REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2013/09477

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

....
DATE SIGNATURE

In the matter between:

DHLADHLA, MANDLA LANARK Plaintiff

And

THE ROAD ACCIDENT FUND Defendant

J U D G M E N T

N F KGOMO, J:

INTRODUCTION

[1] The plaintiff instituted proceedings against the defendant for damages arising out of injuries he sustained when he was a passenger in a motor vehicle owned and driven by his employer while being driven along the N1

South, some 23 km outside the town of Cradock in the Eastern Cape Province on 15 March 2011.

[2] The defendant defends the action.

[3] In addition to pleading to the merits of the matter, the defendant raised three special pleas. The first two special pleas are in respect of general damages, specifically the aspect of "*serious injuries*" as contemplated in s 17 of the Road Accident Fund Act 1996 (Act 56 of 1996), as amended ("*the RAF Act*"). The third special plea, termed in the pleadings as the main Special plea, relates to s 19(a) of the Act relative to claims where the Compensation of Occupational Injuries and Diseases Act, 1993 (Act 130 of 1993) as amended ("*COIDA*") where injuries were sustained by a claimant in a motor vehicle owned and driven by that claimant's employer, are in issue.

[4] These interlocutory proceedings relate to this "*main*" special plea. The plaintiff is opposing the granting of the prayers sought.

THE SPECIAL PLEA

[5] The defence raised in the special plea, which is dated 22 August 2014 and was supplemented in September 2014, is that the Road Accident Fund ("*the Fund*") is not liable to the plaintiff for compensation in terms of s 17 of the Act as amended, because:

5.1 In terms of s 19(1) of the RAF Act the Fund is not liable to compensate a third party in situations, as *in casu*, where neither the driver nor the owner of the motor vehicle concerned would have been liable, but for s 21 of the Act;

5.2 S 21(1)(a) and (b) of the RAF Act provides that no claim for compensation in respect of loss or damage resulting from bodily injury or the death of any person caused by or arising from the driving of a motor vehicle shall lie against the owner or the driver of a motor vehicle or against the employer of the driver;

5.3 In terms of s 35(1) of COIDA the plaintiff's employer, alternatively a person in management deemed to be an employer in terms of s 56(1)(b) of COIDA, being one Mr Anton Jardine in this instance, being the driver whose negligence caused the accident, would not have been liable to the plaintiff.

[6] It deserves mention here that in terms of s 35(2) of COIDA, for purposes of subsection (1) of s 35, a person referred to in s 56(1)(b), (c), (d) and (e) shall be deemed to be an employer.

REASONS FOR ALLOWING ARGUMENT OF THIS SPECIAL PLEA

[7] The special plea raises a point of law which can be conveniently decided first, thus materially shortening the intended proceedings at the end of the day. That is allowed in terms of Rule 33(4) of the Rules of Court.

[8] Initially the plaintiff objected to this procedure. However, after carefully considering the facts, circumstances and the law, they consented or allowed this special plea to be argued.

AMENDMENT OF THE SPECIAL PLEA

[9] The first amended special plea is dated 22 August 2014. This is so, because according to the defendant, the plaintiff did not disclose in his particulars of claim that he (plaintiff) was injured while acting within the course and scope of his employment; and the defendant came across that late.

[10] According to the defendant further, the second amendment or amended special plea came about after the defendant's investigations further revealed that the driver of the motor vehicle involved in the accident was in fact the employer of the plaintiff.

[11] After looking at all relevant facts and circumstances, I am also persuaded and convinced that the special plea was necessitated by the

plaintiff's non-disclosure of all the factual circumstances that gave rise to the claim.

[12] In any event, the plaintiff is no longer objecting to the admission to be part of the record or papers herein, of this special plea.

THE COMMON CAUSE FACTS

[13] The common cause facts here are that on 15 March 2011 the plaintiff was a passenger in a vehicle driven by Mr Anton Jardine ("*Jardine*") travelling along the N1-freeway southwards from Cradock on the way towards Port Elizabeth. The road allows one lane in each direction at the area where the accident occurred. It was raining. Jardine – the driver – lost control of the motor vehicle and it hit the pavement and overturned, resulting in the plaintiff's injuries.

[14] At the time of the collision or accident, the plaintiff was employed by the driver of the motor vehicle, i.e. Jardine.

THE LEGAL FRAMEWORK

[15] The Road Accident Fund Act 1996 was amended by Amendment Act 19 of 2005 to comply with the Constitutional Court order issued in the case of

Anele Mvumvu, Louise Pedro & Bianca Smith v Minister of Transport and The Road Accident Fund[1].

