

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

CASE NO: 24217/16

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

15 DECEMBER 2017

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SIGNATURE

In the matter between

MBANGENI, VICTOR KGOTSO

PLAINTIFF

and

THE MEC HEALTH, GAUTENG PROVINCE

FIRST DEFENDANT

THE ROAD ACCIDENT FUND

SECOND DEFENDANT

J U D G M E N T

YACOOB AJ:

Introduction

1. The plaintiff in this matter was a passenger in a motor vehicle involved

in a collision on 11 May 2014 in Sebokeng, and suffered head, neck and spine injuries.

2. The plaintiff instituted proceedings separately against each defendant. The two matters were consolidated under case number 24217/16 on 10 October 2017. The first defendant is the Member of the Executive Council for Health in Gauteng Province ("the MEC"), while the second defendant is the Road Accident Fund ("the Fund").¹
3. When the matter came before me I was asked to make an order by agreement between the plaintiff and the Fund, and to hear and determine a special plea raised by the MEC.
4. The special plea deals with whether the MEC is liable for secondary injuries suffered by the plaintiff, or whether the Road Accidents Fund Act, 56 of 1996 ("the Act") makes the Fund liable for all sequelae of the motor vehicle accident, including injuries which may have been caused by the MEC's negligence, and has therefore extinguished any remedy that may otherwise have been available to the plaintiff against the MEC.
5. I therefore do not deal with the merits of the matter in this judgment. In

¹ The original case number for the claim against the Fund was 36893/15.

order to place the matter within its context, I set out briefly the events which led to the claims, and the nature of the claims against the two defendants.

6. As far as the Fund is concerned, the order that was made by agreement was simply that the issue of the negligence of the insured driver is separated from the remaining issues on the pleadings, that the Fund concedes that the insured driver was negligent, and that costs are in the cause.

The claims against the two defendants

7. In the claim against the MEC, the plaintiff claimed that he had been brought to the hospital after the accident, and was admitted at about 09h30. However he was not attended to until about 14h00 when a CT brain scan was ordered.
8. The CT scan showed brain swelling and the plaintiff was admitted to the intensive care unit. The plaintiff alleges that the brain swelling was not properly treated and that this resulted in a secondary brain injury.
9. The plaintiff claims damages of R24 million from the MEC, made up of R15 million in future medical expenses, R1 million in past loss of

earnings, R5 million in future loss of earnings and R3 million for general damages.

10. In the claim against the MEC, the plaintiff claims that the collision occurred at 14h00 on 11 May 2014, and that he suffered fractures of the neck, spinal cord and mandible, and some head injuries as a result of the collision.
11. The plaintiff was taken to Sebokeng Hospital where he remained for two months, before being transferred to Chris Hani Baragwanath Hospital, where he remained for 13 days. After his discharge he became an out-patient.
12. He claims from the Fund R950 000 for general damages, an undertaking in terms of section 17(4)(a) of the Act for future medical expenses, past loss of income of R200 000, and future loss of income of R1 million.
13. It is not appropriate for me to comment on the merits of the two claims, save to note that it is clear from the manner in which the claims have been formulated that the plaintiff has attempted to allocate liability for his various injuries between the defendants, and that there has not been an attempt to claim twice for the same harm. In particular, the plaintiff has

not claimed the damages allegedly resulting from the secondary injury from the Fund.

The Special Plea

14. The MEC has pleaded that, because the alleged negligence relates to the treatment of injuries sustained in a motor vehicle accident, and because section 17 of the Act obliges the Fund to compensate the plaintiff for loss or damage resulting from a motor vehicle accident, the plaintiff may not claim against the MEC.

15. The question then is, if the plaintiff is able to prove that he suffered secondary injury as a result of the negligence of the MEC's employees, whether that secondary injury and the damage it has caused to the plaintiff is the result of a motor vehicle accident for purposes of the Act, and whether that means that the plaintiff has no claim for those damages against the MEC.

The Provisions of the Act

16. Section 3 of the Act provides that the object of the Fund is "the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles."

