IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: A 237/18

In the matter between:

THANDISWA LINAH MBELE

(on behalf of minors) Appellant

and

THE ROAD ACCIDENT FUND Respondent

Coram: A. le Grange, P. A. L. Gamble JJ and F. S. G. Sievers AJ.
Date of Hearing: 30 January 2019
Date of Judgment: 1 February 2019

JUDGMENT DELIVERED ON 1 FEBRUARY 2019

GAMBLE, J:

INTRODUCTION

[1] In February 2010 Mr. Simphiwe Robert Makutoana (hereinafter referred to as “the deceased”) was employed as a stevedore in the Cape Town harbour. On 20

February 2010 the deceased was knocked over by a large industrial vehicle known as a “Reach Stacker” while going about his work. He succumbed to his injuries the following day and his widow (the appellant) subsequently sued the respondent (“the RAF”) for damages for the loss of support sustained by herself personally and her three children.

[2] The appellant’s claim was based on the provisions of s17(1) of the Road Accident Fund Act, 56 of 1996 (“the Act”), it being alleged that the deceased had died as a consequence of the negligence of one of Eugene Andrea who, it was alleged, had operated the Reach Stacker in a negligent manner at or near the “*Multipurpose Terminal*” in the harbour. A full description of the Reach Stacker will be given later in this judgment. Suffice it to say for present purposes that its Swedish manufacturer, Konecranes Lifttrucks AB, refers to it in papers before the Court *a quo* as a “*lift truck”.* As the nomenclature suggests the vehicle is a heavy duty machine that is used to lift ocean containers and place them onboard vessels moored alongside the wharf in the harbour.

[3] The RAF disputed liability and alleged, inter alia, that the Reach Stacker was not a motor vehicle as defined under the Act, thereby asserting that the incident in which the deceased died did not fall within the parameters of the Act. The matter came before Desai J and the parties agreed that, in terms of Rule 33(4), the court would first determine whether the Reach Stacker was a vehicle as defined under the Act. All other issues were held in abeyance pending such determination.

[4] In the result, Desai J found that the Reach Stacker was not a motor vehicle as defined under s1 of the Act and ordered the appellant to pay the RAF's costs in the proceedings before him. The appellant is before the Full Bench with the leave of the Court *a quo*.

WHAT QUALIFIES AS A "*MOTOR VEHICLE"* UNDER THE ACT?

[5] S1 of the Act is the definitions clause and in terms thereof a "*motor vehicle*" is defined as

> "*any vehicle designed or adapted for propulsion or haulage on a road by means of fuel, gas or electricity, including a trailer, a caravan, an agricultural or any other implement designed or adapted to be drawn by such motor vehicle."*

[6] It is common cause that a Reach Stacker is self-propelled: it has a diesel engine which enables it to be driven around on its six huge wheels. It is not pulled (or hauled) by any other vehicle and accordingly, the issue for determination was whether it is a "*vehicle designed or adapted for propulsion… on a road."*

[7] It is significant to note that, while the Legislature could readily have done so, "*road*" is not defined under the Act and so it must bear its ordinary meaning, viz "*a line of communication, especially a specially prepared track between places for use by pedestrians, riders and vehicles."* [1] Importantly, the Legislature has not sought to

---

[1] Chauke v Santam Ltd 1997 (1) SA 178 (A) at 181G; Bell v Road Accident Fund 2007 (6) SA 48 (SCA) at [10];

restrict the meaning of "*road*" to a "*public road*" and in *Mbendera*[2] the Supreme Court of Appeal held conclusively that the Act applies throughout the Republic of South Africa and not just on public roads. The focus of the definition of "*motor vehicle*", for present purposes, must therefore be on the words "*vehicle designed…for propulsion… on a road"* with particular emphasis on the word "***designed****".*

[8] There is a line of cases at appellate level which has dealt with the definition of "*motor vehicle*" under the Act, all with particular reference to the size and nature of the vehicle.[3] As the case law has developed, the focus has shifted from the nature of the vehicle in question and its utility to the areas of operation and whether these are to be construed as public roads, roads generally or otherwise. One must therefore be cautious in adjudicating this matter to not slavishly follow earlier decisions and to attempt to use them as a blueprint to determine the issue. As is so often the case, each matter must be determined on its own facts.

