

6/96

CASE NO 636/94

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

MULTILATERAL MOTOR VEHICLE ACCIDENTS FUND

APPELLANT

and

M G MARAMBANA

RESPONDENT

CORAM: HEFER, NESTADT, HARMS, SCHUTZ and SCOTT, JJA

HEARD: 16 MAY 1996

DELIVERED: 30 MAY 1996

J U D G M E N T

HARMS JA/

HARMS JA:

The respondent, the plaintiff in the court below, was injured in a motor accident. It occurred during 1988 in the erstwhile Republic of Ciskei. She was a non-paying passenger in a vehicle that left the road and overturned. Her case is that the accident was due to the sole negligence of the driver of the vehicle. At the time of the accident a Motor Vehicle Assurance Fund existed in Ciskei and its liability was circumscribed by the Motor Vehicle Accidents Act, 28 of 1986 (Ciskei) as amended retrospectively by the Motor Vehicle Accidents Amendment Act, 6 of 1987 (Ciskei).

The appellant, the Multilateral Motor Vehicle Accidents Fund ("the Fund"), was established after this accident by a multilateral agreement between the RSA and the so-called TBVC countries. The agreement is to be found in the schedule to the Multilateral Motor Vehicle Accidents Fund Act, 93 of 1989 (RSA). This Act suspended (for the RSA) the application of the provisions of the Motor Vehicle Accidents

Act 84 of 1986 (RSA) with the proviso that the suspension was not to affect any right accrued under the suspended Act (sec 3). The Ciskeian counterpart of Act 93 of 1989 (RSA) has the same name but is Act 17 of 1989 (Ciskei). It suspended the application of the said Motor Vehicle Accidents Act (Ciskei) and also has the agreement as a schedule. The Act provided for the demise of the Motor Vehicle Assurance Fund (Ciskei) and, further, that all its liabilities and rights "existing as well as accruing" were to devolve on the appellant Fund. It is common cause on the pleadings that the Fund assumed responsibility for the liability of the Ciskeian fund, that the Fund's appointed agent was placed under liquidation and that the Fund had notified the plaintiff to pursue her claim against the Fund.

At the trial during November 1994, in the so-called Ciskei Provincial Division the parties, it seems, agreed that the driver had been negligent and that the plaintiff had suffered only "general" damages and that in an amount of

R12 000,00. The issue for determination was so defined: "Can a casual passenger (i e not for reward) succeed in a claim for general damages under Act no 28 of 1986, Republic of Ciskei?" The court *a quo* (Renene AJ) answered the question in the affirmative and entered judgment for R12 000,00 with costs against the Fund.

On the following day Renene AJ granted the Fund leave to appeal. He did not, as required by s 20(2)(a) of the Supreme Court Act 59 of 1959 (RSA), direct that the appeal be heard by a full court or by this Court. The question then arises whether the appeal is properly before us.

The Republic of Ciskei had its own appellate division but its general division did not have a full court with appeal jurisdiction (Supreme Court Decree 43 of 1990, esp ss 12 and 15). Its appellate division ceased to exist with effect from 14 July 1994 (s 15(a) of the Constitution of the Republic of South Africa Third Amendment Act 13 of 1994, amending s 241(1) of the interim Constitution of the Republic of South Africa,

Act 200 of 1993). This Court was then vested with appellate jurisdiction in respect of Ciskei and the general division of the Ciskei Supreme Court with the same jurisdiction as that had vested in terms of s 101(1) of the interim Constitution in a provincial (or local) division (s 241(1A)). These latter courts retained their jurisdiction (s 101(2)), including their appellate jurisdiction. It seems therefore that a full court was created indirectly for Ciskei (*cf Steelchrome (Pty) Ltd v Jacobs and Others* 1995 (2) SA 873 (BGD)). It is, however, not necessary to decide this point finally - even if we have the power to do so (see s 101(5)) read with s 98(2)). The reason is that before 10 April 1995 the Ciskei Provincial Division assumed that it had no full court appeal jurisdiction. Only on that date the Judge President issued a Court Notice (No 20) "permitting" parties to prosecute appeals to the full court. The correctness or legality of his ruling is not now the issue, but it seems to me that, having regard to the factual position in the Ciskei at the time when leave to appeal

was granted, Renene AJ, in granting leave to appeal, could only have intended to grant leave to this Court. On that basis I hold that the appeal is properly before us.

