In the High Court of South Africa

Western Cape Division, Cape Town

REPORTABLE

Case No: 15863/2013

In the matter between

MOGAMAT RIDAA ABRAHAMS Plaintiff

And

ROAD ACCIDENT FUND Defendant

CORAM:	SALIE-HLOPHE, J
HEARD:	12 May 2016
DELIVERED:	12 August 2016
COUNSEL FOR PLAINTIFF:	Adv. W Coughlan
ATTORNEYS FOR PLAINTIFF:	DSC Attorneys
COUNSEL FOR DEFENDANT:	Adv. C Bisschoff
ATTORNEYS FOR DEFENDANT:	Z Abdurahman Attorneys

JUDGMENT DELIVERED ON FRIDAY, 12 AUGUST 2016

SALIE-HLOPHE, J:

1] The plaintiff in this matter instituted a claim for compensation against the defendant, the Road Accident Fund ("the Fund") in terms of the Road Accident Fund Act 56 of 1996 ("the Act").

2] The fund raised a special plea in respect of the claim. It was declared on 28 October 2015 by the pre-trial judge, my learned brother Justice Dlodlo, that the matter is trial ready for hearing in respect of the special plea only. This judgment is concerned only with the special plea, the details of which I will discuss shortly.

3] The following chronology of events provides context to the issues that arose for determination:

3.1] It is common cause that the plaintiff was involved in a motor vehicle accident which occurred on or about 05 February 2011 and that he was the driver of the motor vehicle at the time of the accident. The vehicle was owned by Suceco Food Manufacturers ("the insured owner"). It is undisputed that it was a single motor vehicle accident, being the vehicle driven by the plaintiff, and the only vehicle involved in the collision. No other vehicles were involved.

3.2] It his particulars of claim, the plaintiff averred that the accident occurred as a result of a burst tyre which caused the insured vehicle to leave the roadway and overturned, causing him to sustain serious injuries. He further alleged that the accident was caused as a result of the wrongful and negligent conduct of the insured

owner in that it failed to maintain the insured vehicle and/or the tyres of the insured vehicle in a safe and roadworthy condition. Differently put, the averment is that the insured owner negligently breached its duty of care to road users and in particular to the plaintiff, namely, to ensure that the insured vehicle did not constitute a source of danger on the roadway to such persons. The plaintiff therefore instituted its claim against the Fund in terms of section 17(1) of the Act.

4] The special plea raised by the defendant comprises of a main and an alternative plea. It its main plea, it contends that taking into account the particular circumstances of this matter and the relevant applicable legislation, the defendant is not liable in that:

> *"11.1 the plaintiff was not an employee of the insured owner;*
>
> *11.2 the plaintiff's use of the insured vehicle was fortuitous and/or unauthorised;*
>
> *11.3 no legal duty can be ascribed to the insured owner of the insured vehicle in relation to the plaintiff and/or road users in general, and hence the insured owner was not negligent."*

5] The alternative special plea is based on a plea that:

> *"12.1 The collision was a single vehicle collision; and*
>
> *12.2 Plaintiff was solely and entirely negligent in causing the collision."*

6] In plaintiff's reply to the defendant's special plea, the averment is made that the facts of this case fall within the ambit of section 17 of the Act and that neither sections 19 nor 21 of the Act is applicable to his claim.

7] During the hearing of the special plea, Mr. Coughlan for the plaintiff and Mr. Bischoff for the defendant, addressed court in argument. It was agreed that at this stage of the proceedings this court is only called upon to determine the special defences which have been raised by the Defendant in its special plea, in terms of Rule 33, with all other issues, including the issues of causal negligence, standing over for later determination.

8] The father of the plaintiff, Mr. Abrahams Senior, ("Abrahams"), was the only witness called to testify. No witnesses testified for the defendant. Abrahams testified that in and during February 2011 he was employed by Suceco Food Manufacturers (Pty) Ltd commonly referred to as Suceco Bakery. His duties included the deliveries of baked goods from supermarkets Shoprite/Checkers and Pick'nPay in the Oudtshoorn and Beaufort West areas. On occasion, when he had more than the usual deliveries within the same time constraints, he would engage the assistance of his son, the plaintiff, to assist in delivering the goods. Such assistance was with the permission of his employer c/o Ms. Wilna Niewhof (the manager) on condition that his son held a valid driver's licence. Abrahams furnished her with a copy of plaintiff's driver's licence and identity document. He would pay his son a fee for his assistance and this fee would be reimbursed to him by his employer from time to time. On the date of the accident, the plaintiff engaged his son to attend to the Beaufort West delivery as he himself had to attend to the George route. To have done both routes in the time allocated would have been extremely difficult. Shortly after the collision his employer was informed by Checkers Beaufort West that his son had been involved in a collision and that he was being transmitted to Beaufort West Hospital for medical attention. On his way to the hospital, he stopped at the accident scene but his son had by that time already been conveyed via the paramedic services. With the

