

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH AND SOUTH GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE		DATE: 5 MAY 2010
(1) REPORTABLE: YES/NO		CASE NO: 3718/2009
(2) OF INTEREST TO OTHER JUDGES: YES/NO		
(3) REVISED.		
05/05/2010		
DATE	SIGNATURE	

In the matter between:

MAFEMANE NORMAN MAKHUBELE

APPLICANT

AND

ROAD ACCIDENT FUND

RESPONDENT

JUDGMENT

PHATUDI (J)

- [1] At the commencement of the trial, the parties, by agreement, amended paragraph 3 of the particulars of claim to read;

"On the 3rd November 2007 at Entabeni, Tzaneen, Limpopo Province, within the jurisdiction of the Honourable Court, an accident occurred where a motor vehicle with registration number and letters presently unknown to the Plaintiff, then and

there driven by Mr Masala Mulaudzi, alternatively Mrs Sarah Ratombo, knocked down the plaintiff. At the time of collision the plaintiff was a pedestrian.”

I then ordered to that effect.

- [2] The following were placed on record as common cause;
 - [2.1] The Plaintiff is the person mentioned at paragraph 1 of the Particulars of claim.
 - [2.2] the accident occurred on 3 November 2007;
 - [2.3] the Plaintiff was injured as a result of the accident;
 - [2.4] there was nobody inside the motor vehicle at the time of the accident.
- [3] The crux of the matter is whether Mr Masala Mulaudzi, alternatively Mrs Sarah Ratombo, can be deemed to have driven the motor vehicle that injured the Plaintiff.
- [4] Mrs Sarah Christina Ratombo testified for the Plaintiff that a day before the accident, Mr Masala Mulaudzi (Mr Mulaudzi) drove the truck to Entanbeni for diesel. The following

morning, at about 5h00, Mr Mulaudzi woke her up for work. He handed the Truck keys over to her. On her arrival at the truck, she opened, got inside, disengaged the gear to neutral, inserted the keys and started the engine. The engine, despite her second attempt, did not run. She went to call the Plaintiff for assistance.

- [5] She further testified that on arrival at the truck with Plaintiff, she proceeded towards the passenger side to “show” the Plaintiff the hinge and how to pull it for the cabin to open. She went to the driver’s side for her to pull the hinge simultaneously with that of the Plaintiff’s side to open the cabin. The cabin automatically opens upon pulling the hinge. She heard a “gudlu” sound immediately after pulling the hinges. The truck started to move. She fell on the ground and later pulled over to the “green grass” (lawn) by a certain man. She, few minutes later, heard the Plaintiff scream for help. The truck was at that moment moving and pulling the Plaintiff with.

- [6] She conceded under cross-examination that Mr Mulaudzi left the truck being well parked and on gear. She said she is the one who disengaged the gear to neutral. The truck did not move until the pulling of the hinges for the cabin to open. She further said that the Plaintiff was not on duty yet as he would only have been on duty from 7h00.
- [7] Mr De Klerk, counsel for the Plaintiff, submit that the court should find that the truck is deemed to have been driven by either Mr Mulaudzi or Sarah Ratombo and to further find that either of them was negligent. He referred me to the provisions of Section 20 (1) or (2) of Road Accident Fund Act 56 of 1996 to that effect. He further referred me to **Guardian National Insurance v Saal 1993 (2) SA 161 (C)** **(full Bench)** where the court held that the onus is on the Defendant to prove the contrary.
- [8] In rebuttal thereto, Mr Hugo, counsel for the Defendant, submits that the Defendant is not liable to compensate the injured if there was no driver in the motor vehicle at the time of the accident. He submits that Mr Mulaudzi safely parked

the truck that never moved until opened by Mrs Ratombo on the day in question.

- [9] He further submitted that Ms Ratombo can as well not be deemed to have driven the truck. She only intended to drive the truck. She does not qualify to be deemed a driver of the truck on that day and at the time the accident occurred. The truck moved due to gravity caused by the pulling of hinges by both the Plaintiff and Mrs Ratombo. The truck moved without a driver. The Defendant is thus not liable. He refers me to **Petersen v Santam 1961 (1) SA 205 (C) at page 209 G.**

- [10] He submits that as a result of Ms Ratombo having failed to start the engine, she cannot be deemed to be a driver. He submits that Ms Ratombo planned to become a driver but did not drive. He lastly submits that section 20 (1) or (2) can never apply to her.

- [11] Section 17(1) (a) of the Road Accident Fund Act: Act 56 of 1996 (RAF Act) provides that 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;”

Section 20 (1) and (2) provides;

“(1) For the purpose of this Act a motor vehicle which is being propelled by any mechanical, animal or human power or by gravity or momentum shall be deemed to be driven by the person in control of the vehicle.

(2) For the purpose of this Act a person who has placed or left a motor vehicle at any place shall be deemed to be driving that motor vehicle while it moves from that place as a result of gravity, or while it is stationary at that place or at a place to which it moved from the first-mentioned place as a result of gravity.”

[12] The “driving” of the motor vehicle is the kernel of success in claiming compensation under section 17 (1) (a)¹, where the driver thereof has been established. The word “driving” is defined as “setting in motion...”² of the motor vehicle”.³ Prior to promulgation of RAF ACT,⁴ driving was defined as “urging on and directly of the course of the vehicle while it was in motion”⁵. A person’s conduct would then qualify as driving only when the vehicle was in motion with the driver or the person in control manipulated the controls, gears and paddles that regulate the speed and direction. The vehicle was required to be in motion to qualify “driving”. This is the principle upon which Mr Hugo basis his submission of: “no driver at the time of the accident”.