Before dealing with the defined issue, it is necessary to refer to another complication put to counsel by this Court during argument. It relates to the effect of the suspension of the Motor Vehicle Accidents Act (Ciskei), the statute on which the plaintiff's cause of action is based. For reasons that are not obvious to me, the legislature of Ciskei did not use the wording s 3 of Act 93 of 1989 (RSA) for its s 3 of Act 17 of 1989 (Ciskei). What is conspicuously absent from the Ciskei legislation is a proper savings provision relating to pending, but not yet instituted claims - a class into which the plaintiff's claim falls. The savings provision is limited to legal proceedings already instituted but still pending (s 3(2)) at the time of the suspension - a class into which the plaintiff's claim does not fall. It is true, as mentioned before, that the Ciskei fund's liabilities have

devolved upon the Fund (s 3(1)(b)) but the Fund's liability is governed by the terms of the agreement; and they differ in some respects from the conditions for liability that had existed under the different suspended acts. Counsel were, in the light of the pleadings and the defined issue, unprepared to argue this matter. It would accordingly be unwise to express any final views on it. It is also not necessary to do so for reasons that will be stated later.

I turn then to consider the defined issue, namely whether a casual passenger had a claim for general damages in terms of s 9(1) of Act 28 of 1986 (Ciskei) as replaced by s 6 of Act 6 of 1987 with retrospective effect. It reads:

"(1) Notwithstanding anything to the contrary contained in the Compulsory Motor Vehicle Insurance Act, 1983 (Act 4 of 1983) (hereinafter in this section referred to as the repealed Act) the liability of the CMVA Fund in connection with any one occurrence to compensate a third party for any loss or damage contemplated in section 8 of this Act or in section 19 of the repealed Act, as the case may be, which is the result of any bodily injury to or the death of any person who, at the time of the occurrence which caused that injury or death —

(a) was being conveyed in the motor vehicle in question -

- (i) for reward, or
- (ii) in the course of the business of the owner of the motor vehicle, or
- (iii) in the case of an employee of the driver or owner of the motor vehicle, in respect of whom subsection (2) does not apply, in the course of his employment, or

(b) ..., or

(c) ..., or

(d) was being conveyed in the motor vehicle in question under circumstances other than the circumstances contemplated in paragraph (a) ... shall be limited -

(aa) in any case referred to in paragraph (a), (b) or (c), to the sum of twelve thousand rand in respect of any bodily injury to or the death of, any one such person or to the sum of sixty thousand rand in all in respect of any bodily injury to, or the death of, any number of such persons;

(bb) in any case referred to in paragraph (d) and which occurred or occurs on or after 1 May 1984, to the sum of twelve thousand rand in respect of loss of income or of support and the costs of accommodation in a hospital or nursing home, treatment, the rendering of a service and the supplying of goods resulting from bodily injury to, or the death of, any one such

person or the sum of sixty thousand rand in all in respect of any bodily injury to, or the death of, any number of such persons, excluding the payment of compensation in respect of any other loss or damage,

but exclusive of the cost of recovering the said compensation."

I take it that the reference to a "casual passenger" in the defined issue, although qualified by the words in parentheses "(i e not for reward)", was intended to refer to "an ordinary passenger" (to use the terminology of Botha JA in *Santam Insurance Ltd v Taylor* 1985 (1) SA 514 (A)), that is, a passenger referred to in par (d) of the section. For ease of reference I shall refer to the passengers referred to in par (a) as business passengers. (The parts of the section not quoted deal with passengers entering, mounting or alighting and these parts do not affect the interpretation of the section.) I also take it that the reference to "general damages" is one to damages of the kind not listed in subpar (bb).

