

IN THE HIGH COURT OF SOUTH AFRICA
BHISHO, EASTERN CAPE

Case No: 154/2010
Dates heard: 7, 15, 21 May 2013
Date delivered: 4 July 2013

In the matter between:

BRYAN L VAN HARMELEN

Plaintiff

And

MEMBER OF THE EXCEUTIVE COUNCIL
FOR EDUCATION, EASTERN CAPE

Defendant

JUDGMENT

GOOSEN, J.

[1] The plaintiff instituted action for damages for personal injuries sustained during a motor vehicle collision which occurred on 20 February 2008. At the time of the collision the plaintiff was employed as a teacher at Kingsridge School for Girls, a school operated by the Department of Education, Eastern Cape. Plaintiff's employer was the School Governing Body and she was, it was common cause, not an employee of the Department. The plaintiff was a passenger in a vehicle owned by and driven by an employee of the defendant.

[2] The defendant, *inter alia*, filed a special plea relying upon the terms of section 21 of the Road Accident Fund Act, 1996, prior to its amendment, in which it is

pleaded that the defendant is not liable to the plaintiff and that the plaintiff's claim lies against the Road Accident Fund.

[3] At the commencement of the trial I was informed by counsel that the parties had agreed that the issue of the determination of the quantum of the plaintiff's claim be separated and held over for later determination. I was accordingly requested to order that the issue of the defendant's liability, if any, be separately determined in terms of Rule 33(4), which I did. I was further informed that in respect of the issue of liability the defendant conceded that the driver of the school mini-bus in which the plaintiff was a passenger was negligent. It was however not admitted that the driver of the school mini-bus was solely negligent. In this regard, so I was informed, it was the defendant's case that the driver of the other vehicle involved in the collision, Mr Njili who was the driver of a tour bus that collided with the school mini-bus, was also negligent in some respects.

[4] The parties were therefore in agreement that in respect of liability this court was required to determine the disputed issue of negligence of the driver of the tour bus and, based thereupon, the special plea tendered by the defendant.

[5] The circumstances in which the collision occurred were common cause between the parties. They are these: On 20 February 2008 a school mini-bus owned by the Department was being driven by Mrs Mdyesha, a school teacher employed by the Department at Kingsridge School. The vehicle was being driven by her in the course and scope of her employment by the Department transporting school children to a school chess competition. The plaintiff was a passenger seated in the front

passenger seat. The school mini-bus was travelling in a westerly direction on a road between East London and Mdantsane. At a certain point along the road the school mini-bus drew up and came to a halt in the emergency stopping lane demarcated by a yellow barrier line on the road. The collision occurred when the driver of the school mini-bus executed a U-turn on the road surface turning into the path of travel of a tour bus travelling in a westerly direction between East London and Mdantsane. The bus collided with the mini-bus between the mini-bus driver's door and the rear door of the mini-bus. The mini-bus was driven laterally for a short distance as the bus swerved across the lane of travel of oncoming vehicles. The bus struck an embankment on the right hand side of the road and toppled onto its left hand side coming to a rest in a position on the right hand side of the road and partially off the road surface. The mini-bus was pushed to the right hand side of the road and came to a rest a short distance to the front of the bus on the same side of the road as the bus. It too was slightly off the road surface although it remained on its wheels.

[6] The driver of the mini-bus was fatally injured in the collision. The plaintiff was severely injured and apparently only regained consciousness in the Aurora Hospital in Port Elizabeth a month and a half after the collision. There were ten school girls in the school mini-bus. I am not aware whether any of them were injured, either fatally or not.

[7] The plaintiff testified. As a result of the injuries sustained by her she has no recollection at all as to the events of 20 February 2008. Her evidence served to establish that she was employed by the School Governing Body as a teacher at the

school and that she was a passenger in the vehicle which was being driven by the deceased driver.

