THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 334/05
REPORTABLE

In the matter between:

THE ROAD ACCIDENT FUND **APPELLANT**

v

SHELDON SMITH **RESPONDENT**

Coram: Harms, Brand, Cloete, Mlambo JJA and Cachalia AJA

Heard: 25 August 2006

Delivered: 28 September 2006

Summary: Motor Vehicle Accidents – compensation – claim in terms of s 17(1)(b) of the Road Accident Fund Act 56 of 1996 – failure by claimant to comply with regulation 2(1)(c) – Fund competent to waive compliance with regulation 2(1)(c) despite the peremptory nature thereof.

Neutral citation: This case may be cited as *Road Accident Fund v Smith* [2006] SCA 123 (RSA)

JUDGMENT

CLOETE et MLAMBO JJA

[1] The plaintiff (the respondent on appeal) lodged a claim with, and thereafter instituted action for compensation against, the appellant (the Fund) arising from injuries he sustained when a motor vehicle collided with him on 28 April 2000. He had been unable to identify the vehicle that collided with him as well as its driver or the owner and he accordingly based the claim on s 17(1)(b)[1] of the Road Accident Fund Act, 56 of 1996. As an alleged 'hit and run' victim he was required to comply with regulation 2(1)(c)[2] (the regulation). The regulation provides:

'(1) In the case of any claim for compensation referred to in s 17(1) (b) of the Act, the Fund shall not be liable to compensate any third party unless –

. . .

(c) 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 particulars of the occurrence concerned were fully set out; . . ..'

[2] The matter came to trial in the Pietermaritzburg High Court before Swain J. After three days of evidence had been led on the merits, the Fund introduced a special plea seeking to defeat the plaintiff's claim by pertinently raising his failure to comply with the provisions of the regulation as a defence. The plaintiff replicated that the Fund had waived reliance on the provisions of the regulation. Pursuant to an agreement between the parties, Swain J ordered, in terms of rule 33(4), that the issues raised in the special plea and, by necessary implication, the replication, be dealt with separately and that all remaining issues stand over for determination at a later date.

[3] So far as the special plea is concerned, it was common cause that the plaintiff had not complied with the regulation. The facts on which the replication relied were also common cause and can be summarized as follows. On 15 March 2001 the Fund requested the plaintiff's attorneys, by

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[1] Section 17(1): 'The Fund or an agent shall –
(a) . . .
(b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,
be obliged to compensate . . ..'

[2] Published in Government Gazette 17939 of 25 April 1997.

letter, to provide it with documentary proof that the plaintiff had complied with the provisions of the regulation. In addition the Fund requested a detailed sketch plan of the scene of the accident, photographs of the scene of the accident indicating the directions of travel of both the motor vehicle and the claimant, and the point of impact as well as 'proof of physical contact'. The plaintiff's attorneys responded by letter on 3 April 2001 in which they referred to an annexed copy of a cutting from a local newspaper, the Zululand Observer, that contained a report of the collision, and went on to point out that, as appeared from the claim form, the plaintiff had been hospitalised. Between 12 June and 28 November 2001 correspondence was exchanged between the plaintiff's attorneys and the Fund, the significant features of which were the following:

(i) The Fund stated it had not received the letter dated 3 April 2001. A copy was then sent to it and it acknowledged receipt, although it stated that it had not received the annexures to the letter. A rough sketch plan of the accident, together with copies of the photographs, were then forwarded to the Fund.

(ii) The Fund requested certain additional information relevant to the quantum of the plaintiff's claim.

(iii) In response to a query by the plaintiff's attorneys as to whether the Fund was prepared to concede the merits, the Fund stated 'we advise that merits are 80/20 per cent in favour of your client'.

[4] Swain J upheld the contentions set out in the plaintiff's replication and dismissed the special plea with costs. The learned judge found that compliance by a claimant with the provisions of the regulation is capable of being waived by the Fund, and that the Fund had in fact done so in this case. This appeal, with his leave, is directed at those conclusions.

