52/97

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 206/95

In the matter between

DAVID MAMURU MOKHOLWANE APPELLANT

and

PRO HONDA RESPONDENT

CORAM: E M Grosskopf, Vivier, Howie, Zulman et Plewman JJA.

HEARD: 15 MAY 1997.

DELIVERED: 27 MAY 1997.

J U D G M E N T

VIVIER JA:

On 9 October 1991 the appellant ("the plaintiff") sustained serious bodily injuries when the front brakes of the motor cycle he was driving in Harrow Road, Johannesburg, locked with the result that the motor cycle overturned and he was thrown to the ground. At the time the plaintiff was employed by Urban Townhouse Management (Pty) Ltd ("the employer") as a messenger and motor cycle driver and the motor cycle in question had been leased by the employer from the respondent ("the defendant"). In due course the plaintiff instituted action in the erstwhile Witwatersrand Local Division against the defendant claiming compensation for loss and damage suffered as a result of his injuries. In the Particulars of Claim it was alleged that the defendant was the "owner" of the motor cycle and that it had leased the motor cycle to the employer under a written agreement of lease, a copy of which was annexed

to the Particulars of Claim, for a period of two years which was to endure until 17 June 1993. It was further alleged that the brakes had locked as a result of the defendant's negligence or breach of contract in carrying out a 12 500 km service and repairs to the motor cycle the previous day. It was alleged that the service and repairs had been effected pursuant to an oral agreement concluded between the plaintiff, representing the employer, and the defendant.

The defendant excepted to the plaintiff's Particulars of Claim on the ground that the claim fell within the purview of the Multilateral Motor Vehicle Accidents Act 93 of 1989 ("the Act"); that the plaintiff's allegations, if proved, would establish a claim against the Multilateral Motor Vehicle Accidents Fund ("the MMF") or its appointed agent so that, by virtue of Article 52 of the Statutory Agreement which is contained in the Schedule to the Act,

no claim could lie against the defendant arising out of the causes of action as pleaded. The exception was upheld with costs by **Roux J**, who granted an order setting aside the plaintiff's Particulars of Claim with leave to the plaintiff to file amended Particulars of Claim within 14 days. **Roux J** essentially held that the plaintiff was entitled to claim from the MMF or its appointed agent since he was a third party and his injuries allegedly arose out of the driving of a motor vehicle and were due to the negligence or other unlawful act of the defendant as owner of the motor vehicle or its servants. With the leave of the Court *a quo* the plaintiff now appeals to this Court.

Before I come to deal with the merits of the appeal there are two preliminary applications by the plaintiff to be disposed of. The first application was for condonation for the late lodging of the power of attorney and the appeal record. This application was

opposed by the defendant on the ground only that there were no prospects of success on appeal. For reasons which will become apparent later the application should be granted and the plaintiff ordered to pay the costs thereof. The second application was for an amendment to the Particulars of Claim so as to delete the allegation of ownership. This application was not proceeded with and should be dismissed and the plaintiff ordered to pay the costs thereof.

Article 52 in so far as it is material to this case, provides that when a third party is entitled under Chapter XII of the Agreement to claim from the MMF or its appointed 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 out of the driving of a motor vehicle by the owner thereof or by any other person with the consent of the owner, that third party shall not be entitled to claim

compensation in respect of that loss or damage from the owner or from the person who so drove the vehicle unless the MMF or its appointed agent is unable to pay the compensation. The requirements for attaching liability to the MMF or its appointed agent are provided for in Article 40. This Article, in so far as it is material to this case, provides that the MMF or its appointed agent is obliged to compensate "any person whomsoever" for any loss or damage suffered as a result of any bodily injury to himself -

> "caused by or arising out of the driving of a motor vehicle by any person whomsoever at any place within the area of jurisdiction of the Members of the MMF, if the injury ..... is due to the negligence or other unlawful act of the person who drove the motor vehicle ..... or of the owner of the motor vehicle or his servant in the execution of his duty".

In terms of Article 40 the plaintiff would be entitled to claim compensation from the MMF or its appointed agent if his injuries were :

(1) caused by or arose out of the driving of the motor cycle, and

(2) due to the negligence or other unlawful act of the owner of the motor cycle or his servant in the execution of his duty.

