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Case No 621/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE MULTILATERAL MOTOR VEHICLE ACCIDENTS FUND — Appellant

and

MADIKOTSI GROTTER RADEBE — Respondent

Coram: JOUBERT, NESTADT, VIVIER, STEYN et OLIVIER, JJA

Date heard: 18 May 1995

Date delivered: 24 August 1995

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JUDGMENT

NESTADT, JA:

This appeal concerns the enforceability of a claim for

compensation under the Motor Vehicle Accidents Act, 84 of 1986 ("the Act").

The claim was the subject of an action in the Witwatersrand Local Division. The respondent was the plaintiff. She sued for payment of the sum of R55 800.00 being the damages she and her minor child allegedly suffered through being deprived of the support of a certain Maloshi Isaac Maabane. He was the customary union husband of the respondent and the father of the child. He was killed in a collision which occurred on the night of 14 August 1988 in a street in Sebokeng. The respondent's cause of action was that the deceased was a pedestrian and that the collision was caused by the negligent driving of the vehicle that struck him as he was crossing the road. It was further alleged that the identity of

neither the driver nor owner of the vehicle could be established. In these circumstances, and having regard to secs 6(1)(b) and 8(1) of the Act, the respondent's claim would normally have been brought against the MVA Fund ("the fund"). However, the appellant was sued. This was because the liabilities of the fund have, in terms of sec 3(b) of the Multilateral Motor Vehicle Accidents Fund Act, 93 of 1989, devolved upon the appellant. This Act came into operation on 1 May 1989. As from such date it in effect superseded the Act, save that rights which had previously accrued continued to be governed by the Act (see sec 3(a)(i) and (ii) of Act 93 of 1989). It is to the Act, therefore, that we must have regard in order to determine the appellant's liability.

The appellant defended the action. The matter came to

trial before Myburgh J. On the basis of certain agreed facts the parties, presumably acting in terms of Rule 33(4) of the Uniform Rules of Court, asked the court to decide, as a preliminary issue, one of the defences pleaded by the appellant. It related to the sufficiency of the respondent's claim form. In particular the question posed was (i) whether the respondent had complied with sec 15(1)(a) of the Act read with para 9(1)(b)(ii) of the regulations made under sec 17 of the Act and (ii), if not, whether she was excused from compliance. The latter part of the question was decided in the negative. It was held, however, in favour of the respondent, that she had substantially complied with the requirements of the regulation. Accordingly the point in limine taken by the appellant that she had not, was dismissed with costs. This is an appeal, with the leave of the court a quo,

from such decision. In the light of the principles stated in S A Eagle Versekeringsmaatskappy Bpk v Harford 1992(2) SA 786(A), Marsay v Dilley 1992(3) SA 944(A) and Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk 1994(3) SA 407(A), it was, I consider, an appealable order.

It is necessary to outline the appellant's liability under the Act. As I have indicated, the obligation of the fund to compensate third parties for loss or damage arising out of the driving of an unidentified vehicle derives from secs 6(1)(b) and 8(1). As in the case of claims against appointed agents (which arise where the vehicle in question is identified) claims against the fund are subject to the provisions of the regulations to which I earlier referred. Such

regulations were published under Government Notice 1870 in Government Gazette 10430 of 12 September 1986. Para 8 thereof specifies certain conditions which require fulfilment in order to render the fund liable. They include proof that the injury or death giving rise to the claim arose from the negligent driving of the unidentified vehicle and that such vehicle came into physical contact with the injured or deceased person (see reg 8(1)(a)(i) and (iv)). A further requirement (in terms of reg 8(2)(a)) is that a claim for compensation be delivered to the fund within two years of the collision in accordance with sec 15(1) of the Act. This section stipulates that a claim for compensation (under sec 8) has to be set out "in the prescribed manner on a prescribed form which shall include provision for a medical report....in regard to the cause of

death....in connection with which the claim is instituted and for the prescribed supporting proof and particulars". Regulation 9 deals with the claim form and medical report. It is provided (in sub-para (1)(a)) that such form and report "shall be combined in the Form MV3" as set out in an annexure. There follows the provision on which this appeal mainly turns, namely, reg 9(1)(b)(ii). It reads:

> "Where a person is killed outright in a motor accident the completion of the said medical report shall not be a requirement, but in such an event the Form MV3 shall be accompanied by a copy of the inquest report or, in the case of a prosecution of the person who caused the deceased's death, a copy of the relevant charge sheet in which it is clearly indicated that such person's death resulted from the accident to which the claim relates."

