REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
[CAPE OF GOOD HOPE PROVINCIAL DIVISION]

CASE NO: 9730/1999

In the matter between:

BRUCE BENNET BELL Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

JUDGMENT DELIVERED ON 12th OCTOBER 2005

H.J. ERASMUS, J

Introduction

[1] The plaintiff instituted action against the defendant for damages arising from injuries suffered by the plaintiff when he was knocked down by a vehicle driven by an employee of the company for which he was working at the time. The company had its principal place of business and carried out its business activities at the Cape Town International Airport.

[2] The defendant raised a special plea to the effect that –

> Plaintiff's claim is invalid insofar as the purported insured vehicle that allegedly collided with Plaintiff on the 18th November 1994 and at or near the Cape Town

> International Airport is not a motor vehicle as defined in Section 1 of the Act, Road Accident Fund Act 56 of 1996.

[3] The parties agreed that the issue raised in the defendant's special plea is to be decided by means of a stated case in terms of Rule of Court 33(1) and (2). They further agreed that since the accident occurred in 1994, the relevant and applicable legislation is the Multilateral Motor Vehicle Accidents Funds Act 83 of 1989, in particular Articles 1 and 40 of the Agreement Establishing the Multilateral Motor Vehicle Accidents Fund (the "Agreement") (the Multilateral Motor Vehicle Accidents Fund will be referred to as the "MMF").

The stated case was argued before me by Mr JS Saner on behalf of the plaintiff, and Mr F Njokweni on behalf of the defendant.

[4] In Article 1 of the Agreement it is provided that, unless the context indicates otherwise –

> "**motor vehicle"** means any vehicle designed or adapted for propulsion or haulage on a road by means of fuel, gas or electricity and includes a trailer, a caravan, an agricultural or any other implement designed or adapted to be drawn by such motor vehicle.

In Article 40 of the Agreement it is provided that the MMF shall be obliged to compensate a person for any loss or damage which that person has suffered as a result of, *inter alia*, 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 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.

[5] The definition of a motor vehicle in the Agreement is similar to that which appeared in the Compulsory Motor Vehicle Insurance Act 56 of 1972 and the Motor Vehicle Accidents Act 84 of 1986, and to that subsequently included in the Road Accident Fund Act 56 of 1996. The definition, as it appeared in the various statutes, has been a fertile source of litigation.

[6] In *Road Accident Fund v Vogel* 2004 (5) SA 1 (SCA) at 4D—F Marais JA stated that the following propositions can be extracted from the decisions of the Supreme Court of Appeal in which the interpretation of the definition of "motor vehicle" has been considered:

> First, the road referred to in the definition is not just any kind of road however restricted public access, whether vehicular or on foot may be, but a road which the public at large and other vehicles are entitled to use and do use; in general parlance, a public road.
>
> Secondly, the mere fact that the item is being capable of being driven on a public road is not *per se* sufficient to bring it within the definition.

The word "designed" in its context means that the enquiry is what

> 'the ordinary, everyday and general purpose for which the [item] in question was conceived and constructed and how the reasonable person would see its ordinary, not some fanciful, use on a road.'

The appropriate test is whether a general use on public roads is contemplated.

(the words cited by Marais JA are from *Chauke v SANTAM Ltd* 1997 (1) SA 178 (A) at 183B).

[7] With regard to the suggestion in *Chauke v SANTAM Ltd, supra,* at 181B

that in the definition the words “designed for” have a less subjective connotation than the words “intended for”, Marais JA in *Road Accident Fund v Vogel,supra,*at 6C says –

> … that while the Legislature has not entirely ignored the subjective intention of the designer, it is not *per se* conclusive and the item’s objective suitability for use in the manner contemplated by s 1 is to be the ultimate touchstone.

[8] I turn now to the features of the vehicle in question. It is manufactured in Switzerland by Frech Brothers Ltd. In the manufacturers’ promotional brochure they describe themselves as “Manufacturers of Airport Equipment”. In the brochure, the vehicle, called a Transporter 7750A, is described as follows:

> Self-propelled vehicle for transportation and transfer of aircraft pallets and luggage containers. Designed for lengthwise throughloading, loading possible at either end. Equally well-suited for use with trailers with or without transfer outriggers.

In what follows I shall refer to the vehicle as a “flatbed transporter”.

