THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 276/2017

In the matter between:

THE ROAD ACCIDENT FUND **APPELLANT**

and

MOGAMAT RIDAA ABRAHAMS **RESPONDENT**

Neutral citation: *Road Accident Fund v Abrahams* (276/2017) [2018] ZASCA 49 (29 March 2018)

Coram: Navsa, Lewis and Willis JJA and Makgoka and Hughes AJJA

Heard: 21 February 2018

Delivered: 29 March 2018

Summary: Road Accident Fund Act 56 of 1996 : section 17: whether a driver in a single motor vehicle accident is entitled to claim under the provisions of section 17 of the Road Accident Fund Act.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Salie-Hlophe J) judgment reported *sub nom Abrahams v Road Accident Fund* 2016 (6) SA 545 (WCC).

The appeal is dismissed with costs, including costs attendant upon the employment of two counsel.

JUDGMENT

Makgoka AJA (Navsa, Lewis and Willis JJA and Hughes AJA concurring)

[1] The issue in this appeal is whether a driver involved in a single motor vehicle accident, and who was not an employee of the owner of the insured vehicle, is entitled to claim compensation from the appellant, the Road Accident Fund, in terms of the Road Accident Fund Act 56 of 1996 (the Act).

[2] On 5 February 2011 the respondent was involved in a single motor vehicle accident. The vehicle he was driving (the insured vehicle) was owned by his father's employer, Secuco Food Manufacturers (the insured owner). The accident occurred as a result of a tyre burst which caused the insured vehicle to leave the roadway and roll-over. The respondent sustained severe bodily injuries as a result of the accident. He subsequently instituted action in the Western Cape Division of the High Court against the appellant for damages. He alleged that the accident occurred as a result of the insured owner failing to maintain the tyres of the insured vehicle in a safe and roadworthy condition.

[3] Initially the appellant filed a plea to the respondent's particulars of claim, but it subsequently added a special plea. The special plea comprised a main and alternative plea. The main plea is premised on three grounds. First, it asserted that because there was no employer-employee relationship between the respondent and the insured owner, the respondent was not entitled to claim any compensation in terms of the Act. Second, it alleged that the respondent's use of the insured motor vehicle was fortuitous and/or unauthorized. Lastly, the appellant contended that no legal duty could be ascribed to the insured owner in relation to the respondent. In the alternative special plea, the appellant denied liability on the basis that the collision involved a single vehicle accident; and the respondent was solely and entirely negligent in causing the collision.

[4] The special plea came before the court a quo on 12 June 2016.[1] The respondent led the evidence of his father, ostensibly to meet the appellant's assertion that his driving of the insured vehicle at the time of the accident was fortuitous and unauthorized. The essence of the evidence by the respondent's father is as follows. His duties included the delivery of baked goods on behalf of the insured owner to various retailers. He had a standing arrangement with the insured owner in terms of which he occasionally requested the respondent to make deliveries on his behalf, when he was unable to do so himself. It was the same on the day of the collision. The upshot of his evidence is therefore that at the time of the accident, the respondent was driving the insured vehicle with the consent of the insured owner. This was uncontested by the appellant. No other witnesses testified.

[5] The court a quo dismissed the appellant's special plea with costs. This conclusion rested mainly on the court a quo's finding that the respondent's driving of the insured vehicle was with the consent of the insured owner, and in the capacity of a sub-contractor. This, according to the court a quo, established a basis for liability.

[1] In terms of a determination made earlier by a different judge in a case-management allocation, liability and the merits were separated in terms of rule 33(4) of the Uniform Rules of Court, and only the special plea was to be adjudicated. All other issues, including causal negligence and locus standi, stood over for later determination.

Aggrieved at the dismissal of its special plea, the appellant appeals with leave of this court.

[6] It is convenient to set out the relevant provisions of the Act, which are contained in sections 17, 18 and 19. The gateway for compensation under the Act is s 17(1), which establishes the liability of the appellant. Section 18(2) limits liability in certain circumstances, while s 19 excludes liability in certain cases. Section 21(1), on the other hand, abolishes common law claims against the owner.

