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In this edition

1. GENERAL MANAGER'S COLUMN

Being in the habit of complaining that I never have enough time to do everything that I have to or want to do, I was captivated when I came across the words of Duke Ellington, jazz pianist, composer, and conductor (1899-1974) who aptly quipped:

"I don't need time. What I need is a deadline."

My deadline for this column came at a time when only that deadline kept me going as I looked forward to some rest over the holiday season. By the time anyone reads this, the noses will be firmly pressed to the grindstones once again. I wish all readers a happy and successful 2005, in which all deadlines are met and there is enough time for rest and recreation as well.

Last year saw much turmoil for MVA practitioners, with the instability of the RAF, the Road Accident Fund Amendment Bill and the Thugwana judgement (see Risk Alert 2 and 3/2004 and the letters column of this issue). We would value continued input from readers regarding these and other topics.

In this issue, we give you the final instalment of Litigation Do's and Don'ts and a discussion of the recent Appeal Court pronouncements on the validity of Regulation 2(3) in *Geldenhuys & Joubert v Zendra van Wyk and the Road Accident Fund*.

For new readers, please note that the bulletin is available on our website at www.aiif.co.za, where you will also find other relevant information about the Attorneys Insurance Indemnity Fund.

2. POLICY QUERIES

I am a single practitioner. I registered my client's MVA claim with Prescription Alert (PA) and the claim subsequently prescribed.

Does the 15% loading still apply to my deductible of R35 000-00 even though I was registered on the system?

Clause 8.5.2 of the Scheme Policy states that,

> "in the case of a claim for loss or damage in respect of bodily injury or death caused by, arising from or in any way connected with the driving of a motor vehicle (being a motor vehicle as defined in the Road Accident Fund Act 56 of 1996 or any predecessor or successor of the aforementioned Act) at any place within the Republic of South Africa, which has become prescribed in the hands of the insured, the deductible set out in 8.5.1 (column A) will apply. Provided that if Prescription Alert, a computerised diary system available to the insured, has not been *utilised or adhered* to (**my emphasis**) by the insured, the deductible as specified in 8.5.1 (column A) will be increased by an additional 15%."
>
> So, if the claim has been registered with PA, but subsequently prescribes even though regular reminders were sent by PA, the 15% loading on the deductible will still apply as the system was not *adhered* to by the Insured. Under no circumstances will the loading be waived by the Insurers.

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3. USEFUL TIPS FOR MVA PRACTITIONERS

The validity of Regulation 2(3) of the Road Accident Fund Act 56 of 1996

Geldenhuys and Joubert v Zendra van Wyk and Road Accident Fund 471/2003 SCA

Facts

Reg. 2 (3) requires claims for compensation from the Road Accident Fund ("the Fund"), for loss or damage caused by unidentified vehicles, to be lodged within two years.

The first respondent's ("Van Wyk") husband was killed in a "hit-and-run" accident on 25 February 1998. During December 1999, she instructed the appellant ("Firm G") to lodge a loss of support claim for her and her minor children against the Fund. The claim was lodged in December 2000 – nearly three years after the collision and the Fund repudiated her claim on the basis that it had prescribed after two years.

Issues on Appeal

It was argued that the two- year period in terms of Reg. 2(3) was invalid. Further, that Van Wyk was entitled to the three- year prescription period in terms of the Prescription Act 68 of 1969 and her minor sons to one year after they attained majority (in terms of Section 13(1) of the Prescription Act). The trial Court upheld the validity of the Regulation and rejected the argument that the Prescription Act was applicable, hence the present appeal.

Judgement

In his judgement, Cameron JA referred to *Mbatha vs Multilateral Motor Vehicle Accident Fund* 1997 (3) SA 713 (SCA) which upheld a similar two year period in terms of the MMF Act 93 of 1989. However, three and a half years later, in *Moloi vs Road Accident Fund* 2001 (3) SA 546 (SCA) involving a similar claim by a minor, the court held that the two year cut off did not apply and that the periods specified by the Prescription Act did. Although *Moloi* concerned a minor's claim and *Mbatha* did not, the learned judge conceded that the two decisions are "at odds in their approach to the repealed statute."

Here, both the minors as well as Van Wyk's claim were at issue. Cameron JA considered Section 17 which determines the Fund's liability and distinguishes between cases where the owner or driver is identified, and those where neither is identified. Section 26 further gives the Minister of Transport the duty and the power to "make regulations to prescribe any matter which in terms of this Act shall or may be prescribed or which may be necessary or expedient to prescribe in order to achieve or promote the object of this Act." Reg. 2(3) was issued under this provision.

Section 21 of the Act was also considered to be important as it provides that when a third party is entitled to claim compensation, he or she may not claim from the driver, unless the Fund is unable to pay. Where a plaintiff can trace the vehicle or the driver, he or she loses a valid claim against an identifiable wrongdoer in terms of the common law.