[13] The challenges that flow with that line of defining driving prompted the legislature to enact the RAF ACT. Section 20 (1) provides (for the purpose of this Act) that a “Motor vehicle which is being propelled... by gravity... shall be deemed to be driven by the person in control of the vehicle.”

¹ RAf Act 56 of 1996

² Shorter Oxford English Dictionary

³ In casu

⁴ Promulgated 01 May 1997

[14] In evaluating the said subsection, it is clear that the legislature intended to extend the meaning of driving only for the purposes of this Act to qualify the provisions of Section 17 (1) (a) or even (b). The words “ shall be deemed” to be driven,⁵ create, in my view, an irrebutable presumption that the motor vehicle was driven. The motor vehicle which is being propelled by gravity shall thus be presumed, irrebutably so, to have been driven. The section places a person who, at the time of the motor vehicle being propelled by gravity, was in control of the motor vehicle to be irrebutably presumed to have been the driver of the said motor vehicle.

[15] In **ROAD ACCIDENT FUND V MKHIZE 2005 (3) SA 20 SCA** Conradie JA held that “ a person who is not [driving], within the ordinary meaning of the term... but is nevertheless in control of the motor vehicle being propelled,,, by gravity..., is in terms of section 20 (1) of the Act deemed to be the driver of that vehicle.” The court further held that “a person who is in control of a vehicle is the one

⁵ Section 20 (1)

who can make it move or not as he pleases”⁶ It is further thereto held that “someone who is deemed to be the driver of a vehicle is in law, although perhaps not in fact, the driver of that vehicle and must be treated as though he or she were manipulating the controls and making, it move.”⁷

[16] In evaluating the evidence tendered by the only witness, Ms Ratombo, I am of the view that she became in control of the motor vehicle the moment she accepted the keys from Mr Mulaudzi. She intended (mens rea), as testified, to drive the truck to fetch workers as it being one of her daily work chores. She further exercised control by opening the door of the motor vehicle, inserting the key in the ignition slot, disengaging the gears and starting the motor vehicle though the engine failed to run. I find her state of mind to have been to control the motor vehicle. I thus find her as “the person in control of the vehicle” on the day and time of the accident. She, in my view, is deemed to have driven the truck that caused Plaintiff’s injuries as envisaged in terms of section 20(1) of RAF Act.

⁶ Page 22

⁷ Page 23

[17] Section 17 (1) of the Act clearly confers on any person who got injured as a result of the accident, an unlimited claim against the Road Accident Fund for loss or damages suffered as a result of bodily injury. This clearly indicates that there must be negligence on the part of the insured driver of the insured motor vehicle in order to establish liability of the Fund. The slightest degree of negligence is sufficient to satisfy the provisions of section 17 (1) of the Road Accident Fund Act.

[18] Ms Ratombo testified that she opened the truck, inserted the key, and, most importantly, disengaged the gear to neutral. She conceded not to have put the handbrake on at the time of starting the engine even when she left the motor vehicle seeking assistance from Plaintiff. I find Ms Ratombo to have failed to exercise care legally required of a reasonable driver of a truck in her position within the circumstance as described by her in her testimony, by failing to either pull the hand brakes on or to re-engage the gear to its former position prior to her disengaging it to neutral. I find her

(insured driver) to have been negligent rendering the Defendant liable in terms of Section 17 (1).

[19] I perused the draft order handed in by agreement between the parties in calculating the damages as well as costs to that effect. I am satisfied and intend to incorporate it in my order.

[20] I, thus make the following order;

[20.1] Defendant is 100% liable for the Plaintiff's proven agreed damages;

[20.2] The Defendant pays the Plaintiff the sum of **R 468 026.00** which payment is to be effected on or before 04 June 2010;

[20.3] The Defendant will not be liable for any interest on this payment on condition that payment be made timeously;

[20.4] In the event of the Defendant not making this payment timeously the Defendant will pay interest at the rate of 15.5% per annum on the amount

then outstanding as provided for in section 17 (3) (a) of the Road Accident Fund, Act 56 of 1996.

[20.5] The Defendant furnish the Plaintiff with an undertaking in terms of Section 17 (4) (a) of the Road Accident Fund, Act 56 of 1996, for costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service to the Plaintiff or supplying of goods to the Plaintiff arising out of the injuries sustained by the Plaintiff in the motor vehicle collision which occurred on 3 November 2007 after such costs have been incurred and upon proof thereof;

[20.6] The defendant pays the Plaintiff's taxed or agreed party and party on the High Court Scale which will include;

[20.6.1] The costs of obtaining the reports of the following expert witnesses and their reasonable reservation and preparation fees (if any);

[20.6.1.1] Dr Wessel Van Rensburg:
Orthopaedic Surgeon;

[20.6.1.2] Stacey Fannin (Zenzela Occupational
Therapists): Occupational Therapists

[20.6.1.2.2] Christa Du Toit; Counselling and
Industrial Psychologist;

[20.7] the fees\costs of Senior –Junior counsel;

[20.8] The costs of obtaining the actuarial report of I B
Kramer of Ivan Kramer CC: Consulting Actuaries,
only

[20.9] In the event that costs are not agreed the Plaintiff
agrees as follows;

[20.9.1] The Plaintiff shall serve the notice of
taxation on the Defendant's attorney
of record; and

[20.9.2] The Plaintiff shall allow the
Defendant 7 (seven) court days to
make payment of the taxed costs.

14



AML PHATUDI

JUDGE OF THE NORTH GAUTENG HIGH COURTHeard on: 30 APRIL 2010For the Appellant: Adv MCC DE KLERKInstructed by: Messrs SO RAVELE ATTORNEYSFor the Respondent: Adv M HUGOInstructed by: Messrs MAPONYA ATTORNEYSDate of Judgment: 5 MAY 2010