intervention of his employer, his son was later transferred to a private hospital, George Medi-Clinic, for better medical attention and they financed the medical costs so incurred. Abrahams testified that in February 2014 two branches of his employer's business had closed down, resulting in his retrenchment. Under cross examination, Abrahams confirmed that his son had in these circumstances performed as sub-contractor and not as an employee of the insured owner. The further evidence was not challenged by the defendant.

9] Relevant provisions of the Act:

9.1] Section 17(1) reads:

"17. Liability of Fund and agents.-(1) the fund or an agent shall-

(a)……'

(b)……",

be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee:…."

9.2] Section 18(2) reads:

"18. Liability limited in certain cases.-

(1) …..

(2) Without derogating from any liability of the Fund or an agent to pay costs awarded against it or such agent in any legal proceedings, where the loss or damage contemplated in section 17 is suffered as a result of bodily injury to or death of any person who, at the time of the occurrence which caused that injury or death, was being conveyed in or on the motor vehicle concerned and who was an employee of the driver or owner of that motor vehicle and the third party is entitled to compensation under the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993), in respect of such injury or death -…."

9.3] The relevant portion of section 19 of the Act provides as follows:

"19. Liability excluded in certain cases

"The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage-

(a) For which neither the driver nor the owner of the motor vehicle concerned would have been liable but for section 21; or

(b) ….."

10] Thus, in establishing whether an injured party has a claim in terms of the Fund, regard must be had to the provisions of section 18. If the injured party was injured in the course and scope of employment, he is entitled to claim compensation in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("COIDA"). In the event of the injured party being injured in the course and scope of his or her employment, in a motor vehicle accident, the claim is to be instituted in terms of COIDA and the fund's liability is limited to the balance which an employee is not able to claim in terms of COIDA. In other words the fund will only be liable for any balance.

11] The argument for the defendant is that inasmuch as the entitlement to claim (as illustrated in paragraph 10 above) is based on the employer/employee relationship, it matters not if it is a single vehicle collision as the driver was employed and had used the vehicle in the course and scope of his employment. The result would be that on the basis of his employment relationship he is entitled to claim. The point of departure for the defendant is that absent an employment relationship and thus no COIDA claim in terms of section 18, the Act turns its attention to Section 17. The argument followed that only in the event of there being a COIDA claim would a single driver of a vehicle involved in a collision in the course and scope of his employment be entitled to claim from the Fund, as stated, for the balance of the claim not covered by COIDA. This reasoning it was argued results from a reading of section 17 in conjunction with sections 18 and 19. If this court were to accept this argument, it would mean that the only instance in terms whereof the plaintiff would have been able to claim against the Fund as a single driver involved in a single motor vehicle collision, is if he had been employed by the insured owner.

12] Mr. Bischoff attempted to illustrate this submission by pointing out that a careful reading of s17(1) of the act discloses six requirements for liability which a "third party" has to prove in order to succeed with his or her third party claim. The term "third party" is defined in the act to mean: *"the third party referred to in section 17(1)."* The term "third party" denotes any RAF victim who has suffered damage or loss as a result of bodily injury to himself or herself or of the death of or injury to his/her breadwinner as a result of the negligent and unlawful driving of a motor vehicle. The scope of section 17, he argued, does not include someone in the position of the plaintiff in this case. What the plaintiff is attempting to do, he argued, is to place himself in the position of the third party, in view of the fact that he was injured. However, he argued, that plaintiff

was effectively the first party as he was the driver of the vehicle in a single vehicle collision. He therefore is attempting to transfer liability to the insured owner as a result.

13] Mr. Coughlan, argued that the plaintiff's claim falls squarely within section 17 of the Act in that the plaintiff had sustained injuries from a motor vehicle accident that was caused as a result of the wrongful and negligent conduct of the insured owner. The evidence of Abrahams, he argued, sufficed to establish that the plaintiff drove the vehicle with the express permission and prior consent of the insured owner. The second special defence, namely, that the driver of a single vehicle collision does not have a claim for damages against the defendant was argued to be supported by the unreported decision of ***Maatla v Road Accident Fund (11690/11)[2015] ZAGPPHC 129*** (6 March 2015).