The position differs with regard to an unidentified vehicle as there is no identifiable wrongdoer to sue and the legislation creates a claim for compensation where otherwise the plaintiff would have been remediless. Cameron JA makes it clear that the Fund is not substituted for a wrongdoer.

The difference in treatment between identified and unidentified vehicles arises from the fact that the possibility of fraud is greater in unidentified vehicle cases because it is usually impossible for the Fund to find evidence to controvert the claimant's allegations and the later the claim is brought, the greater the Fund's problems (*Mbatha*- see above). Further, that Section 22(1)(a) places an obligation on the owner and the driver to furnish to the Fund if reasonably possible, within fourteen days, particulars of an occurrence in which any person other than the driver has been injured or killed. Therefore, in identified vehicle cases, the Fund or its Agent has early notice of an impending claim.

It was also argued by the Fund that they rely solely on documentation from the SAP in order to verify unidentified claims in an effort to eliminate fraud. According to evidence by a representative of the SAPS in the *court a quo,* where the driver is not traced, there is no prosecution and the case docket is sent back to the police station where it is kept for a period of three years and then destroyed. The storage capacities at police stations were not good and even though the occurrence book was kept for a period of ten years, it did not constitute a reliable source of detail on accidents, since only very basic information was recorded. The two year period should be viewed against this background, because longer cut off periods would make it impossible for the Fund to take any practical steps to verify such claims and may place the Fund at risk for fraud.

The Appellant contended that the Regulation was invalid and that the provisions of the Prescription Act applied. The latter Act provides in general for a prescriptive period of three years in respect of a debt, save when an Act of Parliament provides otherwise (Section 11(d)). It was argued that the Regulations were not intended to have the force of a Parliamentary enactment and therefore could not override the Prescription Act.

According to Cameron JA, to invoke the Prescription Act is to assume that an unidentified vehicle is owed a debt and the debtor is the Fund. The source of the Fund's liability to unidentified vehicle claimants is not a pre-existing legal right and the Fund is only liable because legislation creates a public benefit accessible on conditions that the Act itself expressly licenses the Minister to stipulate by Regulations.

In conclusion, it was held that the 1996 Act expressly empowers the Minister to subordinate the Fund's liability to unidentified vehicle claimants to certain conditions. In Moloi, however, the now repealed MMF Act 93 of 1989 did not empower the Minister by Regulation "to endeavour to convert" the Fund's unconditional liability to a conditional liability.

The appeal was dismissed with costs.

In view of the above decision, practitioners must continue to ensure that unidentified claims (whether the claimant is subject to a legal disability or not) are lodged within the two-year period as stipulated in Reg. 2 (3) of the 1996 Act.

4. PRESCRIPTION MATTERS

Barend Petrus Barkhuizen v Ronald Stuart Napier 33129/01 TPD

This (as yet unreported) judgement dealt, inter alia, with the constitutionality of time bar clauses in insurance policies.

Facts

The facts are briefly that the plaintiff claimed an amount of R118 000-00 plus interest and costs from the defendant (the insurer) arising out of the insurer's policy in terms of which the plaintiff's car was insured. The defendant raised a special plea to the effect that it attracted no liability on the basis of Clause 5.2.5 of the Policy which stated:

"if we reject liability for any claim made under this policy, we will be released from liability unless summons is served on Lloyds SA or Hamford (Pty) Ltd within ninety days of repudiation".

Issues

The plaintiff argued that the provisions of Clause 5.2.5 infringed on the rights contained in section 34 of the Constitution which states that:

> *"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."*

He argued further, that such limitation was not reasonable and justifiable in terms of section 36 (1) of the Constitution.

Judgement

The Court found that the time bar clause was unconstitutional because it was an infringement of the plaintiff's right of access to the courts which limitation was not reasonable and justifiable as envisaged by section 36(1) of the Constitution (referred to above).

The defendant has noted an appeal against the judgment.

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5. LITIGATION DO'S AND DON'TS- part 2

Failure to adequately prepare for trial

Do

- Prepare fully and timeously
- Consult thoroughly with client and witnesses
- Provide counsel with complete instructions for the purposes of trial
- Prepare your Advice on Evidence or get Counsel to do so
- Serve notices timeously
- Instruct the appropriate experts
- Make proper discovery
- Allow sufficient time to compel your opponents to comply with notices
- Be present at the entire trial in order to support Counsel.

Wrong party before court (non-joinder, misjoinder, no locus standi etc.)

Do

- Read your instructions and the documentation carefully to ensure that you have issued proceedings in the name of the correct plaintiff (often proceedings are instituted in the name of the client when in fact the cause of action belongs to the client's company).
- The necessary research to ensure that you are suing the correct defendant (it often happens that once a matter has already prescribed, it is realised that the directors of defendant companies or related companies should be joined as parties.)
- A company search when suing companies or close corporations as there are often name changes to the Co. or CC and the wrong entities can easily be sued.