[9] In *Chauke,* (a case involving a collision between a worker and a forklift vehicle in the enclosed yard of a transport company) Olivier JA conducted a thorough review of the relevant statutory provisions and the applicable case law since 1942, the year in which compulsory third party insurance was introduced into South Africa through legislation. The learned Judge of Appeal noted that, while there was initially

---

[2] Road Accident Fund v Mbendera and others [2004] 4 All SA 25 (SCA) at [13]

[3] See for example Chauke v Santam Ltd, *supra;* Mutual and Federal Insurance Co Ltd v Day 2001 (3) SA 775 (SCA); Road Accident Fund v Mbendera and Others, *supra*; Road Accident Fund v Vogel 2004 (5) SA 1 (SCA); Road Accident Fund v Van den Berg 2006 (2) SA 259 (SCA) and Bell v Road Accident Fund 2007 (6) SA 48 (SCA).

some statutory disharmony in relation to the definition of "*motor vehicle*", this was clarified under the Compulsory Motor Vehicle Insurance Act, 56 of 1972 in which (in s1(i)) the definition was formulated in the same terms as one finds today in the Act – "*any vehicle designed or adapted for propulsion or haulage on a road by means of any power…"*

[10] After consideration of the relevant case law, both locally and abroad, Olivier JA concluded that "*just because a vehicle can be used on a road by no means implies that it was 'designed for propulsion on a road'.* The learned Judge of Appeal went on to determine the point of departure as follows.

> "*The correct approach to the interpretation of the legislative phrase quoted above is to take it as a whole and to apply to it an objective, common sense meaning. The word 'designed' in the present context conveys the notion of the ordinary, everyday and general purpose for which the vehicle in question was conceived and constructed and how the reasonable person would see its ordinary, and not some fanciful, use on a road. If the ordinary, reasonable person would perceive that the driving of the vehicle in question on a road used by pedestrians and other vehicles would be extraordinarily difficult and hazardous unless special precautions or adaptation were effected, the vehicle would not be regarded as a 'motor vehicle' for the purposes of the Act. If so adapted such vehicle would fall within the ambit of the definition not by virtue of*

*being **intended** for use on a road but because it had been **adapted** for such use.'"*[4]

[11] In *Chauke* the evidence established that the forklift in question operated in a restricted area and under limited conditions.

"*The forklift was not used on a road. It was used in an out of the warehouse and in the yard. Outside the warehouse it was not required to move along demarcated lines or lanes. The evidence was also that when the need arose to transport the forklift from one locality to another, this was done with a trailer… It could not be registered in terms of the statutory licensing rules unless modified. The forklift drivers are not allowed to drive out of the premises. If a forklift is driven on a public road, according to the witness, '…. you could knock somebody over'."*

Olivier JA confirmed the finding of the trial court in that matter that the forklift in question was not a motor vehicle as defined under the applicable act.[5]

[12] In *Van den Berg* (a claim under the Act for damages arising out collision involving a piece of heavy duty road building equipment called a "*pneumatic tyre roller" (*or PTR) which, like a steam-roller, is used to compact the road surface in the construction phase of road-building), Streicher JA stated how he understood the

---

[4] 183 A-D

[5] The Multilateral Motor Vehicle Accidents Fund Act, 93 of 1989 ("*the MMVAF Act"*)

dictum in *Chauke*. In so doing he expressly disagreed with the interpretation placed thereon by Marais JA in *Vogel.*

> "*[7]…Olivier JA made it clear that he was of the view that 'an objective, common sense meaning' should be applied to the phrase 'designed for'. When he immediately thereafter said that the word 'designed' in the present context conveys the notion of the ordinary, everyday and general purpose for which the vehicle in question was conceived and constructed, he was, in my view, referring to the general purpose for which the vehicle, objectively determined, was conceived and constructed.*
>
> *[8] It is common cause that the PTR is used to compact road surfaces. It does not, however, follow that it was not designed to be used for other purposes as well.* ***If one of those other purposes it was designed for is to travel on a road it falls within the definition and qualifies as a motor vehicle as defined.***" (Emphasis added)

[13] In each case then the court will be required to objectively consider what the primary purpose of the design of the vehicle (or piece of equipment) in question is. If it is concluded that in giving effect to such purpose the equipment may also be required to travel on a road, then it will follow that it is a "*motor vehicle"* as defined in the Act. This is adequately demonstrated, in relation to a PTR, by the following conclusion arrived at by the learned Judge of Appeal in *Van den Berg*.