And, finally, the effect of reg 8(2)(b) must be noted. It is that the fund cannot, unlike an appointed agent, just be sued. The fund must first consent to be sued. If it does not, or if it rejects liability for the

claim, the claimant may submit written representations to the Minister (of Transport Affairs) for consent to sue the fund. The Minister's decision "shall be final and binding on all parties concerned". In any action against the fund the consent of the Minister or the fund:

> "shall establish the claimant's right to sue the MVA Fund, whereupon the issues before the court shall, subject to the provisions of this regulation, mutatis mutandis be the same as they would have been if the motor vehicle had been identified. The consent of the Minister or the consent of the MVA Fund shall not constitute an admission of liability by the MVA Fund in respect of the claim concerned."

(reg 8 (3)).

I turn to the facts as agreed on and as they appear from certain documents which form part of a bundle placed before the trial court by consent. In summary they are the following:

(i) On 26 June 1989 an inquest into the death of the deceased was held by a Vanderbijlpark magistrate. His main findings were:

"(c) Oorsaak of waarskynlike oorsaak van dood: Ruptuur van hart opgedoen toe die oorledene deur 'n aankomende voertuig raakgery is terwyl hy oor 'n straat gehardloop het. Bloedalkohol-konsentrasie van oorledene: 0,39 g/100 ml.

(d) Of die dood veroorsaak is deur 'n handeling of versuim wat 'n misdryf aan die kant van iemand insluit of uitmaak: Nee."

(ii) On 9 August 1990 and within the two-year prescriptive period referred to in reg 8(2)(a)(i), an unsigned, partly completed MV3 claim form was sent to the fund under cover of a letter from the respondent's attorney. Included in the information given in the MV3 form was the name of the deceased, the date and place of the

accident, the fact that it was reported to the Sebokeng police station and what the police reference number was. In reply to a question whether an inquest into the deceased's death was held the answer "unknown" is given.

(iii) The medical report portion of the MV3 form was not filled in. Nor, for obvious reasons, could a copy of any charge sheet relating to the prosecution of the driver of the vehicle be submitted to the appellant. And, of course, the MV3 form was not accompanied by a copy of the inquest report. All that did accompany the MV3 form was the child's birth certificate, a police accident report and what is described as an "earning certificate"

(in respect of the deceased).

(iv) On 8 September 1990 the appellant rejected liability for the claim and on 4 January 1991 refused the respondent permission to sue it. This was not done on the basis that the respondent had failed to answer all the questions in the MV3 form or that it was unsigned. The allegation was rather that reg 9(1)(b)(ii) had not been complied with.

(v) The respondent did not agree that this was so. Accordingly, and by letter dated 11 March 1991, the Minister's consent to sue the appellant was sought. The request by the respondent's attorney submits that, though the appellant contends that reg 9(1)(b)(ii) was not

complied with, "our client has indeed complied with....the regulation".

(vi) Permission to sue the fund was granted. This took place by the appellant itself, at the request of the Minister, by letter dated 2 May 1991 notifying the respondent that "permission to sue the MMF is hereby granted". It was followed some weeks later, however, by a further letter from the appellant to the respondent in effect informing her that the appellant still maintained that reg 9(1)(b)(ii) had not been complied with.

The first issue with which I deal is whether the respondent complied with reg 9(1)(b)(ii). This, of course, pre-supposes the validity of the regulation. During argument before us,

however, the soundness of doing so was queried with counsel. This was done with Shield Insurance Co Ltd v Booysen 1979(3) SA 953(A) in mind. In this case (at 960 C-G) doubt was expressed whether the predecessor to sec 15(1)(a), viz, sec 25(1) of Act 56 of 1972 sanctioned the requirements of reg 16(1)(b)(ii) (made under the old Act and corresponding broadly to reg 9(1)(b)(ii)). Nevertheless, counsel were content to accept that reg 9(1)(b)(ii) was not ultra vires. The appeal is therefore dealt with on this basis. In does not, however, follow that strict or exact compliance with the regulation was required. On behalf of the appellant, Mr Coetsee conceded that substantial compliance sufficed. Despite the wording of secs 6(1)(a) and 8 of the Act (to the effect that liability of the fund is subject to the regulations and the conditions thereby prescribed) I am satisfied

that the concession was correctly made. As I have said, Myburgh J decided that there had been substantial compliance. I proceed to consider the correctness of this finding.