[8] The plaintiff also led the evidence of the driver of the tour bus, Mr Njili. He testified that on the day in question, at approximately 15h00 he was the driver of the tour bus travelling in the direction of Mdantsane. He was on his way home after completing his shift. He stopped the bus at traffic light controlled intersection. After the light turned green he pulled away. When he came to a curve in the road a short distance beyond the traffic lights he was in fourth gear and was, according to his estimate, travelling at between 40 and 45km/h. As he rounded the bend he saw a white school mini-bus which had come to a halt in the emergency lane in front of him. When he was approximately five metres from the rear of the mini-bus it suddenly and without signalling executed a U-turn across the road immediately in front of him. He applied brakes and the left front corner of the bus struck the mini-bus in the vicinity of the driver's door. He explained that the mini-bus was pushed in front of the bus; that the bus swayed because of his braking and swerved across the road to the opposite side of the road. The right hand side of the bus struck an embankment at which point the bus toppled onto its left hand side and then came to a rest on its side on the right hand side of the road. The mini-bus was pushed laterally, it remained on its wheels and when the bus struck the embankment the mini bus continued moving along the road until it too came to a rest slightly off the road a short distance in front of the bus.

[9] The evidence of Njili was not contested by the defendant who presented no evidence at trial. Njili was however cross-examined with a view to establish that he too was in some respects negligent.

[10] On the uncontested evidence of Njili he was confronted with a situation which was both unexpected and sudden and, having regard to his estimate of the distance between his vehicle and the mini-bus when it executed the turn into his path of travel, there was nothing that reasonably could have been done by him to avoid the collision.

[11] If it is accepted, as it must be, that the mini-bus was some five metres away from his vehicle when it commenced the turn then, even travelling at 40km/h, he would not have had sufficient time nor space to bring the bus to a halt before colliding with the mini-bus. Defendant's counsel sought to suggest that Njili could have swerved to the left and, given the width of the road surface, would have been able to avoid the collision. Njili's trenchant and eminently reasonable response, namely that if he had done so the bus would have collided with the mini bus directly into the side with the probable consequence that the children in the bus would have been killed, put the end to that line of attack. It was also suggested that the photographs of the scene and the position of the bus relative to the point of impact indicated by Njili suggested that Njili was driving the bus at a speed excessive in the circumstances. Again, Njili's unequivocal answer was telling. He stated that he was then only in fourth gear having pulled away from the traffic light and that he was not travelling at an excessive speed. The speed limit on that stretch of road was, he stated, 70km/h and his evidence was that he was well within that. He also explained the mechanics of the collision in detail and that explanation is consistent with the scene as depicted in the photographs, including the position of the brake marks from what appears to have been the point of impact.

[12] Apart from these tentatively put bases of alleged negligence on the part of Njili nothing further was put to him in cross-examination.

[13] Njili was an impressive witness who testified with candour. He made a very favourable impression upon me. His evidence was consistent, coherent and clear throughout. I have no hesitation in finding him to be a credible witness who delivered reliable evidence as to the tragic events of that day.

[14] Based on the accepted evidence I am unable to come to any other conclusion than that the negligence of the deceased driver of the school mini-bus was solely responsible for the collision.

[15] Having come to that conclusion it is now necessary to consider the defendant's special plea.

[16] As indicated the defendant relies upon section 21 of the RAF Act prior to its amendment by the Road Accident Fund Amendment Act, 2005 which amendment came into effect on 21 July 2008. Based on the wording of the old s 21 the defendant contends that the plaintiff's claim lies only against the Road Accident Fund.

[17] Section 21 as it read at the time when the collision in this matter occurred provided that:

‘When a third party is entitled under section 17 to claim from the Fund or an agent any compensation in respect of any loss or damage resulting from any bodily injury to or death of any person caused by or arising from the driving of a motor vehicle by the owner thereof or by any other person with the consent of the owner, that third party may not claim compensation in respect of that loss or damage from the owner or from the person who so drove the vehicle, or if that person drove the vehicle as an employee in the performance of his or her duties, from his or her employer, unless the Fund or such agent is unable to pay the compensation.

[18] It is common cause that the plaintiff's claim is one which falls within the ambit of section 17 of the RAF Act and that, pursuant to the provisions of section 18 of the Act (as the section read prior to its amendment by the Amendment Act) that the liability of the Fund to compensate the plaintiff is limited to an amount of R25 000.00. These are the circumstances which pertain in this matter since the collision was caused by the sole negligence of the employee who was driving the vehicle in which the plaintiff passenger was injured.