Counterclaims for professional negligence arising out of fee disputes

Do

- Take an adequate deposit
- Account to your client on a regular basis
- Keep your client informed on an ongoing basis about costs, the likely success of the case and any delays that may occur and how these delays may affect the costs.
- Maintain detailed records and documents, which will support your claim for costs.
- Consider the possibility of any allegations of negligence before issuing cost recovery proceedings and weigh up the costs involved.

7. LETTERS TO THE EDITOR

Dear Colleagues

An extremely serious situation has emerged consequent upon the judgment of *Road Accident Fund vs Thugwana* 575/2002 SCA. The effect of this judgement is as follows:

1. Every accident victim injured in circumstances where the vehicle responsible for the collision is unidentified and who has not lodged an affidavit with the SAP in terms of Reg. 2(1) (c) to the Road Accident Fund Act 56 of 1996 within 14 days after being in a position to do so, is non-suited, i.e. the claim

has a fatal defect which can never thereafter be rectified and the claimant will receive nothing.

2. The Court stated that "the Regulation in question in this appeal is not *ultra vires*. It is regulatory in nature, designed to eliminate fraud or to facilitate proof." On the one hand the court is therefore saying that the inferred intention of the Legislature to give the greatest possible protection to accident victims, is of sufficient force to render the regulations requiring the victims to prove physical contact *ultra vires (Bezuidenhout v Road Accident Fund* 2003(6) SA 61 (SCA)*,*yet it is in exactly the same circumstances i.e. a hit-and-run accident, the usually illiterate and unsophisticated victim is now required somehow to have detailed knowledge of the Road Accident Fund Act and Regulations which would require him or her to make an affidavit to the police within fourteen days of the accident, failing which the claim is extinguished and the intention of the Legislature as referred to above is of no relevance.

3. In an apparent further inconsistency, the Court in non-suiting the claimant, tries to soften the judgement by making reference to the possible assistance of S 24(5) of the Act. The hope expressed by the learned judges of the Supreme Court of Appeal that the "injustice" which would be visited upon the unfortunate Mr. Thugwana would be removed by the application of S 24(5) of the Act, proved to be in vain as the TPD held, per Els. R *(Krischke v Road Accident Fund* 2004 (4) SA 358) that S24(5) of the Act, which requires the Fund to object within sixty days of receipt of the claim with respect to the validity thereof, merely refers to procedural issues and that reliance thereon by Mr. Thugwana could not cure his failure to comply with Reg 2(1)(c) which lays down substantive requirements in respect to the validity of the claim, resulting in Mr. Thugwana being non-suited.

It is understood that the management of the RAF has issued a directive to all its claim handlers and attorneys to immediately raise and/or plead this defence and widespread reports received by the Law Society and SAAPIL confirmed that this has indeed occurred. The net result is that there are almost certainly hundreds if not thousands of existing claimants who are now forever irretrievably non-suited. In many instances, this will result in a very large number of attorneys facing claims with respect to alleged negligence, consequent upon their failure to see to it, in circumstances where it was reasonably possible for a claimant to have lodged the requisite affidavit within the stipulated fourteen days that such affidavits were indeed lodged with the police.

It is now imperative for every attorney accepting instructions in any matter, where there is the remotest prospect of the responsible vehicle being unidentified, to see to it, where the instructions are received early enough, that the claimant lodges the required affidavit with the police. Practically, there is little a profession can do to inform what will be approximately 300 000 South Africans who will sustain injury on the roads during the next twelve months of the danger many of them will face in not having any claims consequent upon the ignorance of Reg. 2(1)(c).

Ronald Bobroff
Ronald Bobroff and Partners Inc.
(This letter has been shortened due to space constraints)

Editor’s Note

We thank Mr. Bobroff for his contribution and urge practitioners to heed the warning contained above.

Please also note that the Reg.2(1)(c) affidavit must be deposed to by the person who suffered damages and must describe how the accident occurred. The affidavit must further be **submitted** to the SAPS within 14 days. Practitioners should insist that a docket be opened, so that the affidavit forms part of the docket and thereby provides proof of submission.

If the claimant is not physically/ mentally in a position to submit the affidavit, the 14 days will run as soon as he/ she is in a position to depose to such affidavit.

If you are approached by a client well after he/she was in a position to lodge the required affidavit, then the individual facts of the claim should be assessed (i.e. whether the client was in a position to submit the affidavit within the 14 days). The client should then be fully advised of the consequences of Thugwana, that the claim may be repudiated and that he/she is at liberty to seek alternative legal advice.

It is clear that the decision should, and will eventually be tested by the Constitutional Court. In the interim, practitioners should also carefully consider the options available to their clients, having regard to the fact that *Thugwana* may be declared unconstitutional in the future.

We welcome any further suggestions from our readers.

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