It will be recalled that reg 9(1)(b)(ii) affords a claimant who sues in respect of a person who has been killed "outright", a choice of submitting, in substitution of a medical report, one of two documents with the MV3 form. They are (i) a copy of the inquest report and (ii) where there has been a prosecution of the driver who caused the deceased's death, a copy of the relevant charge sheet. On a proper interpretation of the regulation, the document must, in both cases, clearly indicate that the death "resulted from the accident to which the claim relates". The respondent's allegation is that the deceased was killed outright. It follows that the appellant could not

complain about the non-completion of the medical report. Nor did it. And, as already indicated, there was no charge sheet relating to the driver's prosecution. (Indeed it is difficult to envisage how in a claim against the fund, where ex hypothesi an unidentified vehicle is involved, such a document could ever be utilised.) In these circumstances, it was required of the respondent that a copy of the inquest report accompany the MV3 form. The appellant's complaint of non-compliance with reg 9(1)(b)(ii) was founded on the respondent's failure to do this.

In Khumalo v Guardian National Insurance Co Ltd and Another 1990(3) SA 69(T) at 73 D, Streicher J held that the inquest report referred to in the previous regulation means, not the inquest record, but the magistrate's findings. The same applies to reg

9(1)(b)(ii). Plainly, however, not even these were annexed by the respondent to her MV3 form. She did not therefore comply with reg 9(1)(b)(ii). Can it be said that there was substantial compliance? I am prepared to accept that the regulation does not necessarily require that a copy of the inquest report per se be furnished. I shall assume that if, for example, the MV3 form itself particularised the substance of the inquest findings (in which it is clearly indicated that the deceased's death resulted from the collision), this would constitute sufficient compliance with reg 9(1)(b)(ii). But even in this respect the MV3 form was wanting. Indeed, in the words of the judge a quo "the information furnished in the MV3 form did not allow the Fund to ascertain whether it could be held liable and the potential ambit of its liability nor could the Fund decide to resist the claim or to

compromise it before costs of litigation were incurred." The main argument on behalf of the respondent rested rather on the following propositions: (i) the information furnished in the MV3 form (ie the name of the deceased, the date and place of his death and the police reference number) would have enabled the appellant itself to have easily obtained a copy of the inquest report from the Vanderbijlpark magistrate's court; and (ii) there was a duty on the appellant to have done this.

There can, I think, be no quarrel with the first proposition. I say this despite certain ineffectual attempts by the respondent's attorney to obtain a copy of the inquest report. The report was at all times available to the public. And it was the appellant which eventually obtained it. But the question is: does

the fact that the respondent in the MV3 form furnished the appellant with sufficient information to enable it to obtain the inquest report constitute compliance with reg 9(1)(b)(ii)? In other words was there, as Myburgh J found, a duty on the appellant to have procured it? The respondent relied on the principle that the claim form is designed to invite, guide and facilitate investigation of the claim by (what used to be called) the insurer and thus enable it to determine, before litigation commences, its attitude to the claim (AA Mutual Insurance Association Ltd v Gcanga 1980(1) SA 858(A) at 865 D and H). Galgut AJA in Constantia Insurance Co Ltd v Nohamba 1986(3) SA 27(A) at 39 G-H stated the consequences of this to be the following:

> "It follows, in my view, that if an insurance company is given sufficient information to enable it to make the necessary inquiries in order to decide whether 'to resist the claim or to settle or to compromise it before any costs of litigation are

incurred', it should not thereafter be allowed to rely on its failure to make the inquiries." (My emphasis.)

In this case there was an inaccuracy in the claim form. It had incorrectly been stated that the plaintiff was not entitled to workmens' compensation. In fact he was and had received such compensation. In all other respects, however, the claim form was accurate and complete. It contained information as to the nature of the plaintiff's employment and the name and address of his employer. The Court held that there had been substantial compliance with the provisions of sec 25(1) of the old Act. The reasoning appears at page 40C and is in the following terms:

"There can be no doubt that had the defendant made the most elementary investigations, as it would have had to do to ascertain plaintiff's injuries, his loss of earnings and future earnings and who had paid the doctors, chemists and hospitals, it must have learned that he was a 'workman' who had received

> compensation from the WCC. If in fact it failed to make any investigation it cannot complain. In short, the form gave defendant all the information it required in order to decide whether 'to resist the claim or to settle or to compromise it before any costs of litigation were incurred.'" (My emphasis.)

Similarly, so it was submitted on behalf of the respondent, the appellant had been given all the necessary information to enable it to obtain the inquest report; this being so, the obligation imposed by reg 9(1)(b)(ii) to furnish the report had been substantially complied with.