17. Among the powers and functions of the Fund are:

- 17.1. the establishment of terms and conditions for the administration of "claims for the compensation contemplated in section 3",² and
- 17.2. the investigation and settling of "claims arising from loss or damage caused by the driving of a motor vehicle".³

18. The Act provides in section 17:

17. Liability of Fund and agents.—(1) The Fund or an agent shall—

- (a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;
- (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 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 ... [my emphasis]

19. It is this section on which the MEC relies, contending that all the plaintiff's injuries are sequels to the wrongful or negligent driving of a motor vehicle, and that therefore the Fund is liable.

² Section 4(1)(a) of the Act.

³ Section 4(1)(b) of the Act.

20. Section 19 of the Act excludes the Fund's liability for loss or damage, *inter alia*, "for which neither the driver nor the owner of the motor vehicle concerned would have been liable but for section 21".⁴

21. Section 21(1) abolishes common law claims for compensation of loss or damage against the owner or driver or the employer of the driver of a motor vehicle resulting from bodily injury or death "caused by or arising from the driving of" that motor vehicle.

22. Thus, the Act provides that the Fund is only liable to the extent that a negligent or otherwise wrongful driver⁵ would have been liable under the Common Law, that is, the law of delict.⁶

23. In order for the damage arising from any secondary injuries suffered by the plaintiff to be borne by the Fund, the driver of the vehicle would have had to have been liable for that damage under the Common Law.

24. The Act does not purport to extinguish or abolish any common law claims against any other party, or for any other injuries save for those caused by or arising from the driving of a motor vehicle.

⁴ Section 19(a).

⁵ (or owner, or employer of a driver)

⁶ *Fortuin v Road Accident Fund* 2015 (5) SA 532 (GP) at [3]

25. Thus, if there had been a concurrent claim against a driver and another person (such as the MEC), only the claim against the driver is extinguished by the Act, and not the claim against the other person.

Analysis of the legal submissions

26. It was argued by Mr Notshe SC, on behalf of the MEC, that all the plaintiff's injuries were caused by or arose from the driving of a motor vehicle. It was argued that "arising from" is broader in meaning than "caused by", and that "arising from" meant the injury was not directly caused by the driving, but causally connected to. In this regard the Mr Notshe relied on the case of *Wells v Shield Ins Co Ltd*.⁷

27. That case did not, however, come to any conclusion that "arising from" was unrestricted. It differed from "caused by" in that "caused by" meant direct causation, while "arising from" meant that the driving was an antecedent or ancillary act to the direct cause. However, that case did not do away with the enquiry regarding causation. In fact, the question still remained whether the injury was sufficiently closely connected to the driving of a motor vehicle.

⁷ 1965 (2) SA 865 (C)

28. The court commented, by way of illustration, that a broken leg caused by someone disembarking a bus and stepping into a hole in the road, does not "arise from" the driving of the bus. Nor does the assault of a passenger by a bus driver. In that case, it was found that a driver opening a door, after he had parked his vehicle, which set off a chain of events resulting in the injury, was not closely enough connected to the driving of that vehicle, and that as far as any injury was caused by that driver, it was not "arising from" the driving of that vehicle.

29. The court found that a common sense approach ought to be followed.

30. Mr Notshe also relied on the case of *General Accident Insurance Co SA Ltd v Xhego and Others*,⁸ in which it was held that injuries resulting from petrol bomb thrown into a bus were covered by the predecessor of the RAF. In that case, however, there had been a history over the previous few days of stoning or petrol-bombing on the route, and the court found, applying the common sense test set out in *Wells v Shield Ins Co Ltd* that a reasonable bus driver would have realised that a real possibility of attack on the buses on that route existed, and would have taken precautions.

⁸ 1992 (1) SA 580 (A)

31. Mr Notshe's argument is that the plaintiff was in hospital because of the injuries sustained in a motor vehicle accident, and therefore there was a close enough link to the driving of a motor vehicle for the injuries to have arisen out of the driving of the motor vehicle. He submitted that, because there were injuries arising from a motor vehicle accident, this meant that any common law remedy against the MEC was extinguished.

32. This submission is entirely inconsistent with the explicit provisions of the Act which I have set out above. It is only common law remedies against the insured driver that are extinguished.

33. It was argued that the secondary injury was not too remote from the motor vehicle accident and that as a matter of policy the Fund was created to meet just such a situation.