[9] In an agreed statement of “Facts for the Stated Case” placed before the Court, and in the manufacturers’ brochure, the following features of the flatbed transporter are highlighted:

1. The vehicle is used at airports (in particular Cape Town Airport) on the airside; that is, on the tarmac and runway area where planes arrive and depart.

2. A flatbed transporter is designed and used for carrying baggage and cargo on the airside of an airport from its place of origin (within the confines of the airport, i.e. the airside) to next to an aircraft. The flatbed

of the loading area is divided into three lengthwise roller lanes, separated by two walking strips. The vehicle does not have a mechanism for lifting the baggage from the flatbed to the aircraft.

3. The vehicle has a raised seat, but it has no windscreen or cab for the driver. The controls and instruments are described in the manufacturer's brochure:

> Complete drive controls on panel at left of the steering wheel, including starter switch, light switch, fuel gauge, thermometer, oil pressure gauge, blinker switch with horn, as well as various warning and control lights.

It does not have a speedometer.

4. The vehicle has a water cooled Perkins 4.236 diesel engine. It can reverse and go forward and has a hydraulic transmission similar to a normal car's automatic transmission. It can attain a top speed of about 50km/h but its maximum permitted speed on the airport runway is 30km/h. It has direct power steering and power brakes on all four wheels, and a hand brake. It has four pneumatic tires.

5. The vehicle is fitted with a full set of lights, including headlights and lights and reflectors at the rear as well as a beacon light. It has parking lights on all four corners and brake lights at the back. The lighting system on the vehicle allows it to work 24 hours a day whether at night or during the day, and safely to move around the airport runway road system like any other vehicle which uses that system, by day or by night. It does not have a rearview or side mirror, nor is it equipped with safety belts. It is equipped with a hooter.

[10] The flatbed transporter operates on the airside of the airport and does not travel anywhere else. The area within which it operates is described as follows in

the agreed Statement of Facts:

1. The tarmac / runway area on the airside of the airport has a road system which functions for all material purposes the same as normal public roads, except that the public does not have access thereto. The roads are two way with a middle demarcation or dotted line; there are parking bays alongside the demarcated roads; there are normal traffic control signs such as stop signs, yield signs, pedestrian crossings, speed signs and the like;

2. No vehicle may drive anywhere else on the airside except on the demarcated roads and to and from parking bays or places of origin. [This unqualified statement in the agreed Statement of Facts is not quite correct: it is clear from the Statement of Facts that the flatbed transporter in the process of loading and unloading moves to a position next to a parked aircraft].

3. The airside roads at Cape Town International Airport are used by vehicles and pedestrians alike. There are pedestrian crossings at designated areas. There are also ACSA (Aircraft Company of South Africa) safety officers who ensure that vehicles obey the rules of the airside roads.

4. The roads on the airside are used by the following vehicles:

   Ordinary licensed motor vehicles and courier service “bakkies”;
   Ordinary licensed trucks from a food service company;
   Toyota Venture vehicles;
   Tractors with pallet support trailers and baggage trailers;
   Various types of transporters, high loaders and vehicles which the ACSA permit to travel on the airside;
   Various pedestrians (personnel and passengers);
   Passenger buses.

5. All the vehicles using the airside portion of the airport must have a special ACSA Airside Vehicle Permit. Most of the vehicles which travel on the airside do not have normal vehicle licenses, but rather the ACSA Airside Vehicle Permit.

6. All vehicles which drive on the airside of Cape Town International Airport require strict, regular service checks. These are not "*roadworthies"* but the vehicles have to comply with ACSA standards in this regard. They have regular services to this end. The flatbed transporter must also comply in this regard.

7. The driver of the flatbed transporter requires a valid driver's license code 10 to drive the vehicle on the airside of Cape Town International Airport.

[11] The collision in question occurred next to an aircraft and not on one of the airport roads.

[12] The flatbed transporter is a vehicle designed by its manufacturer for use on the airside of an airport. It does not travel anywhere else. Its principal purpose is to carry cargo (consisting of aircraft pallets and luggage containers) to and from the airport buildings and aircraft parked on the airport aprons.

