 of 2012 (*"the Transition Act"*). It is also common cause that the plaintiff has duly elected in terms of the Transition Act to have her claim *"remain subject to the old Act"* – that is *"the Road Accident Fund Act 56 of 1996, as it stood prior to 1 August 2008"*.

[5] In terms of section 1 of the Transition Act the *"old Act"* means the Road Accident Fund Act, 1996 (Act no 56 of 1996) as it stood prior to 1 August 2008. The *"new Act"* means the Road Accident Fund Act, 1996 (Act no 56 of 1996) as it stood from 1 August 2008 onwards. That is the Act as extensively amended by virtue of the Road Accident Fund Amendment Act, 2005 (Act no 19 of 2005).

[6] The issue that presently requires to be determined is one of statutory interpretation. There are two possible approaches adopted by the respective parties in this matter:

6.1 The plaintiff contends that the Transition Act, coupled with her election, means that her claim against the Road Accident Fund is unlimited.

6.2 The Road Accident Fund (first defendant) contends that the Transition Act, coupled with the plaintiff's election, means that her claim against the Road Accident Fund is limited to R25 000,00, meaning she can claim the balance of her claim against Putco.

[7] Putco Limited, the second defendant, is not contesting this case. I am advised that they abide the decision of the court.

[8] A brief background to the relevant legislation herein will assist in resolving the issue between the parties. I accordingly set out the legislative history giving rise to the present dispute.

- [9] When the Road Accident Fund Act 56 of 1996 was enacted, it sharply limited the ability of certain claimants to claim compensation against the Road Accident Fund. In particular passengers in single vehicle accidents were limited by section 18 of the Act to a maximum claim of R25 000,00. They were entitled to claim the balance of their claims from the driver/owner of the motor vehicle concerned. This then was the position under the "*old RAF Act*" prior to 1 August 2008.
- [10] On 1 August 2008 the Road Accident Fund Amendment Act 19 of 2005 commenced operation. This put in place a range of far-reaching amendments, including capping claims for loss of income, limiting the plaintiffs to whom general damages were available and so on. It abolished the R25 000,00 cap on passengers' claims. This regime is referred to as the "*new RAF Act*". However, the new RAF Act expressly did not apply to accidents occurring before 1 August 2008. In respect of those accidents the old RAF Act continued to apply.
- [11] In view of this, three passengers whose accidents occurred prior to 1 August 2008 and whose claims were consequently capped by the old RAF Act, challenged the constitutionality of certain sub-sections of

section 18 of the old RAF Act. On 17 February 2011 in **Mvumvu and others v Minister for Transport and another 2011 2 SA 473 (CC)** the Constitutional Court upheld their constitutional challenge. It granted an order declaring sections 18(1)(a)(i), 18(1)(b) and 18(2) of the old RAF Act unconstitutional and invalid. It, however, suspended the declaration of invalidity for eighteen months "to enable Parliament to cure the defect".

[12] The period of eighteen months was later extended by the Constitutional Court for a further six months. Within this six months period the Transition Act was enacted by Parliament. It commenced operation on 13 February 2013.

[13] The Transition Act applies to claimants whose claims have not yet been finalized and whose claims were previously inexorably capped at R25 000,00 by the old RAF Act. Section 2 of the Transition Act offers them an election. They must either:

13.1 choose to be subject to the regime under the Transition Act, which is far more generous than the old R25 000,00 cap but

which means they give up their common law claim against the driver or owner of the motor vehicle; or

13.2 choose to "*remain subject to the old Act*", in which case their common law claim against the driver or owner of the vehicle is preserved.

[14] The present plaintiff elected to adopt the latter course. The plaintiff has not challenged the constitutional validity of the Transition Act. I shall therefore, for purposes of this judgment, accept that the Act is constitutionally valid and embark on the interpretation of the relevant clause in issue.

[15] The plaintiff contends that upon a proper interpretation of the Transition Act, the limitation in section 18(1)(a)(i) of the old RAF Act does not apply to the plaintiff's claim. Mr Geach SC, counsel for the plaintiff, argued that the purpose of this legislation remains, as it always has been, to afford the greatest possible protection to victims of road accidents. That in applying the limitation contemplated in section 18(1)(a)(i) of Act 56 of 1996 undeniably runs counter to such purpose. Counsel referred to the decision in **True Motives 84 (Pty)**

Ltd v Mahdi and another 2009 4 SA (SCA) at 75 par [70] where it was said:

"If the literal meaning of the subsection defeats its objective then the subsection ought to be construed differently so as to ascribe to it a meaning that promotes its purpose."

[16] Mr Geach SC submitted further that it is inconceivable that the legislature would have intended to subject victims of road accidents to provisions and limitations that have already been found by the Constitutional Court to be unconstitutional and wholly inconsistent with the Constitution of the Republic of South Africa. It is quite absurd, counsel argued, to suggest that the legislature would iniquitously expect its citizens to be treated unconstitutionally.