"*[10] Counsel for the appellant submitted that, being an objective test, one cannot have regard to the fact that the PTR is generally used on a road. However, the purposes for which the PTR is generally used are objectively determinable and is a fact that cannot be ignored when attempting to determine objectively the use for which it had been designed.*

[11] It is the design of the PTR that makes it possible for the vehicle to be used as aforesaid. It is fitted with all the paraphernalia required to be fitted to a motor car so as to enable it to be used with safety on a public road, such as headlamps, direction indicators, brake lights and rear-view mirrors. These features may of course also be required for its primary purpose of compacting, but that is, in my view, an irrelevant consideration. The third gear, which enables the PTR to travel at a maximum speed of 20 kilometres per hour and the facility to reduce the tyre pressure from 7 bar required for compacting to 2 bar are not required for compacting purposes but when travelling on roads to and from the site where compacting is required."

[14] In *Bell* the plaintiff (a baggage controller at Cape Town International Airport) was injured when knocked over by a "*flatbed transporter*" operating on the airport apron, by definition an area with restricted access to the public. The flatbed transporter was described by Theron AJA as follows.

"*[6] According to the manufacturer's brochure admitted in evidence, it is a self-propelled vehicle designed for the transportation of baggage and cargo. It*

is used at airports to transport baggage and cargo from its place of origin within the confines of the terminal to next to an aircraft on the airside of the airport (the tarmac and runway area where the planes arrive and take off). The flatbed transporter operates only within the confines of the airport."

[15] The learned Acting Judge of Appeal went on to describe the area within which the flatbed transporter operated as follows.

"*[7] The airside of the airport has a road system which functions similarly to that of public roads, except that the general public does not have access to these roads. The roads are two-way with a demarcated middle line. There are standard traffic-control signs such as stop, yield and speed signs. No vehicle may drive anywhere else on the outside, except on the demarcated roads. The roads on the airside are utilised by standard licensed vehicles, including bakkies, trucks, tractors, various types of transporters, and passenger buses, as well as by pedestrians (personnel and passengers) who cross at designated pedestrian crossings."*

[16] Applying the judgments in *Chauke* and *Van den Berg* in relation to the objective test for determination of the manufacturer's design intentions, Theron AJA noted that it was common cause that the flatbed transporter was designed "*for propulsion on an airport road".* The question that arose, in those circumstances, was whether the definition of "*motor vehicle*" required that the vehicle in question be designed for propulsion on a public road. With reference to *Mbendera*, the learned

Acting Judge of Appeal found that this was an impermissible limitation: the flatbed transporter was designed for propulsion on a road and it mattered not that the road was in a restricted area and not accessible to the public. She accordingly concluded that the flatbed transporter was a motor vehicle as defined under the Act.

DESIGN FEATURES OF THE REACH STACKER

[17] As the photograph attached hereto as Annexure "A" demonstrates the Reach Stacker is a unique vehicle which combines components of a forklift and a mobile crane. As stated, the manufacturer prefers to call it a "*Lift Truck".* The evidence establishes that it is 12,5m in length, 4,2m wide and 4,3m high. It weighs almost 72 tons and has six wheels: a pair of double wheels mounted on either side of the front axle and a pair of single wheels mounted on the back axle. Each tyre, which is pumped to a pressure of 100 bars, was said to weigh 7 tons. The front axle is static while the rear axle is movable and is used to turn the vehicle left or right with power-assisted steering.

[18] A large telescopic arm to which a crab-like lifting device is attached is mounted over the rear section of the chassis and this is used to grab an ocean container, lift it off the ground or the back of a truck or railway wagon, transport it to the edge of the quay and load it on board a vessel moored alongside. That function is demonstrated in the photograph attached hereto as Annexure "B".