[7] Section 17(1) reads:

'The fund or an agent shall-

(a) ….

(b) ….

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….' (my emphasis.)

[8] Section 18(2) reads:

'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 ….'

[9] Section 19 provides that the appellant shall not be obliged to compensate any person in terms of s 17 for any loss where neither the driver nor the owner of the motor vehicle concerned would have been liable but for s 21. Section 21(1), in turn, abolishes certain common law claims. It provides that no compensation in respect of bodily injury to or the death of any person caused by or arising from the driving of a

motor vehicle shall lie against the owner of a motor vehicle or the employer of the driver.

[10] In this court, counsel for the appellant submitted that the respondent's claim is not covered by the provisions of the Act. Counsel submitted further that the only instance where a driver involved in a single motor vehicle accident would be entitled to claim against the appellant is in terms of s 18(2) of the Act. This is where persons conveyed in or on the insured vehicle are employees of the driver or owner of the vehicle. Because the respondent was not being conveyed in or on the insured vehicle as an employee of the insured owner, so went the argument, s 18(2) did not apply to the respondent.

[11] In this context, so the argument proceeded, a driver in a single motor vehicle accident, such as the respondent, does not qualify as a 'third party' for purposes of the Act. In the circumstances, it was contended, the respondent's claim did not fall within the ambit of the Act, but lies at common law. Moreover, it was submitted that because such a claim is not excluded by s 21 of the Act, it would be against public policy to apply an extensive interpretation of the Act to create a remedy for claimants under such circumstances. In the alternative, it was argued that the bodily injuries and loss suffered by the respondent were neither caused by nor arose from the driving of the insured vehicle, but resulted from a tyre burst.

[12] I do not agree with the construction placed on s 18(2) by the appellant's counsel. The sub-section does not create a right of action. Its purpose, as is clear also from the heading of the section, is to limit certain claims under s 17 where the third party is conveyed in or on the insured vehicle, and who was an employee of the driver or owner of the insured vehicle. In those instances, the third party's claim lies in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) and the Act. The third party's compensation recovered in terms of COIDA is to be deducted from the award made in terms of the Act, to avoid double compensation. It is common cause that the respondent was not an employee of the insured owner at the time of the accident, and therefore s 18(2) and COIDA are not

applicable to him. But does this mean that he does not have a claim in terms of the Act? I consider that question below.

[13] A useful starting point is to consider the effect of s 17(1), read with s 21(1). As stated already, the latter section abolishes the right of an injured claimant to sue the wrongdoer at common law. Section 17(1), in turn, substitutes the appellant for the wrongdoer. It does not establish the substantive basis for liability. The liability is founded in common-law (delictual liability). Differently put, the claim against the appellant is simply a common-law claim for damages arising from the driving of a motor vehicle, resulting in injury. Needless to say, the liability only arises if the injury is due to the negligence or other wrongful act of the driver or owner of the motor vehicle. See Jansen JA's explanation in *Da Silva and Another v Coutinho* 1971 (3) SA 123 (A) at 139A-H, with regard to the provisions of the Motor Vehicle Insurance Act 29 of 1942 (one of the predecessors to the Act).

[14] Corbett JA summed up the position in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A). Explaining, with reference to ss 21, 23 and 27 of the Compulsory Motor Vehicle Insurance Act 56 of 1972 (one of the predecessors to the Act) he stated the following at 841E-G:

'To a great extent the Act represents an embodiment of the common-law actions to damages for bodily injury and loss of support where the bodily injury or death is caused by or arises out of the driving of a motor vehicle insured under the Act and is due to the negligence of the driver of the vehicle or its owner or his servant. Then in place of, and to the exclusion of, the common- law liability of such persons is substituted the statutory liability of the authorized insurer. Sections 21, 23(a) and 27 indicate that the statutory liability of the authorized insurer is no wider than the common-law liability of the driver or owner would have been but for the enactment of the Act (indeed in certain instances it is narrower – see ss 22 and 23(b)) and that this statutory liability is dependent upon the existence of a state of affairs which would otherwise have given rise to such a common-law liability. [T]he negligence upon which liability under s 21 hinges is the *culpa* of the common law and, save in certain specified instances, the compensation claimable under s 21 is assessed in accordance with the common-law principles relating to the computation of damages.'