In *Taylor* this Court had occasion to consider the

defined issue, save that it was with reference to the wording of s 22(1) of the (since repealed) Compulsory Motor Vehicle Insurance Act 56 of 1972 (RSA). After an analysis of the wording of this section, Botha JA, speaking on behalf of the Court, said that "while the wording of s 22(1)(bb) leaves the intention of the Legislature shrouded in obscurity, an examination of the historical background of the section leaves no doubt as to what was intended". (At p 527C). He then considered the history of the provision and concluded that its clear intention was to deny a claim for general damages to an ordinary passenger.

Renene AJ, alive to the existence of *Taylor*, failed to consider it or its implications. It is a judgment that was (if applicable) binding on him and it deserved at least a modicum of attention.

I do not wish to traverse the same ground as in *Taylor* and I shall confine myself to a summary of the history of a third party claim of a passenger. The Motor Vehicle

Insurance Act 29 of 1942 introduced compulsory third party insurance. It gave third parties unlimited claims, ordinary passengers no claims and, generally speaking, business passengers a limited claim. (There were two types of limitations: for each individual business passenger and also for each group of business passengers.) All claims were for the loss or damage suffered because of bodily injury or death. (See *Taylor* at 527D-528C). This underlying scheme was carried over into s 22 of Act 56 of 1972 that replaced Act 29 of 1942 (*Taylor* at 528G-I). When this section was amended by Act 69 of 1978, the basic policy of the Legislature relating to compensation for passengers remained the same (*Taylor* at 528I-529D).

This section was again amended, this time by s 2(a) of Act 23 of 1980. So amended it was the subject of *Taylor*. (See *Taylor* at 529D-530B.) It will serve no purpose to quote the provision - it is to be found in *Taylor* at 522E-523B. It is also, except in three respects, for all intents and purposes

identical to the Ciskei section in issue. Of the exceptions, two have no bearing on either the *Taylor* judgment or this case – they related to lift clubs and persons under military service or training. The third related to subpar (bb). It did not contain the following two phrases that are to be found in the Ciskei section:

(a) "and which occurred or occurs on or after 1 May 1984", and

(b) "or the sum of sixty thousand rand in all in respect of any bodily injury to, or the death of, any number of such persons".

Upon independence during 1981, the Ciskei inherited Act 69 of 1978 in this form. That meant, as was decided in *Taylor*, that ordinary passengers did not have any claim for general damages. Asserting its independence, Ciskei adopted the Compulsory Motor Vehicle Insurance Act 4 of 1983. In s 20 the existing distinction between ordinary and business passengers was done away with. In respect of all passenger

categories (they were the same as those defined in (a) and (d) of the section in issue already quoted) damages (without limitation as to kind) were limited in the words used in (aa) of the section under scrutiny. Act 4 of 1983 (Ciskei) was repealed by Act 28 of 1986 but s 9(1) in its original form was identical to the said s 20. As mentioned at the beginning of this judgment, s 9(1) was replaced with retrospective effect by the section in issue. All it really did, was to introduce (bb). The words of (aa) were retained, save that they no longer applied to ordinary passengers.

To sum up thus far: Ordinary passengers had no claim for damages of any kind from 1942 to 1980. In 1980 they were granted a limited right for specified special damages only. During 1983 they obtained a limited right to all damages and in 1987 that right was again the subject of amendment: Was it extended, contracted or did it remain the same?

It may be useful to quote the section again but this time stripped of words, phrases and subparagraphs that are not

strictly necessary for present purposes. It would then read as follows:

"The liability of the Fund in connection with any one occurrence to compensate a third party for any loss or damage contemplated in section 8 which is the result of any bodily injury to or the death of any person who was being conveyed in the motor vehicle in question shall be limited to the sum of twelve thousand rand in respect of loss of income or of support and the costs of accommodation in a hospital or nursing home, treatment, the rendering of a service and the supplying of goods resulting from bodily injury to, or the death of, any one such person or the sum of sixty thousand rand in all in respect of any bodily injury to, or the death of, any number of such persons, excluding the payment of compensation in respect of any other loss or damage."