[19] The Reach Stacker is equipped with a powerful six cylinder 12 litre diesel engine. It has an automatic gearbox consisting of 4 forward and 4 reverse

gears and can reach a maximum speed of 24 km/h. The Reach Stacker is equipped with, *inter alia*, fully functional headlights (low and high beam), tail and brake lights, a reverse light, and front and rear indicator lights. It also has a set of windscreen wipers and washers, a hooter and a handbrake. The driver sits in an enclosed cab which is equipped with a seat and seatbelt, a speedometer, rear view mirrors and a video camera to afford the driver improved vision to the rear.

THE REACH STACKER'S AREA OF OPERATION

[20] The vehicle in question was registered with the City of Cape Town under registration number CA 825 213. It can operate on any public road but due to its weight and the fact that its width exceeds the permissible limit of 2,5m, it may only do so while under the escort of vehicles equipped with warning lights. The expert witness for the appellant, Mr. Grobbelaar, compared this to the type of travel ordinarily undertaken by abnormal load vehicles and pointed out that due to its size and speed limitations the vehicle may have to travel outside of peak traffic times and via a route designated by the traffic authorities.

[21] Mr. Grobbelaar visited the Cape Town Harbour and observed how a Reach Stacker operates. Contemporaneous photographs show how it would be required to travel along a designated road in the terminal – the road is clearly demarcated with appropriate road markings – in an area which was open to a variety of vehicles driven by the general public. The witness illustrated his testimony with reference to a number of photographs which were before the Court *a quo.*

[22] In relation to the photograph attached hereto as Annexure "C", the uncontested evidence of Mr. Grobbelaar, when questioned by the Court and counsel for the appellant, Mr. Benade, was to the following effect.

"*COURT:* *You say on…[Annexure "C"] is where they pick up the container and, on the right-hand side… (Intervention) --- Yes,..[Annexure "C"]*

… and then take it on the left-hand side where it's loaded onto a ship? --- That's correct, yes, M 'Lord, this photograph is just taken in the opposite direction to the previous one, and one can see the ship on the left-hand side and this large space on the left-hand side where the accident actually occurred, just a little bit more towards the photographer and opposite the photographer. But the reach stackers use this road up and down, travelling from wharf to wharf….

MR BENADE: *There is a little car parked on the left-hand side and further up it looks like a bakkie parked. --- That's correct.*

Is that correct? So this space, and these roads, are they limited for usage by just a reach stacker, or the vehicle that was involved in this incident? --- No M 'Lord, there are other vehicles using the road, which we also found when we were travelling to the scene and back. And one can see them parked over there."

[23] It is, further, common cause that the Reach Stacker may be be required to move from one port in the harbour to another to move containerized cargo. In so doing it would travel on an ordinary public road, or at the very least on a road such as that depicted in Annexure “C” which appears to be a road as contemplated in cases such as *Mbendera* and *Bell.*

WAS THE REACH STACKER DESIGNED TO BE PROPELLED ON A ROAD?

[24] Counsel for the respondent accepted unequivocally in argument before us that the Reach Stacker travelled on roads as contemplated under the Act in the harbour: both public roads and other areas which constituted roads as discussed in *Mbendera.* But that is not the test. As *Chauke* and *Van den Berg* held the question to be asked is, viewed objectively, whether the persons responsible for the design of the Reach Stacker intended that it should be propelled on a road.

[25] Having regard to the uncontested evidence of Mr. Grobbelaar it seems to me to be clear that the very function of the Reach Stacker requires it to move around the harbour to adequately perform its work. Collecting a container at one place and transporting it to the quayside would of necessity require it to be propelled around the harbour. The areas over which it is so propelled, so the photographs handed in by Mr. Grobbelaar demonstrate, include the demarcated traffic lanes in the harbour used by the public and the flat parking and storage areas adjacent thereto.

[26] The day-to-day functioning of the Reach Stacker is dependent on its ability to be propelled, at times on a road and at times elsewhere. Similarly, when it is

required to move to another part of the harbour, it has to be self-propelled albeit in appropriate circumstances guided by a set of escorting vehicles. In so doing it would travel down a demarcated road and possibly even a public road. That is very much part of the ordinary work of the Reach Stacker.

[27] In *Van den Berg* Streicher JA expressly dealt with the situation where a slow and cumbersome vehicle was required to move from one area of functionality to another. After describing the distinguishing features of the PTR[6], His Lordship remarked as follows regarding the significance of such a journey.

