IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case no: 164/2005

In the matter between

SIAS SMITH **APPELLANT**

and

THE ROAD ACCIDENT FUND **RESPONDENT**

Coram: **MPATI DP, NAVSA, CONRADIE, LEWIS and HEHER JJA**

Heard: **27 FEBRUARY 2006**

Delivered: **17 MARCH 2006**

Summary: Motor Vehicle Insurance – Road Accident Fund Act 56 of 1996 – liability of Fund to indemnify negligent defendant.
Damages – Apportionment of Damages Act 34 of 1956, s 2(1) – whether Road Accident Fund a joint wrongdoer with negligent defendant.

Neutral citation: This judgment may be referred to as S Smith v RAF [2006] SCA 12 (RSA).

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JUDGMENT

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HEHER JA

HEHER JA:

[1] A plaintiff who is unable to identify a defendant cannot pursue a cause of action. Motor vehicle accidents lend themselves to drivers who disappear and leave their victims without recourse. In 1964 the legislature, recognizing the social inequity of such cases, provided for payment of compensation from a fund where the identity of the owner or driver could not be established. All succeeding legislation has made equivalent provision, that presently in force being s 17(1)(b) of the Road Accident Fund Act 56 of 1996. In this matter the appellant seeks to extend the right of recourse against the Road Accident Fund to a negligent driver who is sued by a third party (as defined in s 17(1)) in the circumstances described below.

[2] In the High Court of the Eastern Cape Mary Pedro claimed payment of R2 563 728,20 from the appellant as damages for injuries sustained by her while being conveyed as a fare-paying passenger in a vehicle negligently driven by the appellant. The amount of her claim took into account an amount of R25 000 paid by the Fund in accordance with its liability under s 18(1)(b) of the Act. The appellant defended the action. In his plea he alleged that the collision was caused wholly or in part by a Sentra vehicle and/or a Mazda vehicle and that the details of the registration, owners and drivers of the two vehicles were unknown to him.

[3] The appellant caused a third party notice in terms of rule 13(1) to be served on the Fund in which he alleged that the Fund was obliged by s 17(1) of the Act to compensate Pedro for the loss or damage she had suffered as a result of her bodily

injuries[1]. However, if the court were to find that he had negligently contributed to the incident and to the injuries thus sustained, then, so the appellant alleged, he and the Fund would be joint wrongdoers as against the plaintiff, save that he would be excused by the provisions of 21 of the Act, read together with 18, thereof from liability for the first R25 000,00 of any damages suffered by the plaintiff.

Accordingly the appellant sought a conditional order

'1. Declaring that the Defendant and the [Fund] are joint wrongdoers as against the Plaintiff;

2. Determining the respective degrees of blame of the Defendant and the [Fund];

3. Declaring that in the event of the Defendant effecting payment to the Plaintiff of such amount as might be awarded in favour of the Plaintiff against the Defendant, then and in that event the Defendant will be entitled to recover so much thereof as equates to the percentage degree of blame of the Defendant;

4. An appropriate award as to costs, including the costs of the Plaintiff's action against the Defendant.'

The Fund disputed the entitlement of the appellant to join it as a joint wrongdoer and to claim relief based on such a joinder. The dispute was tried between the Fund and the appellant as a preliminary issue at the trial.

[4] The court *a quo* upheld the objections of the Fund and dismissed the claims in the third party notice with costs. The judgment of Liebenberg J is reported *sub nom Smith v Road Accident Fund* at [2004] 4 All SA 579(E). The appellant now appeals with leave of that court against its order.

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[1] '17(1) The Fund or an agent shall-

(a) subject to this Act, 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) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,

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

[5] Certain propositions enunciated by the court *a quo* have been accepted by appellant's counsel as correct. They are supported by authority and the legislation and need merely to be stated.

1. The object of the Act is the payment of compensation in accordance with its terms for loss or damage wrongfully caused by the driving of motor vehicles.
2. The effect of the Act is to substitute the Fund as a defendant in place of the wrongdoer.
3. The liability of the Fund is to compensate a person (the third party) who has suffered loss or damage as a result of bodily injury to himself or herself or the death of or any bodily injury to any other person.
4. When the driver or owner of an offending vehicle cannot be identified s 17(1)(b) provides for a claim to be made against the Fund 'subject to any regulation made under s 26'.
5. The regulations which have been made under s 26 may only be invoked by the third party.
6. Certain of the regulations require strict compliance before the liability of the Fund can arise.[2]
7. No regulations have been published which may be invoked by or confer benefits on persons in the position of the appellant, ie defendants in proceedings under the Act.