14] In ***Maatla*** *supra*, the parties agreed to a stated case and listed the various issues, agreed between them as common cause. The court in that case was required to decide whether the plaintiff was entitled to a claim against the defendant in a case where he was the driver of the motor vehicle which was involved in a collision, relying on his employer's negligence. The court referred to the case of ***Wells and Another v Shield Insurance Co. Ltd and Others*** **1965 (2) SA 865 (C)** at 867 where Corbett J stated in relation to section 17 that:

"The section lays down two prerequisites of liability upon the part of a registered insurance company for damages suffered by a third party as a result of bodily injury. These are (i) that the injury was caused by or arose out of the driving of the insured motor vehicle and (ii) that the injury was due to the negligence or other unlawful act of the driver of the insured vehicle, or the owner or his servant. There are thus two

separate enquiries, a fact which is sometimes lost sight of because in most cases the injury is caused by the negligent driving of the insured driving vehicle."

15] The court in ***Maatla*** *supra* at para 15*,* found that the twofold enquiry referred to in ***Wells*** *supra*, had to be answered in the affirmative, namely, that the injuries arose out of a motor vehicle collision and secondly that the owner of the vehicle in terms of the common cause facts was negligent. Accordingly, the court concluded that the defendant should be held accountable for the injuries sustained by the plaintiff. Mr. Coughlan submitted that ***Maatla*** *supra,* is direct authority for the proposition that the defendant can in fact be held liable in a single motor vehicle collision where the accident was caused by the negligent conduct of the owner of the motor vehicle.

16] I am not persuaded that the decision in ***Maatla*** is directly on point with the matter before this court. The judgment does not specify whether more than one vehicle was involved in the accident or not, but it is clear that the plaintiff in the matter was the driver of the motor vehicle and relied on the negligence of the owner of the vehicle, his employer, pertaining to his failure to maintain the vehicle. In my view, even if the plaintiff in that matter was involved in a single motor vehicle collision, the fact remains that an employer/employee relationship existed between the plaintiff and his employer and that he was injured in the course and scope of his employment, driving a vehicle which belonged to his employer.

17] <u>What is the remedial relief for the injured driver in the position of the plaintiff?</u> The plaintiff did not enjoy an employment relationship with the insured owner. It is his claim that he had sustained injuries from a single vehicle collision which resulted from the insured owner's failure to maintain the vehicle in a road worthy condition. Can it

be said that he is not entitled to claim against the Fund for compensation in respect of his sustained injuries?

18] What is the purpose of the Road Accident Fund Act?

Section 3 of the Act, titled: ***"Object of the Fund"*** reads:

> *"The object of the Fund shall be the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles."*

The Act is the culmination of a long line of national legislation beginning with the Motor Vehicle Insurance Act 29 of 1942. The primary concern of our legislature in enacting these relevant statutes has always been to give the greatest possible protection to persons who have suffered loss through a negligent or unlawful act on the part of the driver or owner of a motor vehicle. (See: ***Aetna Insurance Co v Minister of Justice* 1960 (3) SA 273 (A)** at 285 E-F; ***Mntambo v Road Accident Fund* 2008 (1) SA 313 (W)** at 317 F-G).

19] Relevant in the determination of the issue before this court is to bear in mind the primary purpose and objective of the Act. It has been recognised in our courts that when provisions of the act have to be interpreted, such interpretation must be done as extensively as possible in favour of the third party in order to afford the latter the widest possible protection. (See ***Mntambo*** *supra* at 317 para 11).

20] Although Mr. Coughlan did not directly challenge the submission by Mr. Bischoff that the plaintiff was not a third party, but rather a first party, clearly this reasoning is flawed. The first party is the insured, in this case the owner of the vehicle. In the realm of insurance, which in effect a RAF claim is, a third party insurance claim is

made by someone who is not the policyholder. The insurance company (in this case the Fund) can be referred to as the second party. A third party claim is commonly referred to as a liability claim because someone else is liable for the injuries suffered by the third party. That the plaintiff herein was the driver of the insured vehicle cannot and does not mean that he is therefore the first party.