The court *a quo* took a simple, but also simplistic, approach. It acknowledged that, historically, ordinary passengers had no claim for general damages until 1980. As far as the wording of (bb) was concerned, Renene AJ realized that some meaning had to be given to the concluding words, namely "excluding the payment of compensation in respect of any other loss or damage". He held that these words "can only mean, that if you were in that vehicle with your expensive Chinese

crockery, you cannot be compensated for that". Counsel for the plaintiff did not embrace this reasoning. It is easy to understand why. Subpar (bb) limits the claim of the ordinary passenger. Renene AJ assumed that without the limitation the ordinary passenger, and for that matter all third parties, had a right to compensation for damage to goods in terms of the Act. The assumption is without any foundation. Since 1942 all the acts referred to created a liability for loss or damage suffered as a result of bodily injury or death – and only that. The Act under consideration was no exception (see s 8), and the introductory words of s 9(1) also permit of no doubt.

Mr Notshe, for the plaintiff, was unable to suggest a meaning for the concluding words of (bb) but, nevertheless, submitted that, having regard to the purpose of the legislation, the subpar means that there is a R12 000,00 limitation to the claim of a single ordinary passenger and a R60 000,00 ceiling for general damages both for a single person and for a group of persons. I do not believe that the sub-par

can be interpreted in this manner.

It is clear from the introductory words of sec 9(1) ("notwithstanding anything to the contrary contained in the Compulsory Motor Vehicle Insurance Act, 1983 (Act 4 of 1983)") that the intention was to undo what Act 4 of 1983 (Ciskei) had done. The obvious is confirmed by the fact that the limitation of (bb) was made retroactive to 1 May 1984, the date on which Act 4 of 1983 came into operation. And we know that it introduced liability for general damages for ordinary passengers. There was nothing else to qualify. Further, (bb) and (aa) contain limitations to and not extensions of liability. The words added (noted earlier as (a) and (b)) do not evince an intention to extend liability. On the interpretation proposed by counsel, business passengers, especially taxi and bus passengers, would be in a worse position than ordinary passengers in a private vehicle. Having regard to the history and social purpose of the legislation, this result could not have been intended. Another problem with

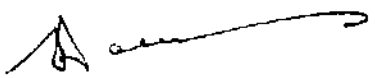
this interpretation is that the limit of R60 000,00 is "in all" coupled to "any number" of persons whereas the R12 000,00 limit applies to "any one such person". The difference between "any one" and "any number" goes back to 1942. It has never been understood to mean that an individual is entitled to claim under both heads. As counsel for the Fund pointed out, the plaintiff's interpretation negates the words "in all" - they must refer to the sum of the individual claims referred to in the first part of (bb). I can also not subscribe to the idea that the legislature could have intended to limit a claimant's entitlement to special damages to a greater extent than in relation to general damages. One would have expected the reverse. Further, if the intention was, as Mr Notshe submitted, to allow an individual a claim for R72 000,00, why not say it and why are the heads (special and general) limited?

But, concluding where I began, this interpretation ignores the final words of (bb). In *Taylor* the debate centred around the meaning and effect of the introductory word of the

final phrase, namely "excluding". It was argued on the one hand that it qualified the noun "R12 000" and, on the other, that it qualified the verb "shall be limited". The debate was found to be unhelpful. Counsel before us chose not to reopen it. As noted earlier, *Taylor* held that the phrase meant that the claim of the ordinary passenger was limited to the special damages listed. In spite of the legislative diversions that have since taken place, and despite counsel's argument, I am firmly of the view that, in context and within a historical perspective, the meaning of the phrase (and (bb)) has not changed. That means that the defined issue must be answered in the negative.

I have said before that the outcome of this appeal does not depend upon a decision on the applicability of the Multilateral Agreement to the plaintiff's claim. The reason is obvious. Art 46(b) of the agreement is virtually identical to the subpar (bb) considered in *Taylor* and that decision would *a fortiori* govern its meaning.

In the result the appeal succeeds with costs and the order of the court *a quo* is amended to read "Absolution from the instance with costs".



L T C HARMS
JUDGE OF APPEAL

HEFER JA)
NESTADT JA) AGREE
SCHUTZ JA)
SCOTT JA)