[15] I now consider whether the respondent's claim falls within the ambit of s 17(1). There are six elements to the section, which can conveniently be broken down as follows:

(a) the liability is towards a 'third party';

(b) who had suffered any loss or damage;

(c) the loss resulted from bodily injury to himself or herself;

(d) the loss arose from the driving of a motor vehicle;

(e) the injury was due to negligence or other wrongful act;

(f) the negligence or wrongful act must be that of:

(i) the driver; or

(ii) the owner of the motor vehicle; or

(iii) of his or her employee.

[16] That the respondent meets the elements in (b); (c); (e); and (f) is not disputed. The appellant disputes those in (a) and (d). I consider them in turn.

[17] It was submitted on behalf of the appellant that the respondent was the driver, and as such, cannot be a 'third party' for the purposes of s 17. He could only be a 'third party' had he been involved in a multiple vehicle collision arising from the negligence of the insured driver of another vehicle. I disagree. Section 17 defines a third party as being 'any person'. This undoubtedly is wide enough to include a driver involved in a single motor vehicle accident, such as the respondent, provided the injury arises from the negligence or wrongfulness of the owner, among others.

[18] The appellant focuses on the fact that the respondent was the driver, who, in its view, was solely negligent in causing the accident. This explains why the respondent is described in the appellant's heads of argument as a 'delinquent driver'. But the negligence or otherwise of the respondent does not arise in the present enquiry. As a consequence of its focus on the respondent, the appellant loses sight of the pertinent provisions of s 17, that liability arises from, among others,

blameworthy conduct of the owner of the insured vehicle. In some instances, this may have nothing to do with the actual driving.

[19] As was pointed out by Corbett J in *Wells and Another* v *Shield Insurance Co Ltd and Others* 1965 (2) SA 865 (C) at 867H, the section (the predecessor to s 17) lays down two prerequisites for liability on the part of a registered insurance company for damages suffered by a third party as a result of bodily injury. These are (i) that the injury was caused by or arose out of the driving of the insured motor vehicle and (ii) that the injury was due to the negligence or other unlawful act of the driver of the insured vehicle, or the owner or his servant. In *Santam Versekeringsmaatskappy Bpk v Kemp* 1971 (3) SA 305 (A) at 332C (albeit in a dissenting judgment) Jansen JA observed that there are two separate enquiries, a fact which is sometimes lost sight of because in most cases the injury is caused by the negligent driving of the insured vehicle.

[20] It is clear that the appellant has fallen into the pitfall which Jansen JA cautioned against. As correctly submitted by counsel for the respondent, it is the negligent or wrongful conduct of the owner of the insured vehicle that the respondent relies upon. As such, the focus of liability is not on the driver, but on the insured owner. The facts of this case differ from what is usually encountered, where two vehicles collide. In such instances, the appellant steps into the shoes of the negligent driver. Here, the appellant steps into the shoes of the insured owner, whose conduct is alleged to have been negligent. For all the above reasons, I have no difficulty in concluding that the respondent falls within the definition of a ‘third party.’

[21] I now consider whether the respondent’s injuries were caused by or arose from the ‘driving’ of a motor vehicle, as required in s 17. The term ‘driving’ is not defined in the Act and it must therefore be given its ordinary meaning. It was submitted on behalf of the appellant that the respondent’s injuries were not caused by the driving, but from the unroadworthy condition of the insured vehicle, namely a worn tyre that burst. To my mind, there is no merit in this submission. The respondent’s claim is based on the alleged wrongful and negligent conduct of the

insured owner who failed to maintain the tyres of the insured vehicle in a safe and roadworthy condition, which resulted in the tyre burst, causing the accident.