[19] In *Law Society of South Africa and Others v Minister for Transport and another* 2011 (1) SA 400 (CC), the Constitutional Court (at par. 26) said the following regarding s 21 prior to its amendment:

Before the amendment s 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 did a wrongdoer enjoy immunity. This meant that. Where no claim lay against the Fund or an agent, a third party retained the common-law residual claim to recover losses not recompensable under the RAF Act from a wrongdoer.

[20] It was argued in this matter that the limitation of liability of the wrongdoer effected by s 21 of the RAF Act was confined to the claim signified by the term "that loss" where it appears in s 21. Section 21 does not, it was submitted, bring about a limitation of a person's common law right to claim damages against a wrongdoer. All that s 21 achieves is to substitute the RAF in the place of the wrongdoer. Where the RAF Act imposes a limit on the quantum of a person's claim the RAF's liability is thereby limited, such limit does not divest the person of the right to claim against the wrongdoer for the loss suffered in excess of the statutory limit imposed by section 18 as read with section 21. I agree. The defendant argued that it must be established that

the Fund is “unable to pay” compensation and that in this instance the plaintiff failed to do so since she did not institute action against the Fund.

[21] In my view the phrase “unable to pay” plainly refers to a statutory inability or limitation rather than a financial “inability”. The judgment in the *Law Society* matter clearly indicates that a third party retains a residual common-law claim in respect of such loss which is “not recompensable”, i.e. such losses which cannot be claimed from the Fund by reason of the limitations imposed upon the Fund’s liability (see *Dodd v Multilateral Motor Vehicle Accident Fund* 1997 (2) SA 763 (A)).

[22] The defendant however had another string to its bow. It was argued that the limitations imposed by section 18 of the RAF Act had been declared to be unconstitutional and, accordingly, as matters now stand the plaintiff is entitled to claim full compensation from the RAF Fund. On this basis the special plea must be upheld.

[23] The defendant did not, in its special plea, plead reliance upon the declaration of constitutional invalidity and no amendment was sought in order to raise that issue on the pleadings. Even if it is accepted that the question raised is one of law upon which the defendant may rely without specifically pleading it, the reliance is misplaced.

[24] In *Mvumu and Others v Minister for Transport and Another* 2011(2) SA 473 (CC) sections 18(1)(a)(i), 18(1)(b) and 18(2) as they read before the changes introduced by the Amendment Act were declared to be inconsistent with the

Constitution and invalid. The court remarked that although the other portions of section 18(1) are not covered by the declaration those portions suffer the same defects as the impugned provisions. In its order the court suspended the declaration of invalidity for a period of 18 months from the date of the order (which was 17 February 2011) in order to enable Parliament to cure the defect. It was provided that in the event that the declaration of invalidity came into effect without Parliament having cured the defect the order of invalidity would not apply to those claims in which a final settlement had been reached or in which a final judgment has been granted before the date of the order. The declaration would accordingly operate retrospectively to the date of the commencement of the Act.

[25] As at the date of determination of this matter the declaration of invalidity had not yet come into operation. Accordingly the matter falls to be determined on the basis of the fact that the provisions of section 18 prior to its amendment remained valid. It follows therefore that for the purposes of determining the special plea it must be accepted that the plaintiff's claim for compensation against the RAF Fund is limited and that she is vested with a residual claim against the defendant for such losses as are not recompensable by the Fund.

[26] In the circumstances I come to the conclusion, having found that the driver of the school mini-bus was solely negligent, that the plaintiff, upon abandonment of the sum of R25 000.00 is entitled to claim such damages as she may prove in excess of the sum of R25 000.00 from the defendant. In the circumstances, and based upon the defendant's admission regarding the negligence of the driver of the school mini-bus I

accordingly find that the plaintiff has established that the defendant is liable to her in respect of such damages as she may prove as exceed the sum of R25 000.00.

[27] I accordingly make the following order:

- 27.1. The Defendant's Special Plea is dismissed.
- 27.2. It is declared that the defendant is liable to the plaintiff for such losses in excess of the sum of R25 000.00 as the plaintiff may prove at trial.
- 27.3. The Defendant shall pay the Plaintiff's party and party costs in respect of the determination of the issue of liability.

G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances:	For the Plaintiff Mr Khan Instructed by: Smith Tabata Incorporated
	For the Defendant Mr Bloem SC assisted by Mr Nyangiwe Instructed by: State Attorney