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

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

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DATE SIGNATURE

CASE NO: 34135/2012

In the matter between

LABUSCHAGNE, JL 1st Plaintiff

LABUSCHAGNE, GJ 2nd Plaintiff

LABUSCHAGNE, M 3rd Plaintiff

And

LOURENS, DD Defendant

JUDGMENT

Summary: Road Accident Fund – common law claims abolished – exceptions to abolition limited to claims for emotional shock and trauma of persons not directly involved in accident – third party as defined in RAF Act precluded from claiming from common law wrongdoer.

WEPENER J

[1] The plaintiffs seek damages from the defendant as result of emotional shock and trauma sustained during a motor vehicle collision. The defendant accepted liability for the damage suffered by the first and second plaintiffs on a basis which was not disclosed to me and which I need not consider.

[2] As far as the third plaintiff is concerned, the parties agreed that I should decide the issue of the defendant's liability in limine. The question posed is whether the third plaintiff's claim, as pleaded, as against the defendant, is excluded by virtue of the provisions of s 21(2)(b) of the Road Accident Fund Act [1] (RAF Act).

[3] It is common cause that the third plaintiff was the driver of a vehicle which was involved in a collision in which he alleges the death of passengers in the vehicle resulted in his emotional shock and trauma for which he instituted the present claim.

[4] It is common cause that if the claim by the third plaintiff would have been competent against the Road Accident Fund (the Fund), it would not be competent against the defendant by virtue of the provisions of s 21 of the RAF Act, which provides for the abolition of common law actions.[2] The claim then lies against the Fund. However s 21(2) provides for certain exceptions to the abolition.

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[1] Act 56 of 1996

[2] Section 21(1): Abolition of certain common law claims-

(1) No claim for compensation in respect of loss or damage resulting from bodily injury to or the death of any person caused by or arising from the driving of a motor vehicle shall lie-

(a) against the owner or driver of a motor vehicle; or

(b) against the employer of the driver.

(2) Subsection (1) does not apply-

(a) if the Fund or an agent is unable to pay any compensation; or

(b) to an action for compensation in respect of loss or damage resulting from emotional shock sustained by a person, other than a third party, when that person witness or observed or was informed of the bodily injury or death of another person as result of the driving of a motor vehicle."

[5] In order support the various contentions both parties relied on Fourie and another vs Road Accident Fund [3] where Pillay AJ said at para 41: " The exclusion differs from other exclusions and limitations in the Amendment Act because the individual suffering emotional shock retained his or her common-law claim against the wrongdoer. The amendment came into effect on 1 August 2008. What the Act intended to exclude was emotional shock suffered or sustained by someone who was not directly involved in the accident or did not sustain the injuries which gave rise to the claim for emotional shock" and at para 48: "It is clear that the intention of the legislator was not to exclude the circumstances of the present plaintiffs, but to exclude strictly those who were not directly involved in the accident."

[6] Counsel for the defendant submitted that the third plaintiff is indeed a third party as defined in s17 of the Act. [4] As the result the third plaintiff does not fall into the exclusion of the abolition created in s 21 (2) (b) which specifically excludes a third party from the general exclusion created in s 21(2) (b). The legal representative for the plaintiff submitted that the interpretation in Fourie only excludes claims by persons "who were not directly involved in the accident" [5] "or did not sustain injuries which gave rise to the claim for emotional shock".[6] In the first sense referred to, the third plaintiff was indeed involved in the accident and his claim is not excluded against the Fund.

[7] After an analysis of the case law and the RAF Act, Pillay AJ concluded that the claim, as defined by her was not barred against the Fund by the provisions of s 21(1) of the Act but remained available against the Fund for that plaintiff.

[8] The question in this matter is whether the third plaintiff is a third party because if he is, s 21(2) (b) does not allow for a claim by him against anyone but the Fund.

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[3] 2014(2)SA 88(GNP)

[4] Section 17. Liability of Fund and Agents

(1) The Fund or Agent shall-

(a) subject to this Act in the case, 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) …..

be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as 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 the motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or wrongful act of the driver or of the owner of the vehicle or of his or her employee in the performance of the employee's duties as employee: Provided…

[5] Fourie para 48

[6] Fourie para 41

[9] Section 1 defines the third party as the party referred to in s 17 (1) of the RAF Act. The section requires (in order to be a third party), that a person must:-

(a) be the claimant (being any person "whosoever" or " third party") who suffered damage or loss in the form of bodily injury to him- or herself or by virtue of a death of another person;

(b) there must have been negligent driving of a motor vehicle or another unlawful act resulting in;

(c) damage or loss to the third party; and

(d) the damage or loss must have been caused by or arisen from the negligence driving of a motor vehicle.

The proviso contained in s17 finds no application in this matter.

[10] The third plaintiff, in my view, satisfies the all the requirements of a third party as defined in the RAF Act.

[11] The result is that the exclusion contained in s 21 (2) (b) is not available to the third plaintiff. His claim falls within the provisions of s 21(1) of the Act. The claim should consequently have been made against the Fund. In my view the fact that the Fund may not be liable pursuant to s 19 of the Act, does not take the matter any further. Section 19 excludes liability in a number of instances, such as a failure to prosecute a claim properly; a refusal to undergo examinations and as a result of damages suffered pursuant to emotional shock sustained when another was injured or died. Section 19 does not revive a claim at common-law and is not worded as an exclusion to s 21(1). In my view only those matters that can be brought under s 21(1) (a) or (b) would allow for a claim against an owner or driver or employer of the driver as having been excluded in terms of s 21.

[12] The third plaintiff is indeed a person (third party) who should be compensated by the Fund for any loss or damage which the third plaintiff has suffered as a result of any bodily injury[7] to himself or herself or the death of or any bodily injury to another person caused by or arising from the driving of a motor vehicle by any person.

[7] It was common cause that the injury suffered as a result of emotional shock is such damage – See Bester vs Commercial Union Versekeringsmaatskappy 1973(1)SA 769(A).

[13] The third plaintiff consequently has no claim against the driver of the vehicle as the claim lies against the Fund. The case of Fourie did not deal with this aspect but with the breadth of the exclusion of the liability of the Fund for damages suffered as a result of emotional shock. The remarks made in the Fourie judgment should be seen in that context. The learned Judge said [8] that the "exclusion (of liability of the Fund) was for emotional shock suffered and sustained by persons not directly involved in the accident". Accepting this view as

being correct, the third plaintiff was directly involved in the accident and the Fund remained liable to compensate him for his damage. By virtue of the provisions of s 21, the third plaintiff has no claim against the common-law wrongdoer and should have claimed for his damage from the Fund.

[14] I am fortified in my view by virtue of the fact that I was advised from bar, and it was common cause, that the third plaintiff did successfully institute a claim for damages for medical costs incurred, against the Fund. In that claim no other heads of damages were sought. The fact that the third plaintiff was indeed a third party as defined in s 17 of the Act is underscored by that successful claim for damages against the Fund.

[15] In the circumstance the question which I am required to answer is answered as follows:

15.1 The third plaintiff's claim, as pleaded against the defendant, is excluded by virtue of the provisions of s 21(2) (b) of the Road Accident Fund Act.

15.2 This being so, the third plaintiff's claim falls to be dismissed with costs.

APPEARANCES:

For the Plaintiff: Legal representative for plaintiff – Mr HJ Strauss

For the Defendant: Advocate C Korf

Date of Hearing: 25 August 2014

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[8] At 97 D

Judgment delivered on: 29 August 2014