> *[12] Counsel for the appellant contended that objectively considered the PTR was nevertheless not designed for propulsion on a road because it is inherently dangerous to drive it on a road for the following reasons-*
>
> *(a) the maximum speed at which it can travel is 20 km per hour;*
>
> *(b) its tyres are smooth, with the result that it may skid; and*
>
> *(c) its centre of gravity is high as a result of which it may tip over….*
>
> *[13] The Judge a quo held that the driving of the PTR on stretches of public road between construction sites cannot be regarded as 'extraordinarily difficult and hazardous unless special precautions or adaptations were effected'. I agree and shall deal each of three reasons advanced in turn."*

---

[6] See [10] and [11] in para 13 above

[28] After analyzing the purported dangers alluded to by counsel for the RAF, the Learned Judge of Appeal concluded as follows.

> "*[17] In the light of the fact that the PTR is in fact generally used for travelling on a public road from one construction site to another and that its design is such that it can be safely done, I am of the view that one cannot but conclude that it was designed for that purpose, whatever other purposes it may have been designed for."*

[29] Applying similar reasoning to the facts at hand, it is clear that the Reach Stacker was designed and equipped to be self-propelled around the harbour along roads and over areas such as parking and storage lots adjacent thereto, in the ordinary course of its work. The fact that it may need to be escorted along certain of those routes does not, in my considered view, detract from the fact that this is part and parcel of its everyday work, just as an abnormal load low-bed trailer transporting a large piece of heavy equipment such as an electrical transformer, would similarly be required to be escorted along a public road due to the fact that it exceeds the permissible width for travel without an escort.

[30] Counsel for the respondent sought to persuade us that this case was on all fours with *Day* in which the Supreme Court of Appeal held that a Komatsu model forklift was not a motor vehicle as contemplated under the MMVAF Act.[7] The evidence in that matter, in which Mr. Grobbelaar fortuitously testified on behalf of the

---

[7] The definition of a motor vehicle under that act is the same as under the Act

appellant Fund, showed that the vehicle in question was fitted with much of the paraphernalia which the Reach Stacker has and that it travelled on roads outside of the yard from time to time. However, its primary function, as a forklift, was to lift goods in storage yards, lumber mills and the like.

[31] It is important to note, in the first place, that *Day* was decided some 7 years before *Van den Berg* and Navsa JA did not enjoy the benefit of Streicher JA's subsequent qualification of the *dictum* in *Chauke*. Navsa JA may have viewed the matter differently had he considered that analysis of *Chauke.*

[32] But, more fundamentally, the intended utility of the vehicle in this case is wholly different to that in *Day.* As I have attempted to demonstrate above, the primary function of the Reach Stacker differs from a forklift such as the Komatsu in *Day* in that it is required as part of its everyday function to traverse both public roads and other non-statutory roads such as those as contemplated in *Mbendera* and *Bell* to do its job. And, therein lies the answer to counsel's submissions. Objectively viewed, the designers of the Reach Stacker would have contemplated that it would be required to be propelled along such roads in the harbour.

CONCLUSION

[33] In the circumstances I conclude that the Reach Stacker with registration number CA 825 213 which collided with the deceased was a motor vehicle as defined in s1 of the Road Accident Fund Act, 56 of 1996. It follows that the appeal should succeed with costs and that the order of the Court *a quo* should be varied accordingly.

IN THE CIRCUMSTANCES I WOULD PROPOSE THE FOLLOWING ORDER:

A. The appeal succeeds with costs.

B. The order of the court *a quo* is set aside and replaced with the following :

1. The vehicle in the present case, a Reach Stacker with registration number CA 825 213, is declared to be a motor vehicle as contemplated in section 1 of the Road Accident Fund Act, 56 of 1996.

2. The defendant is ordered to pay the plaintiff's costs of suit, including the qualifying expenses of the expert witness, Mr. Barry Grobbelaar

_____

GAMBLE, J

LE GRANGE, J:

I AGREE.

IT IS SO ORDERED.

_____

LE GRANGE, J

SIEVERS, AJ:

I AGREE

_____

SIEVERS, AJ