I am unable to agree with the argument. What the Court said in Nohamba must not be misunderstood. Nor should it be taken out of context. The statement that the insurer cannot rely on its failure to make enquiries was premised on it having been given sufficient information; hence the use by Galgut AJA of "if" in the

first passage cited and the reference to the fact that "the form gave defendant all the information it required" etc in the second. Moreover, an opportunity to investigate is not to be converted into an obligation to do so. This could not have been the intention of the framers of the Act or the regulations. The matter was, I consider, put in the correct perspective in Guardian National Insurance Co Ltd v Van der Westhuizen 1990(2) SA 204(C). Here the claim form particularised the hospital at which the plaintiff had been treated, the doctor who attended her, the period of her hospitalisation and the hospital reference number. But the claim form did not contain the statutory medical report. There was merely an informal one from a doctor who certified that the plaintiff suffered serious and multiple injuries in the collision and that as a result she was crippled and

permanently unfit to work. In holding that there had not been sufficient compliance with sec 25(1) of the old Act, Tebbutt J (Friedman and Conradie JJ concurring) stated (at 212 E - 213 A):

> "While it is true that one of the purposes of the claim form is to 'invite, guide and facilitate' investigation by the insurer, it does not, in my view, mean that the insurer is obliged or required to do so. The dicta to that effect in Gcanga (supra at 865D and 865H) and Nohamba (supra at 39B and 39G)..... mean no more than that the information in the form must be such that if the insurer should wish to investigate any aspect, including the injuries, it should have available reasonably correct information from which to launch its enquiries or conduct its investigations.....These dicta do not mean, in my view, that a claimant can merely set out sources of information and then say, in effect, to the insurer: 'Now you go ahead and find out what my injuries are, what is wrong with me at present and why I am claiming the amounts I am.' I also do not think that by his remarks in Nohamba (supra), that an insurer should not be 'allowed to rely on its failure to make inquiries' or that if the insurer 'had made the most elementary investigations, as it would have had to do to ascertain plaintiff's injuries...', Galgut AJA intended to lay down that an insurer must make enquiries and do an investigation.....Galgut

> AJA certainly did not intend.....to indicate that, because in particular circumstances an insurer may reasonably be expected to make further enquiries, the claimant is relieved of the obligation of substantially complying with the regulations. Indeed, he stated.....that the insurer must be given the information it requires to decide whether to resist the claim or to settle or to compromise it before any costs of litigation are incurred."

From the point of view of both principle and policy these views are to be supported. It is true that the object of the Act is to give the widest possible protection to third parties. On the other hand, the benefit which the claim form is designed to give the fund must be borne in mind and given effect to. The information contained in the claim form allows for an assessment of its liability including the possible early investigation of the case. In addition, it also promotes the saving of the costs of litigation. In particular, the purpose of reg 9(1)(b)(ii) is to facilitate a decision whether, in the

case of a dependent's claim, it was the fatal accident which caused the deceased's death and whether the driver of the vehicle in question was negligent. Sec 16(2) of the Inquests Act 58 of 1959 enjoins the judicial officer holding the inquest to record a finding inter alia as to the cause or likely cause of death and whether it was brought about by any culpable conduct on the part of any person. The fund would be able to obtain similar though less cogent information from the charge sheet. These various advantages are important and should not be whittled away. The resources, both in respect of money and manpower, of agents and particularly of the fund are obviously not unlimited. They are not to be expected to investigate claims which are inadequately advanced. There is no warrant for casting on them the additional burden of doing what the regulations require should be

done by the claimant. There can be no (substantial) compliance where the claimant has merely indicated to the fund how it, through its own efforts, can obtain the necessary information or documents.

To sum up so far, I am of the opinion that the fact that the information supplied by the respondent in her MV3 form would have enabled the appellant to obtain a copy of the inquest report does not avail the respondent. There was no duty on the appellant to do this. Reg 9(1)(b)(ii) imposed the obligation on the respondent. She failed to comply with it. This was therefore not a case of substantial compliance but one of non-compliance.

An alternative argument was advanced on behalf of the respondent. As I understood it, it was that the respondent had not wilfully withheld the inquest report and that on the authority of

Union and South-West Africa Insurance Co Ltd v Fantiso 1981(3) SA 293(A), the respondent should not be non-suited. I doubt whether the point is covered by the pre-trial agreement between the parties concerning the issues to be decided. In any event, it is without substance. Fantiso's case dealt with sec 23(c)(ii) of the old Act which provided that an insurer was not obliged to pay compensation where the claimant "refuses or fails" to furnish certain medical reports. It was held that forfeiture of the plaintiff's claim would only be allowed if the documents had been wilfully withheld. The Court was not concerned with any question of substantial compliance. The wording of reg 9(1)(b)(ii) is quite different. The fact that the failure to furnish the inquest report might not have been deliberate in the sense used in Fantiso's case is irrelevant.