[22] In *Wells*, at 870A-H, Corbett J recognised that the negligence or unlawful conduct may consist of some antecedent or ancillary act or ommission on the part of the driver or owner of the vehicle such as failing to maintain the vehicle in a roadworhty condition. He further stated that '[w]hether the causal connection between the injury and the driving would be found would depend upon the particular facts of the case and whether, applying ordinary, common-sense standards, it could be said that the causal connection between the death or injury and the driving was sufficiently real and close to enable the Court to say that the death or injury did arise out of the driving'.

[23] Jansen JA explained in *Santam* at 332D:

'It can however happen that even in the instance of blameless driving of a motor vehicle, injury or death may result, for example as a result of a wheel which becomes dislodged. If the dislodgment, and the resultant death or injury is due to the negligence of the owner (for example because he did not tighten it properly) then the insurer of the particular vehicle is liable because death or injury occurred, despite the blameless driving…. (My translation from Afrikaans.)

See also *Barkett v SA Mutual Trust and Assurance Co Ltd* 1951 (2) SA 353 (A).

[24] For present purposes it must be assumed that the respondent would prove his allegations against the insured owner at the trial. It is clear that the insured motor vehicle was being driven at the time of the accident. The tyre burst was dependent on this fact. As a result, the causal connection between the injuries suffered by the respondent and the driving is sufficiently real. In the circumstances there is no merit in the appellant's contentions.

[25] In sum, I conclude that respondent's claim falls within the ambit of s 17 of the Act. Section 18 of the Act is not applicable in the circumstances of this case. The court a quo was apparently of the erroneous view that for the respondent's claim to be within the ambit of the Act, he had to base his claim on s 18, hence its reasoning

that the respondent was a contractor on behalf of the insured owner at the time of the accident. That was not necessary. The liability of the appellant for the injuries sustained by the respondent must be found in the plain wording of s 17, read together with s 21 of the Act.

[26] Before I conclude, it is regrettable that this court has, once again, to give guidance on how the procedure set out in rule 33(4) of the Uniform Rules of Court should be applied.[2] The process of dealing with a matter under rule 33(4) was clarified in *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) para 3:

'Rule 33(4) of the Uniform Rules ─ which entitles a Court to try issues separately in appropriate circumstances ─ is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked, even though, at first sight, they might appear to be discrete. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately. But, where the trial Court is satisfied that it is proper to make such an order ─ and, in all cases, it must be so satisfied before it does so ─ it is the duty of that Court to ensure that the issues to be tried are clearly circumscribed in its order so as to avoid confusion.'

See also *ABSA Bank Ltd v Bernert* 2011 (3) SA 74 (SCA) para 21 where the following was stated:

'I[f] for no reason but to clarify matters for itself a court that is asked to separate issues must necessarily apply its mind to whether it is indeed convenient that they be separated, and if so, the questions to be determined must be expressed in its order with clarity and precision.'

[27] It is by no means clear that these principles informed the decision to separate issues in this matter. In my view, the issue raised in the special plea is inextricably linked with the separated issues of locus standi, negligence, and causation. They could have been ventilated in one hearing. This should have been clear to the court a

[2] See for example, *Firstrand Bank v Clear Creek Trading* [2015] ZASCA 6 paras 9-10; *Feedpro Animal Nutrition v Nienaber* [2016] ZASCA 32 para 15; *Cilliers & others v Ellis & another* [2017] ZASCA 13 paras 12-14; and *Transalloys v Mineral-Loy* [2017] ZASCA 95 para 6.

quo at the commencement of the trial. I appreciate that the decision was made in a pre-trial hearing by a different judge. In my view, there was nothing that precluded the court a quo from re-visiting the earlier determination by another judge, if it was of the view that the special plea should be heard in one hearing with the other issues.

[28] For the reasons set out above, the appeal is dismissed with costs, including costs attendant upon the employment of two counsel.

_____

T M Makgoka
Acting Judge of Appeal

APPEARANCES

For Appellant:	D Potgieter SC (with him C Bisschoff)
	Instructed by:
	Z Abdurahman Attorneys, Cape Town
	Maduba Attorneys, Bloemfontein
For Respondent:	JW Olivier SC (with him WS Coughlan)
	Instructed by:
	DSC Attorneys, Cape Town
	Rosendorff, Reitz, Barry Attorneys, Bloemfontein