[16] Section 19(a) of the Act as amended reads as follows:

> "***19. Liability excluded in certain cases.–***
>
> *The Fund or an agent shall not be obliged to compensate any person in terms of Section 17 for any loss or damage –*
>
> *(a) For which neither the driver nor the owner of the motor vehicle concerned would have been liable but for Section 21, …*"

[17] Section 21 of the Act reads as follows:

> "***21. Abolition of certain common law claims.–***
>
> *(1) No claim for compensation in respect of loss or damage resulting from bodily injury to or death of any person caused 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 witnessed or observed or was informed of the bodily injury or the death of another person as a result of the driving of a motor vehicle …*"

[1] Case CCT 67/10 [2011] ZACC 1 decided on 4 November 2010

[18] This section (section 21) was brought in by s 9 of the Amendment Act[2] with effect from 1 August 2008.

[19] S 35(1) and (2) of the Compensation of Occupational Injuries and Diseases Act[3] as amended ("*COIDA*") precludes an employee from recovering damages from his or her employer in respect of an occupational injury. To put things in their proper perspective or context, I quote the subsection:

> "*35(1) No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employees against such employee, employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.*
>
> *(2) For the purposes of sub-section (1) a person referred to in section 56(1)(b), (c), (d) and (e) shall be deemed to be an employer.*"

[20] S 56(1) and (2) of COIDA in turn reads as follows:

> "*(1) If an employee meets with an accident or contracts an occupational disease which is due to the negligence –*
>
> *(a) of his employer;*
>
> *(b) of an employee charged by the employer with the management or control of the business or of any branch or department thereof;*
>
> *(c) of an employee who has the right to engage or discharge employees on behalf of the employer;*
>
> *(d) …*

[2] Act 19 of 2005
[3] Act 130 of 1993

> *(e) of a person appointed to be in charge of machinery in terms of any regulation made under the Occupational Health and Safety Act, 1993 (Act 85 of 1993)*
>
> *the employee may, notwithstanding any provisions to the contrary contained in this Act, apply to the commissioner for increased compensation in addition to the compensation normally payable in terms of this Act …*"

[21] "*Occupational injury*" is defined in s 1 of COIDA to mean "*… a personal injury sustained as a result of the accident*". "*Accident*" is defined as "*… an accident arising out of and in the course of an employee's employment and resulting in personal injury, illness or death of an employee …*"

THE RESPECTIVE PARTIES' STANDPOINTS

[22] By its nature, the defendant's counsel argued first and relied as authority on the judgment in *Road Accident Fund v Monjane* [2007] ZASCA 57 " Monjane case". The gist of its argument was that the plaintiff was precluded from claiming in the circumstance of this case, taking account statutory constraints or limitations.

[23] The plaintiff's counsel's submissions were that the purpose of the 1995 Amendment Act[4] was to allow for equity to prevail where compensation is sought. She also submitted that contrary to the defendant's counsel's assertion, the court in *Mvumvu* took into account COIDA when it delivered its judgment.

[4] Act 19 of 2005

[24] It may be so, however, apples need to be sorted out or compared with apples.

EVALUATION

[25] *Mvumvu* was about the amended s 18 of the Road Accident Fund Act where a constitutional challenge to the legislative provisions that placed a cap on the recovery of damages by those victims of motor collisions under the Act. This cap was in s 18.

[26] In the unamended form s 18 provides:

> "*(1) The liability of the Fund or an agent to compensate a third party for any loss or damage contemplated in section 17 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, was being conveyed in or on the motor vehicle concerned, shall, in connection with any one occurrence, be limited, excluding the cost of recovering the said compensation, and except where the person concerned was conveyed in or on a motor vehicle other than a motor vehicle owned by the South African National Defence Force during a period in which he or she rendered military service or underwent military training in terms of the Defence Act, 1957 (Act No 44 of 1957), or another Act of Parliament governing the said Force, but subject to subsection (2) –*
>
> > *(a) to the sum of R25 000 in respect of any bodily injury or death of any one such person who at the time of the occurrence which caused that injury or death was being conveyed in or on the motor vehicle concerned –*
> >
> > *(i) for reward; or*

(ii) in the course of the lawful business of the owner of that motor vehicle; or

(iii) in the case of an employee of the driver or owner of that motor vehicle, in respect of whom subsection (2) does not apply, in the course of his or her employment; or

(iv) for the purposes of a lift club where that motor vehicle is a motor car; or

(b) in the case of a person who was being conveyed in or on the motor vehicle concerned under circumstances other than those referred to in paragraph (a), to the sum or R25 000 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, excluding the payment of compensation in respect of any other loss or damage.