34. This submission ignores the provisions of 19(a) which limits the liability of the Fund to injuries for which a negligent or wrongful driver would have been liable.

35. Mr Notshe further submitted that the principles of delictual causation would, if applied, bear the same result. The reason for this is that, but for

the accident, the plaintiff would not have been in hospital.

36. However this argument is circular. It relies on factual causation to prove legal causation. It also ignores that, had the MEC's employees not behaved negligently (assuming that negligence is proved), the second injury would not have happened. There can be no contention that a person who goes to hospital when injured should be aware of and take precautions against negligence by hospital personnel. Nor that such negligence is an ordinary consequence of injury in a road accident.

37. In my view, applying the common sense approach, it is clear that the negligence of the MEC's employees is not an ordinary consequence of the collision, is not sufficiently closely connected with it and does not arise from the driving of a motor vehicle. The negligence is a new event which, if it is proven that it caused further injury, is a separate cause of action.

38. Mr Notshe further contended that the Fund had conceded that the injuries were sufficiently closely connected to the motor vehicle accident for its contention that, in this case, the Fund was liable for the injuries.

39. The Fund has made no formal concession in this regard. It has not

pleaded to the averments made in the summons against the MEC. Its plea to the summons issued against it dealt only with those injuries apparently attributable to the road accident, prior to any intervening negligence by the hospital personnel.

40. Mr Notshe, and Mr Shepstone who appeared for the plaintiff, relied on a concession by the Fund apparently made at trial roll call, to the effect that the Fund accepts liability. However, in response to my enquiry, it was submitted by Ms Moosa who appeared for the Fund that there was no acceptance by the Fund of liability for the secondary claim. As a result, the only order that was made by agreement when this matter was heard was that the Fund concedes the negligence of the insured driver. Mr Shepstone for the plaintiff confirmed this agreement. Thus, if the negligence of the MEC's employees is proved, the Fund would only be liable for the injuries attributable to the collision, to the exclusion of the secondary injuries.

41. Mr Notshe submitted that the Fund had not pleaded that there had been a *novus actus interveniens*. However, there had not been any opportunity for the Fund to do so. Until 10 October 2017, less than a month before the matter came before me, the further injuries suffered by the plaintiff were not even formally notified to the Fund.

42. In any event, it is clear from examining the papers of the consolidated matter as a whole that facts have been pleaded which support a conclusion that, if those facts are proved, the actions of the hospital personnel constitute a *novus actus interveniens*, for which the negligent driver could not have been held liable in the common law.

43. This approach is consistent with the decision of the Supreme Court of Appeal in *MEC for Health, Eastern Cape v Mkhitha and Another*,⁹ in which the SCA dismissed an appeal against a judgment of the Eastern Cape High Court to which I was referred by the plaintiff. Regrettably neither Mr Shepstone nor Mr Notshe referred me to the judgment of the SCA, despite the fact that Mr Notshe had appeared in the matter before the SCA.

44. The SCA found that negligent treatment by medical staff at the hospital to which a plaintiff injured in a motor vehicle accident had been admitted was a *novus actus interveniens*. In that case, the evidence regarding negligence had already been heard, and negligence had been established. In this case, that process is still to take place.

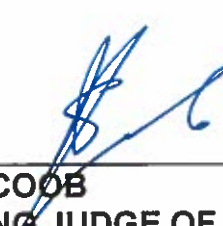
⁹ (1221/2015) [2016] ZASCA 176 (25 November 2016)

Conclusion

45. For the reasons set out above, it is clear that, should the plaintiff successfully prove negligence on the part of the MEC's employees, and that that negligence caused secondary injury as pleaded, then that negligence would constitute a *novus actus interveniens*, for which the Fund would not be liable.

46. In the result I make the following order:

The first respondent's special plea is dismissed with costs.



S YACOOB
ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR PLAINTIFF: RS SHEPSTONE
INSTRUCTED BY DUDULA INCORPORATED

COUNSEL FOR FIRST DEFENDANT: V NOTSHE SC
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DATE OF HEARING
DATE OF JUDGMENT

07 NOVEMBER 2017
15 DECEMBER 2017