This brings me to a consideration of the second issue, namely, whether the respondent was excused from complying with reg 9(1)(b)(ii). Clearly, if this be so, the appeal must, despite the respondent's non-compliance with the regulation, succeed. The respondent's contention that she did not have to comply with the regulation was based on reg 8(2)(b). It will be recalled that it provides for the Minister's consent to sue the fund. The submission was that the Minister, having granted such consent, the respondent's right to sue the fund was conclusively established and the appellant was therefore precluded from relying on the respondent's non-compliance with the regulation. As I have said, the trial court rejected the argument. I shall assume, in favour of the respondent, that in seeking to overturn the learned judge's decision, it was not

necessary for her to cross-appeal.

In my opinion, Myburgh J, on the authority of Verster v Motor Vehicle Assurance Fund 1978(3) SA 691(A), correctly decided the point against the respondent. In that case it was held that the Minister's consent given under reg 6(1)(b)(ii) of the 1972 Act (which is in substantially similar terms to our reg 8(2)(b)) did not exclude the fund from contending that it was not liable because the unidentified vehicle had not come into physical contact with the person injured. According to Miller JA (at 697 G-H) there was "nothing in the regulations to suggest that anything more than the right to sue is established by the certificate or that finality is lent to anything more than the Minister's decision to allow the claimant to sue the Fund". The reasoning was that there had been no factual

decision by the Minister on the issue of "physical contact"; the Minister was not constituted a court of law; he is not obliged to allow the parties to lead evidence or address him; it was hardly conceivable that it was intended that he could make final and unassailable findings of fact in regard to questions so vital to the claim, without proper observance of the audi alteram partem rule (see at 697H - 698C).

Mr Hotz, for the respondent, sought to distinguish Verster on the basis that the court was there concerned with what counsel described as an issue of causation arising from a peremptory provision in the regulations, whereas in our case the appellant's complaint was founded on a procedural defect where only substantial compliance was required I do not think this matters. What Miller

JA said applies with equal force to a case where there has been non-compliance with reg 9(1)(b)(ii). To begin with, it must be borne in mind that the appellant, having rejected the respondent's claim, was bound, to enable her to sue, to seek and obtain the Minister's consent; it was therefore part of her cause of action. Moreover, the Minister was told that the issue whether the regulation had been complied with was in dispute. There is nothing to suggest that his consent was founded on a decision that the respondent's contention in this regard was correct or that the fund made any representations to him that it was not. His consent must therefore be taken to have been given on the basis that the issue of compliance would, if raised, be resolved at the trial. And, of course, effect must be given to the end part of reg 8(3), namely, that the consent of the Minister "shall not constitute an

admission of liability.....in respect of the claim concerned". This was a factor that Miller JA also took into account (see at 698 G).

As a last resort, counsel argued that the fund had waived its right to insist on compliance with reg 9(1)(b)(ii). Multilateral Motor Vehicle Accidents Fund v Meyerowitz 1995(1) SA 23(C) was relied on. In this case a claim for compensation against the appellant was initially rejected by it on the ground that the claim had become prescribed. The plaintiff acknowledged this but requested the appellant to waive prescription. This being so, it is not surprising that it was held that the appellant's subsequent grant of consent to be sued amounted to a waiver of prescription. The facts in our case are quite different. The respondent's letter to the Minister seeking permission to sue (see para (v) above) acknowledged that

there was a dispute between the parties as to whether reg 9(1)(b)(ii) had been complied with. So there was no question of an unambiguous, implied request that an admitted non-compliance by the respondent be waived by the appellant. Its consent to be sued must be judged in this light. There is in the circumstances no warrant for finding that such consent incorporated a waiver of its right to rely on the respondent's non-compliance with reg 9(1)(b)(ii). On the contrary, as appears from its subsequent letter to the respondent (see para (vi) above), there was no waiver. I should add that the issue of waiver was not referred to in the statement of agreed facts and was not raised in the court a quo.

In the result therefore the respondent having failed to comply with reg 9(1)(b)(ii) and not being excused from compliance,

Myburgh J should have upheld the point in limine and decided both the agreed issues in the appellant's favour. The result of doing so would have been to dismiss the respondent's claim.

The following order is made:

(1) The appeal is upheld with costs.

(2) The order of the court a quo is set aside and the following substituted:

"(a) The defendant's plea that the plaintiff failed to comply with reg 9(1)(b)(ii) is upheld.

(b) The plaintiff's action is dismissed with costs."

H H Nestadt
Judge of Appeal

Joubert, JA )
Vivier, JA ) Concur
Steyn, JA )
Olivier, JA )