(2) Without derogating from any liability of the Fund or an agent to pay costs awarded against it or such agent in any legal proceedings, where the loss or damage contemplated in section 17 is suffered as a result of bodily injury to or death of any person who, at the time of the occurrence which caused that injury or death, was being conveyed in or on the motor vehicle concerned and who was an employee of the driver or owner of that motor vehicle and the third party is entitled to compensation under the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993), in respect of such injury or death -

(a) the liability of the Fund or such agent, in respect of the bodily injury to or death of any one such employee, shall be limited in total to the amount representing the difference between the amount which that third party could, but for this paragraph, have claimed from the Fund or such agent, or the amount of R25 000 (whichever is the lesser) and any lesser amount to which that third party is entitled by way of compensation under the said Act …"

[27] The impugned subsection 1 of s 18 was deleted when the RAF Act was correspondingly amended in terms of the 2005 Amendment Act.

[28] Counsel for the plaintiff submitted that the Legislature did not follow the whole of the reasoning by the Constitutional Court when it amended s 18.

[29] I do not agree.

[30] By deleting the subsection that was complained about the Legislature complied with the dictates or recommendations of the court. That is why in my considered view, no further appeal was lodged against the new s 18.

[31] This ground cannot avail the plaintiff.

[32] What is in issue in this application is the interpretation of s 19, not s 18.

[33] I also do not agree with the plaintiff's submission that the Act as amended is ambiguous.

[34] Sections 18 and 19 of the RAF Act each deal with specific and specified issues and aspects. It will not be correct to conflate what they say. This Court is called upon to look at the provisions of s 19 and determine whether the defendant's special plea should be upheld. It cannot jump over to s 18 to determine a special plea filed in terms of s 19.

[35] Counsel for the plaintiff further asked this Court to read into the facts in issue here, the imputations about s 18 as set out in *Mvumvu*. She gave the reason as this Court's discretion to do so.

[36] I have doubts about whether this Court would be justified to do so.

[37] Similarly this Court cannot interpret this s 19 widely so as to include the plaintiff's circumstances and facts to fit the ruling in *Mvumvu*. Equally, I do not think I will be entitled to do that.

[38] Mvumvu was not categoric as to whether the driver of the impugned motor vehicle was also its owner.

[39] On the other hand, the authority relied upon by the defendant, *Road Accident Fund v Monjane*[5] specifically dealt with s 19 of the RAF Act. Although this judgment was delivered earlier, it in my considered view captured the spirit of the impugned section correctly and remains within the constitutional boundaries or constraints as set out in *Mvumvu*.

[40] In *Monjane*, when the matter served in the High Court, Shongwe J (as he was then) ordered, at the request of the parties, that the special plea in terms of s 19 be dealt with first, as it is the case in our matter. Similarly, no evidence was adduced but the parties reached agreement on the facts necessary for the determination of the special plea. They were –

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[5] (295/06) [2007] ZASCA 57; [2007] (SCA) 507 (RSA); [2007] 4 All SA 987 (SCA); 2010 (3) SA 641 (SCA) (18 May 2007)

40.1 that the respondent was "*a pedestrian*" at the time of the accident (by which the parties presumably intended to convey that the respondent was not "*being conveyed in or on the motor vehicle concerned*" within the meaning of s 18 of the RAF Act; which was not entirely true;

40.2 that he was in the employ of his employer, Duarte, and was carrying out his duties in pursuance of that employment when the accident occurred;

40.3 that Duarte was solely to blame for the accident.

[41] After hearing argument and reserving judgment Shongwe J dismissed the special plea with costs. He however subsequently granted the Fund leave to appeal to the Supreme Court of Appeal.

[42] The defence raised by the plaintiff in that matter was simply that on the basis of the agreed facts it was not liable to the plaintiff (i.e. the injured person) for compensation in terms of s 17 of the RAF Act because, by virtue of s 35(1) of COIDA, the plaintiff's employer, Duarte, being the driver whose negligence caused the accident, would not have been liable to the plaintiff; and that in terms of s 19(a) of the RAF Act, the Fund was not obliged to compensate a third party for loss or damage for which neither the driver nor the owner of the motor vehicle concerned would have been liable but for s 21.