21] Section 21 abolished certain common law claims. The relevant section reads:

> *"(1) No claim for compensation is respect of loss or damage resulting from bodily injury to or the death of any person caused by or arising from the driving of a motor vehicle shall lie-*
>
> *(a) against the owner or driver of a motor vehicle; or*
>
> *(b) …"*

22] This section abolishes a motor accident victim's common law right to claim compensation from a wrongdoer for losses which are not compensable under the Act. The amendment to the Act, whilst retaining several features of the old scheme also introduced new features. See ***Law Society of South Africa and Others v Minister for Transport and Another 2011(1) SA 400 (CC)***. It has retained the common law fault-based liability. This means that any accident victim or a third party who seeks to recover compensation must establish the normal delictual elements applicable. Before the amendment, section 21 provided clearly that a victim or third party may not claim compensation from the owner or driver of the vehicle or from the employer of the driver when he or she is entitled to claim from the Fund or an agent. To that extent only, a wrongdoer enjoyed immunity by operation of the Act. Thus, where the Fund could not be held liable, a third party retained the common-law residual claim to recover losses not capable of compensation under the Act from the wrongdoer. Stated

differently, no claim for compensation arising from the driving of a motor vehicle shall lie against the owner or the driver or against an employer of the driver, subject to two exceptions.

23] The one is if the Fund is unable to pay any compensation and the other in respect of an action for compensation resulting from emotional shock sustained by a person other than a third party. In other words, emotional shock sustained when such person witnessed, observed or was informed of the bodily injury or death of another person resulting from a motor collision.

24] The plaintiff drove the vehicle in the capacity as a contractor *locatio conductio operis*. At the time of the collision he was exercising his duties as a sub-contractor for the ultimate benefit and advancement of the business of the insured owner. He owed the insured owner an *opus faciendum,* meaning, a particular job to be done as a whole. (See: *Zimmermann R**,** The Law of Obligations*: *Roman Foundations of the Civilian Tradition* (1996) Oxford University Press at 390). He had, however, the consent and permission of the insured owner and was allowed to drive the insured vehicle.

25] The provisions of the Act and the liability of the Fund created therein is that a driver of a motor vehicle who is a wrongdoer (negligent driver) has no claim against the Fund when it is a single motor vehicle collision and if there is no other driver or owner who can be blamed for the collision. The question is, whether it would be different if the wrongdoer is the owner of the vehicle, consenting use thereof by the driver and who sustained injuries in a single vehicle collision as a result of the vehicle not being in a roadworthy condition.

26] At common law a justiciable claim accrued to the plaintiff the moment he was injured and suffered loss or damage as a result of the owner allowing or consenting

him to use the said vehicle which had not been in proper working order. The question of negligence and moreover the cause of the collision and to what extent, if any, the insured owner had failed to maintain the vehicle in proper working order is to be determined at the trial hereof. Whether the collision was caused by the fact that the vehicle was not in a roadworthy condition is not a question before this court.

27] The defendant did not adduce any evidence to gainsay the testimony of Abrahams who testified that his employer consented to the plaintiff driving the vehicle. This consent, had in my view, established a legitimate legal nexus or link between the plaintiff and the insured owner. Even though section 21 of the Act confirms the abolition of common law claims, what section 19 simply states is that if a claimant had a claim against an owner in terms of common law, the Fund would be liable. I see no reason why in these circumstances, and for the reasons set out above, the plaintiff can be denied a claim against the Fund in respect of his loss or damage suffered as a result of the bodily injuries which he had sustained as a result of this collision. The basic delictual requirements of liability found in common law caused by unlawfulness and fault have not been altered by the Act.

28] Mr. Bischoff argued that were the Fund to be held liable to the plaintiff in these circumstances, a hypothetical example of a thief driving a stolen motor vehicle could lead to the owner of the vehicle being liable to the thief where the latter sustains injuries in a single vehicle accident. In ***Pithey v Road Accident Fund 2014 (4) SA 112 (SCA)*** at para 18, the court held that in interpreting the provisions of the Act, courts are enjoined to bear in mind that the primary purpose and objectives of this legislation is to give the widest possible protection and compensation to claimants. Caution though is emphasised that as the Fund relies entirely on the *fiscus* for its funding, it should be protected against illegitimate and fraudulent claims. It is clear that the act

exists for the exclusive benefit and protection of the victim and not for the benefit or protection of the negligent or unlawfully acting driver or owner of a vehicle.

29] In these circumstances and for the reasons set out, I make the following order:

"The defendant's special plea (main and alternative) is dismissed with costs."

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SALIE-HLOPHE, J