[5] The Fund's argument in the court below and before us was that the failure to comply with the regulation meant that there was no claim and consequently no liability on its part to compensate the plaintiff ever arose. The argument was based on the decisions of this court in *Road Accident Fund v*

Thugwana 2004 (3) SA 169 (SCA) and *Road Accident Fund v Makwetlane* 2005 (4) SA 51 (SCA) and, in particular, at the following statements in those decisions: In *Thugwana* at 175D that:

'the effect of the regulation is to deprive a claimant such as the respondent of a valid claim in the event of non-compliance with its provisions'

and at 173H that:

'It [the regulation] provides a penalty for non-compliance, namely the fund incurs no liability to the claimant';

and in *Makwetlane* at 59H that:

'Assuming an otherwise valid claim, the effect of the regulation is to non-suit a claimant should there be non-compliance with its provisions';

at 61G-H that:

'it [compliance with the regulation] is a step which must be taken by the claimant after the commission of the delict as a condition precedent to the Fund having to compensate the claimant';

and further at 61H-I, (quoting from the judgment by this court in *Geldenhuys & Joubert v van Wyk: Van Wyk v Geldenhuys & Joubert* 2005 (2) SA 512 (SCA)) that:

'the lodging of a claim within the two-year period prescribed by reg 2(3) was "a precondition to the existence of the debt under the Act" and that if the claim is not lodged, within that period there is no "debt". . . . By parity of reasoning, so it seems to me, the same must apply to the requirement in reg 2(1) (c).'

[6] In our view the Fund's argument cannot succeed. The meaning sought to be ascribed to the *Thugwana* and *Makwetlane* decisions is incorrect. Those decisions do not mean that in the absence of compliance with the regulation, there is no claim. There is a claim, but unless there has been compliance with

the regulation, the claim is not enforceable. Put differently, absent compliance with the regulation, the Fund is not obliged to compensate the claimant. It is the enforceability of the claim, not its existence, which is compromised by non-compliance with the regulation. In this sense, compliance with the regulation can be described as a precondition to the liability of the Fund to compensate a claimant.[3]

[7] Waiver of such a precondition is possible even where, as in this case, it is couched in peremptory terms. In *Bezuidenhout v AA Mutual Assurance Association Ltd* 1978 (1) SA 703 (A) this court stated, at 709*H*-710A:

'But the imperative character of the provision is not necessarily decisive. Even a peremptory statutory provision may be renounced by a person for whose benefit it has been introduced.'[4]

[8] The precondition in the regulation thus empowers the Fund to refuse to compensate a claimant in the event of non-compliance. It is a power placed at the Fund's disposal for its benefit in view of the problems which can arise in claims emanating from hit and run collisions. In *Mbatha v Multilateral Motor Vehicle Accidents Fund* 1997 (3) SA 713 (SCA) at 718H-I Harms JA stated:

'In these cases the possibility of fraud is greater; it is usually impossible for the Fund to find evidence to controvert the claimant's allegations . . .'[5]

It would nevertheless be perfectly proper for the Fund to waive compliance with the regulation where it is satisfied that the claim is genuine. Counsel for the Fund submitted that it cannot do so because it is dealing with public funds. This submission betrays a serious misconception. The regulation was inserted to protect the Fund against fraudulent and other non-verifiable claims – not to provide it with a technical defence.

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[3] Cf *Padongelukkefonds (voorheen Multilaterale Motorvoertuig Ongelukkefonds) v Prinsloo* 1999 (3) SA 569 (SCA) at 57F-G; *Makwetlane* para 32 at 62E.
[4] See also *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at 49F-G.
[5] See also *Bezuidenhout v Road Accident Fund* 2003 (6) SA 61 (SCA) para 12; *Geldenhuys & Joubert v Van Wyk and another*; *Van Wyk v Geldenhuys & Joubert and another* (*supra*, para 5) para 17; *Thugwana* paras 10 and 15.

[9] In the present matter, the Fund did not receive proof of compliance with the regulation, despite its repeated requests. It nevertheless indicated that it was prepared to concede the merits of the claim on the basis of an 80 % apportionment in favour of the plaintiff. It thereafter engaged the plaintiff on the merits at the trial. In its original plea, it did not deny that the plaintiff had complied with the regulation; it merely put him to the proof of this allegation. All of this conduct on the part of the Fund is inconsistent with a challenge to the enforceability of the claim. It was only after the decision of this court in *Thugwana* became known that it somewhat opportunistically inserted the special plea in its pleadings. The inference is inescapable that when the trial commenced, compliance with the regulation was no longer regarded as an issue, no doubt because the Fund was satisfied that the plaintiff's claim was genuine.

[10] In the result, the conclusion reached by Swain J that the Fund could and did waive compliance with the regulation, cannot be faulted. The appeal is dismissed with costs, including the costs of two counsel.

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T D CLOETE
JUDGE OF APPEAL

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D MLAMBO
JUDGE OF APPEAL

AGREE:

HARMS JA
BRAND JA
CACHALIA AJA