[43] In a nutshell, the plaintiff's contention thereat was that s 18(2) of the RAF Act does not create a new right of action against the Fund. That it serves merely to qualify or limit the Fund's liability under s 17. That limitation, it was argued, relate solely to the situation where the third party is conveyed –

> "*in or on the motor vehicle concerned*"

and accordingly s 18(2) contemplates that a third party will have an unlimited claim where he or she was not being conveyed in or on the motor vehicle concerned, even though the vehicle was owned or being driven at the time by the third party's employer.

[44] As Scott JA found in that case, the above argument would have no doubt been correct were it not for the provisions of s 19(a) read with s 35 of COIDA.

[45] The plaintiff insisted however, that if s 19(a) of the RAF Act were to be construed so as to preclude an action against the Fund in every case where the vehicle concerned was owned or driven by the third party's employer regardless of whether the third party was being conveyed in or on the vehicle, the effect would be to render meaningless the limitation contained in s 18(2). They further contended that s 19(a) had to be strictly construed so as not to exclude the liability of the Fund in that case.

[46] The above is exactly what the plaintiff in our matter argued or contended for.

[47] The effect of s 18(2), when read together with s 19(a) of the RAF Act and s 35(1) of COIDA is that the limited claim contemplated in s 18(2) will lie against the Fund when the wrongdoer, whether the driver or the owner of the vehicle concerned, is not the third party's employer. In such a case the claim was limited but not precluded. Mvumvu rectified that situation.

[48] The correct position is as set out in para [9] of *RAF v Monjane* where the learned justice put it as follows:

> "*… It is only when the wrongdoer is the third party's employer that the claim is precluded. In such a case, the claim will be precluded regardless of whether or not the third party is being conveyed in or on the motor vehicle concerned, provided only that the injury sustained by the third party is an 'occupational injury' as defined in COIDA. The effect of s. 19(1), read with s. 35(1) of COIDA, is therefore not to render s. 18(2) meaningless.*"[6]

[49] I agree, with *RAF v Monjane* that where an "*occupational injury*" is sustained in the context of a motor accident, s 35(1) of COIDA may on occasions have seemingly unfortunate consequences, the reason being that the basis upon which compensation is determined under COIDA differs markedly from that under the RAF Act. The effect of s 35(1) is to deprive an employee of his or her common law right of action to claim damages from an

[6] See also *Mphosi v Central Board for Co-operative Insurance Ltd* 1974 (4) SA 633 (A)

employer. However COIDA substitutes a system which has advantages for an employee not available at common law.

[50] It needs to be mentioned here that the constitutionality of s 35(1) of COIDA was upheld in *Jooste v Score Supermarket Trading (Pty) Ltd*[7].

[51] The RAF Act, like COIDA, constitutes social legislation but it caters for a different situation. It is so that the two Acts may at times overlap, making it possible for a claimant to claim under both of them[8]. A line has nevertheless to be drawn and that duty of dealing with same belongs to the sphere of the Legislature.

[52] S 19(a) of the RAF Act as read with s 35(1) of COIDA is an example of where and how such a line can and has to be drawn: An employee who sustains an "*occupational injury*", as the plaintiff in our matter, in the context of a motor vehicle accident will have no claim under the RAF Act <u>if the wrongdoer is his or her employer</u> (my emphasis). This was recognised in *Mphosi's* case[9].

[53] I again concur with Scott J's assertion in *RAF v Monjane*[10] that it is a well-established rule of construction that the Legislature is presumed to know the law, including the authoritative interpretation placed on its previous enactments by the courts. It is so that the Legislature has in a series of

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[7] 1999 (2) SA 1 (CC)
[8] For e.g. s 18(2) of the RAF Act and s 36 of COIDA
[9] *Supra*
[10] At para [12]

subsequent enactments retained in substance the statutory provisions upon which *Mphosi's* case was decided[11].

[54] It can thus be accepted that the construction used or placed upon them correctly reflects the policy of the Legislature or its so-called intention.

CONCLUSION

[55] It is therefore the finding of this Court that in the circumstances of the motor vehicle collision that occurred resulting in the plaintiff being injured, the plaintiff does not have a claim against the Fund, alternatively, his claim does not attract liability of the Fund.

[56] In the circumstances, the special plea in terms of s 19(a) of the RAF Act stands to be upheld.

ORDER

[57] The following order is made:

[11] Such enactments include the Compulsory Motor Vehicle Insurance Act 56 of 1976; the Motor Vehicle Accidents Act 84 of 1986 and the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989

"*The Special Plea in terms of s. 19(a) of the RAF Act is upheld with costs.*"

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N F KGOMO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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