[6] The appellant's counsel did not dispute that to grant the relief sought by his client would be to concede a right to claim against the Fund without the strict compliance with the regulations which is required of the third party before the Fund attracts liability. The court *a quo* described such a conclusion as 'unsustainable'. Given the reasons for the existence of strict requirements in unidentified vehicle cases[3] that was an appropriate criticism. Before us counsel was unable to urge any

[2] Eg reg 2(1)c; see *Road Accident Fund v Thugwana* 2004 (3) SA 169 (SCA).
[3] *Mbatha v Multilateral Motor Vehicle Accidents Fund* 1997 (3) SA 713 (SCA) at 718G-I.

good reason to favour a negligent driver/defendant above the third party. Nor did he explain why his client should be entitled to claim an indemnification in respect of a claim by the third party which the latter could not herself have recovered from the Fund (because of the limitations placed on the claim of a passenger).

[7] Faced with the legislative intention as it emerges from the propositions to which I have referred, counsel sought refuge in what he called a 'necessary implication'. As I understood it, the argument ran like this: the Apportionment of Damages Act 34 of
1956 confers a right upon a wrongdoer sued delictually to claim an apportionment from a joint wrongdoer; the unknown driver is a joint wrongdoer as against the third party; if the third party had instituted action relying on the negligence of the unknown driver the Fund would have stepped into the shoes of that driver; by joining the Fund the defendant is merely doing what the third party could have done, thereby enabling the court to determine who should pay compensation to the third party, a determination which is consistent with the purpose of the Act and the objects of the Fund; indemnification is merely 'the flip side' (counsel's phrase) of compensation. Thus, so the argument ran, the relief which the appellant claimed was inherent in the Act and necessary to ensure that its objects were not frustrated.

[8] Alternatively, so counsel submitted, his client's entitlement to an indemnification flowed from the clear wording of s 2(1) of the Apportionment of Damages Act.[4]

[9] In my view the submissions are contrived and untenable. I have drawn attention to the substance of s 17 of the Act, *viz* the compensation of victims of road accidents arising out of death or bodily injury. The appellant is not a victim and the

[4] '(1) Where it is alleged that two or more persons are jointly or severally liable in delict to a third person (hereinafter referred to as the plaintiff) for the same damage, such persons (hereinafter referred to as joint wrongdoers) may be sued

loss against

in the same action.’

which he seeks indemnification is purely pecuniary in nature. The designated beneficiary of the Fund is not the uninjured negligent driver but the victim of his driving. The Act and regulations manifest a clear and consistent intention in this regard. To imply the existence of a right in such a person to sue the Fund for a contribution or indemnity would fly in the face of reason and be contrary to the express terms of the Act. The limitation cannot have been accidental nor does the exclusion of persons in the position of the defendant give rise to an anomaly since it is fair to say that such a negligent driver does not even have a moral claim on the Fund.

[10] Counsel's reliance on the Apportionment of Damages Act is also misplaced. That statute does not, as counsel submitted, create a cause of action in s 2(1). What it does is to provide a means of sharing the burden of damages between joint wrongdoers in delict. Prima facie the Fund is not such a wrongdoer when an unidentified driver or owner is involved because its liability is essentially statutory, proof of a delict alone being, by reason of the regulations to the Act, wholly insufficient to establish a cause of action against it.[5] But the legislature has, in the circumstances of this appeal, put the matter beyond doubt by providing (in s 3 of the Apportionment of Damages Act[6]) that s 2 applies where a liability is imposed in terms of the Road Accident Fund Act. While the Fund is a person on whom liability is imposed in circumstances contemplated in that Act to the third party, it is not, as I have found, under any liability to a negligent driver who inflicts loss or damage upon a third party. The consequence is that the Fund cannot be a joint wrongdoer with the appellant in the circumstances of this appeal.

[5] I express no opinion as to the correctness of the opposite conclusion reached by Du Plessis AJ in *Maphosa v Wilke en andere* 1990 (3) SA 789(T) at 798A-G in relation to the liability of the Fund when the driver is identifiable.

[6] 'The provisions of section two shall apply also in relation to any liability imposed in terms of the Motor Vehicle Accident Act, 1986 (Act 84 of 1986), on the State or any person in respect of loss or damage caused by or arising out of the driving of a motor vehicle.'

[11] The appeal has no merit. It is dismissed with costs.

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J A HEHER
JUDGE OF APPEAL

MPATI DP)Concur
NAVSA JA)
CONRADIE JA)
LEWIS JA)