[17] Counsel submitted further that it is possible to avoid the aforesaid absurdity and iniquity by simply interpreting the phrase in section 1 of the Transition Act to mean Act 56 of 1996 minus its unconstitutional limitations. This means that the expression in the 1996 Act "as it stood prior to 1 August 2008" must be read with the exclusion of the limitation contained in section 18(1)(a)(i). This, according to counsel,

does no injustice to the wording of the statute itself yet serves to save it from offending against the Constitution.

[18] Mr S Budlender, for the first defendant, submitted that the plaintiff's interpretation is patently untenable for at least two reasons:

18.1 first, it is inconsistent with the plain wording of the Transition Act, read with the old RAF Act;

18.2 second, it is inconsistent with the purpose and context of the Transition Act.

[19] I am persuaded that the first defendant's contention is correct. Section 2(1) of the Transition Act is clear. A plaintiff may elect "*to have his or her claim remain subject to the old Act*". The term "*old Act*" is defined in the Transition Act as meaning "*the Road Accident Fund Act, 1996 (Act 56 of 1996) as it stood prior to August 2008*". There is no doubt that section 18 of the old RAF Act meant that a claimant who was subject to its terms had his or her claim against the Road Accident Fund capped at R25 000,00, with the balance claimable against the driver/owner of the motor vehicle.

[20] Counsel for the plaintiff somehow contends that the reference to "*the Road Accident Fund Act, 1996 (Act 56 of 1996), as it stood prior to 1 August 2008*" in the Transition Act is not in fact a reference to the whole of the old RAF Act. He seeks to suggest that it is a reference to the whole of the old RAF Act, excluding section 18 thereof. This is untenable. The plain wording of the Transition Act makes it clear that it is the whole of the old RAF Act that applies. If Parliament had wanted to exclude section 18, it would have done so. It did not.

[21] The golden rule of interpretation is to ascertain the intention of the legislature as expressed in the terms used in the statute concerned. In **MN v MM and another 2012 4 SA 527 (SCA)** at para [14] it was said that-

"It is trite that the primary rule in the construction of a statutory provision is to ascertain the intention of the legislature by giving the words of the provision under consideration the ordinary grammatical meaning which their context dictates, unless to do so would lead to an absurdity the legislature could not have contemplated. The language used is but one of the ways of determining the intention of the

legislature; so are the aim and purpose of that particular provision. Whilst words must be given their ordinary meaning, a contextual and purposive reading of the statute is also important."

[22] In my view, in the present case there is no conceivable ambiguity about the definition "*the Road Accident Fund Act, 1996 (Act 56 of 1996) as it stood prior to 1 August 2008*". There is no absurdity which can be read into the statute. Hence a purposive reading of the statute is unnecessary.

[23] In his argument counsel for the plaintiff has called in aid numerous decisions of the constitutional court regarding the need to interpret statutes in a manner that promotes the Constitution. However, in each and every such case the court has made clear that this principle has a limit – it cannot be used to "*unduly strain*" the language of the statute concerned. In **Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO 2001 1 SA 545 (CC)** at paras [23] - [24] the court made this clear:

"Judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section. Limits must, however, be placed on the application of this principle. ... Such an interpretation should not, however, be unduly strained."

See also: **National Credit Regulator v Opperman 2013 2 SA 1 (CC)**
at para [31].

[24] On the plain wording of the Transitional Act and the old RAF Act, the plaintiff's contention must fail.

[25] The plaintiff's interpretation is inconsistent with the purpose and context of the Transitional Act. By contrast, the first defendant's interpretation is consistent with the purpose of the statute. On the first defendant's interpretation the Transition Act allows all previously capped claimants an adequate and far more generous compensation regime in the following instances:

25.1 Whereas such claimant would previously have been able to claim only R25 000,00 in total from the RAF, under the

transitional regime the plaintiff can now claim damages for loss of income of up to R160 000,00 per year, unlimited general damages if there is a serious injury and medical costs.

25.2 In the alternative, such a claimant can elect to remain bound by the old RAF Act and can then claim R25 000,00 from the RAF and full compensation from the driver/owner of the motor vehicle.

25.3 The regime is not only financially sustainable for the RAF, but also allows claimants (like the present plaintiff) to elect to claim their common law rights against the driver/owner of the vehicle.

[26] In their stated case the parties have agreed that it is appropriate that each party pays its own costs whatever the outcome of these proceedings. Consequently there shall be no order as to costs in this matter.

[27] In all the circumstances the stated case is decided in favour of the first defendant and the plaintiff's contentions must fail. Having elected to be bound by the old RAF Act, the position is now that the plaintiff can:

27.1 claim a maximum of R25 000,00 from the Road Accident Fund;

and

27.2 claim the remainder of her damages from Putco.



E M MAKGOBA

JUDGE OF THE NORTH GAUTENG HIGH COURT

76591-2009

HEARD ON: 6 MAY 2013

FOR THE PLAINTIFF: B P GEACH SC AND L J VISSER

INSTRUCTED BY: SALOME LE ROUX ATTORNEYS

FOR THE 1ST DEFENDANT: S BUDLENDER AND R LATIB

INSTRUCTED BY: SEKATI MONYANE & PARTNERS