[13] The flatbed transporter is designed for use on the roads to be found within the operational area of airports. The road system within the operational area of airports is designed to regulate the traffic on the airside of the airport, such traffic consisting of a wide variety of vehicles. There are, on the one hand, ordinary vehicles capable of high speeds such as "bakkies", Toyota Ventures and passenger buses. On the other hand, a variety of bulky and slow-moving vehicles also use the road system. Most of these are vehicles of a type which do not

normally travel on ordinary public roads. Such vehicles include mobile power-units (such as that which featured in *Road Accident Fund v Vogel, supra*), tractors with pallet support trailers and baggage trailers, high loaders and various types of trucks and transporters, including flatbed transporters. All users of the road system within the operational area of an airport require a special permit and the system is not open to the public. In my view, the road system within the operational area of an airport is not the kind of road envisaged by the definition in article 1 of the Agreement.

[14] It was suggested in argument that the fact that the flatbed transporter can be used on the road system within the operational area of an airport is indicative of the fact that the vehicle can also be used on a public road. The mere fact that a vehicle can be used on a public road does not mean that it was "designed" for propulsion on such a road. In *Matsiba v Santam Versekeringsmaatskappy Bpk* 1997 (4) SA 832 (SCA) at 834H it is said with reference to a lawnmower –

> Dat dit moontlik is om hierdie grassnyer op 'n pad te bestuur, is nie deurslaggewend nie.

In *Mutual and Federal Insurance Co Ltd v Day,*2001 (3) SA 775 (SCA), where there was uncontested evidence that a Komatsu FD60 forklift often traveled on public roads close to the yard in which it was principally employed, Navsa JA held –

> Applying the test set out in *Chauke's* case it appears to me to be clear that the Komatsu cannot be defined as a motor vehicle within the definition under consideration.

In *Road Accident Fund v Vogel, supra,* at 9A Marais JA says that the fact that

the mobile power unit in question in that case was in fact driven on a few occasions from one airport to another along public roads, proves no more than that it was possible to use its automotive power to travel relatively long distances.

[15] In the agreed Statement of Facts, and also in argument, certain features of the flatbed transporter which are common to "ordinary" motor vehicles are highlighted. I am in respectful agreement with Marais JA that this takes the matter no further and would echo his words which are, in my view, *mutatis mutandis*, applicable to the present case:

> They [the common features] were obviously required if the unit was to fulfil its function as a mobile power plant and be able to traverse terrain upon which people, aircraft, equipment and vehicles would be encountered. It does not follow that they were provided to enable the unit to be used on public roads other than the roads to be found within the operational area of airports.

(*Road Accident Fund v Vogel, supra,* at 8G—H)

[16] The absence of a speedometer, mirrors and safety belt; the lack of protection against the elements for the driver; the low speeds of which it is capable and, above all, the fact that is a vehicle designed by its manufacturer for use on the airside of an airport for the transport of cargo to and from stationary aircraft –

> … make it impossible to conclude that it was designed for general use upon public roads other than those which would be encountered within the operational area of airports.

(*Road Accident Fund v Vogel, supra,* at 8G—H)

[17] Mr Saner submitted that if a standard motor vehicle were to collide with a pedestrian or another vehicle within the operational area of the airport, the injured party would be able to claim compensation under the Agreement or other similar statutory provision. That being the case, Mr Saner contended, it would be highly anomalous to hold that where injuries were caused as a result of the negligence of the driver of a flatbed transporter, in the same place, no action would be available to the injured party against the MMF or similar fund. This kind of anomaly is adverted to in *Road Accident Fund v Mbendera and Others* [2004] 4 All SA 25 (SCA) at 29h in regard to an off-highway haul truck designed for use on specially prepared haul roads.

[18] The anomaly, if such it is, also has another face. If the mobile power unit in *Road Accident Fund v Vogel*, *supra*, or the forklift in *Mutual and Federal Insurance Co Ltd v Day, supra*, both vehicles which were admittedly on occasion driven on a public road, were to collide with a pedestrian or other vehicle on that road, no action would be available to the injured party against the MMF. If an ordinary vehicle were to collide with a pedestrian or other vehicle on the same road at the same place, an action would be available to the injured party against the MMF.

[19] When one has regard to the subjective intention of the designer, it is clear that the flatbed transporter was not designed by its manufacturers for propulsion or haulage on a road of the kind envisaged in article 1 of the Agreement. When one has regard to the objective suitability of the flatbed transporter for use in the manner contemplated in article 1 of the Agreement, it is clear that it cannot be reasonably regarded as suitable for such purposes.

[20] In my view, the flatbed transporter is not a motor vehicle as defined in the

Agreement.

[21] I make the following order:

The special plea is upheld with costs.

HJ ERASMUS. J