It is clear that in regarding the defendant as the "owner" of the motor cycle for purposes of the exception, the Court *a quo* overlooked the definition of "owner" in Article 1 of the Statutory Agreement. "Owner" is defined in Article 1 as follows -

" 'owner', in relation to -

(a) .....
(b) .....
(c) .....
(d) a motor vehicle under an agreement of lease for a period of at least twelve (12) months, means the lessee concerned."

A particular meaning is thus assigned to the word "owner" in the specific circumstances set out in sub-para (d). Since the lease in the present case was for a period of two years, the

employer as the lessee, and not the defendant, was the "owner" of the motor cycle for purposes of the Act. It is to be noted that sub-para (d) does not say that the word "owner" includes the lessee. It provides instead that in the particular context mentioned "owner" means the lessee concerned. In that particular context the word "owner" does not therefore bear its ordinary meaning namely "owner" as understood at common law. (Cf *Nkosana v Rondalia Assurance Corporation of S A Ltd and Others* 1976 (4) SA 67 (T) at 69C-70C.) In the particular context of the present case the word "owner" in Articles 40 and 52 of the Act therefore apply to the lessee to the exclusion of the common law owner. Since the plaintiff's action was not brought against the lessee it was thus not precluded by sec 52 of the Act. It follows that the exception should have been dismissed and that the appeal must succeed.

There remains the question of costs. The plaintiff has

succeeded on a point raised by this Court itself on appeal. There is a general rule that an appellant who succeeds in having the judgment substantially altered in his favour is entitled to costs of appeal to an extent dependent on the circumstances of the case. At the same time it must be borne in mind that the Court still has a discretion in awarding costs. (*Mahomed v Nagdee,* 1952 (1) SA 410(A) at 420E-H.) The fact that an appellant has succeeded on a point raised for the first time on appeal may have an effect on the costs of appeal and a relevant consideration would then be the course the matter would have taken had the point been raised earlier. See *Durban Corporation v Estate Whitaker* 1919 AD 195 at 203; *Estate Maree v Redelinghuis* 1943 AD 547 at 557-8; *Argus Printing and Publishing Co Ltd v Die Perskorporasie van Suid-Afrika Bpk; Argus Printing and Publishing Co Ltd v Rapport Uitgewers (Edms) Bpk* 1975 (4) SA 814 (A) at 823 E-H;

Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd 1977 (2) SA 425 (A) at 435 A-C; *Navidas (Pty) Ltd v Essop; Metha v Essop* 1994 (4) SA 141 (A) at 157 C-E.

In the present case I am satisfied that had the plaintiff taken the point in the Court *a quo* the exception would not have succeeded so that the costs of appeal would have been saved. Moreover, it was the plaintiff's inept pleading in the first place which led to the exception being taken. His case as pleaded was essentially that his injuries were caused by, or arose out of the driving of the motor cycle and that they were due to the defendant's negligence or breach of contract in servicing and repairing the motor cycle. For those delictual and contractual claims the allegation of ownership which, I take it, was intended to refer to common law ownership, was quite unnecessary and superfluous, as it was not an element of either claim. The plaintiff's belated

application before this Court to amend the Particulars of Claim by deleting the allegation of ownership, which I have dealt with above, clearly shows that that allegation should not have been made. On the other hand it may be said that had the defendant been aware that the lessee was the "owner" for purposes of the Act he would not have excepted to the Particulars of Claim or that he should first have delivered a notice in terms of Rule 23 (1) of the Uniform Rules of Court to ascertain the relevance of the allegation of ownership by which the exception would have been averted.

In all the circumstances it seems to me that the fairest order to make is that there should be no order as to costs both in the Court *a quo* and in this Court.

The following order is made :

1. Condonation for the late lodging of the power of attorney and the appeal record is granted and the plaintiff is ordered to pay the costs of the application for condonation;

2. The plaintiff's application for amendment of the Particulars of Claim is refused with costs;

3. The appeal succeeds but there will be no order as to costs. The orders of the Court *a quo* are set aside and the following order is substituted -

> "The exception is dismissed. There is no order as to costs."

W. VIVIER JA.

E M GROSSKOPF JA)
HOWIE JA)
ZULMAN JA)
PLEWMAN JA) Concur.