CASES / VONNISSE

SCA CLARIFIES THE TERM "MOTOR VEHICLE" IN ROAD ACCIDENT FUND ACT 56 OF 1996:

The Road Accident Fund v Mbele [2020] ZASCA 72

1 Introduction

The Supreme Court of Appeal (SCA) in *The Road Accident Fund v Mbele* [2020] ZASCA 72 (SCA judgment) had to decide whether a large industrial vehicle called a Reach Stacker was a motor vehicle as contemplated in section 1 of the Road Accident Fund Act 56 of 1996 (the Act). This judgment is important, not only because it paves the way for the respondent and others like the respondent to claim compensation from the Road Accident Fund in cases of injury or death, but also, because it provides clarity on the test that the court uses to determine whether a vehicle in question is a motor vehicle as contemplated in the Act. The features, purpose and intended use of the vehicle in question play a pivotal role in the determination of whether a vehicle is a motor vehicle. The SCA indicated that the Reach Stacker in question was equipped with full road-going lighting, including tail lights, indicators, brake lights and reverse lights. Furthermore, it was fitted with windscreen wipers and washers, a hooter, and a handbrake. According to the court, it was clear from its features that the Reach Sacker fitted the description of a "motor vehicle" as defined in the Act.

2 Facts

In February 2010, Mr Simphiwe Robert Makutoana (the deceased) was employed as a stevedore in the Cape Town harbour. On 20 February 2010, the deceased was a pedestrian at the Multipurpose Terminal at Cape Town Harbour and was knocked over by a large industrial vehicle known as a "Reach Stacker" while he was going about his work (*Mbele v Road Accident Fund* [2019] ZAWCHC 5; 2019 (4) SA 65 (WCC) (High Court judgment) par 1–2). The Reach Stacker was operated by one Eugene Andrea when the accident occurred. The deceased succumbed to his injuries the following day and his widow, Thandiswa Linah Mbele (the respondent) instituted an action for loss of support in the Western Cape High Court against the Road Accident Fund (RAF) for the payment of damages for the loss of support

suffered by herself personally and her three children as a result of the death of the deceased (High Court judgment par 2).

The respondent's claim was based on the provisions of section 17(1) of the Act. The respondent alleged that the deceased had died as a consequence of the conduct of Eugene Andrea who operated the Reach Stacker in a negligent manner at or near the Multipurpose Terminal in the harbour (High Court judgment par 2).

The RAF disputed liability and alleged, *inter alia*, that the Reach Stacker was not a motor vehicle as defined in the Act. The RAF asserted that the incident in which the deceased died did not fall within the parameters of the Act. The matter came before Desai J in the court *a quo* and the parties agreed that, in terms of Rule 33(4), the court would first determine whether the Reach Stacker was a vehicle as defined in the Act. All other issues were held in abeyance pending such determination (High Court judgment par 3).

Desai J found that the Reach Stacker was not a motor vehicle as defined under section 1 of the Act and ordered Ms Mbele to pay the RAF's costs in the proceedings before him (High Court judgment par 4). She was granted leave by Desai J to appeal to the full bench of the same division. A full bench (Gamble, Le Grange JJ and Sievers AJ concurring) upheld the appeal. The court concluded that the Reach Stacker with registration number CA825213, which had collided with the deceased, was a motor vehicle as defined in section 1 of the Act. The court further held that the appeal should succeed with costs and the order of the court *a quo* be set aside. The court ordered the RAF to pay Ms Mbele's costs, including the qualifying expenses of her expert witness, Mr Barry Grobbelaar (High Court judgment par 33).

3 Issue

The issue before the SCA was whether a large industrial vehicle called a Reach Stacker is a motor vehicle as contemplated in section 1 of the Act. The appellant (the RAF) contended that a Reach Stacker is not a motor vehicle, and that the respondent's claim was not competent under the Act. The precise nature of a Reach Stacker was important because it determines the competence of a claim under the Act by a person who alleges that he or she has suffered damage or loss resulting from a collision with a Reach Stacker (SCA judgment par 1).

4 SCA Judgment

Zondi JA (Maya P, Plasket and Nicholls JJA and Eksteen AJA concurring) held that the definition of a motor vehicle in the Act lays down three requirements: (a) the vehicle must be propelled by fuel, electricity or gas, and (b) must be designed for propulsion (c) on a road. Regarding the first requirement, the SCA held that it was clear from its features that the Reach Stacker was propelled by means of diesel fuel; and the evidence was that it transported containers on roads within the port premises (par 5).

Zondi JA held that the test as to whether a vehicle is designed for use on a road is objective (par 12). The test is whether a reasonable person viewing the vehicle in question would come to the conclusion that the vehicle, when

used on a road, will not create a danger to other road users (par 12). In this regard, design features such as lights, indicators, field of vision, hooter, maximum speed and engine output are all considerations that will be relevant in deciding whether or not there is compliance with the definition (par 12).

Zondi JA held that, objectively viewed (regarding the second and third requirement) and despite its imposing and gigantic size in terms of mass, width, length, height and low speed limitation, it could not be said that driving the Reach Stacker on a road used by pedestrians and other vehicles would be extraordinarily difficult and hazardous (par 25). This is on the basis that it was fitted with all the controls and features required to be fitted to a motor vehicle so as to enable it to be used with safety on a road outside the container yard and port terminal where it primarily operated (par 26). The Reach Stacker also had a number of features of a motor vehicle and was driven in a manner similar to a motor vehicle. Moreover, because of its operation on terminal premises, the Reach Stacker was required to be registered and was registered for use on public roads in terms of road traffic legislation (par 27).

The SCA accordingly held that the Reach Stacker was a motor vehicle as defined in section 1 of the Act, and the appeal was accordingly dismissed with costs, including the costs of two counsel employed (par 29).

5 Discussion

The court had to determine whether the Reach Stacker was a vehicle as defined under section 1 of the Act.

Section 1 of the Act is the definitions clause and a "motor vehicle" is there defined as:

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

The definition lays down three requirements for a vehicle to qualify as a motor vehicle for purposes of the RAF Act. The vehicle (a) must be propelled by fuel, electricity or gas, and (b) must be designed for propulsion (c) on a road. Such a vehicle includes a trailer, caravan or implements designed to be drawn by a motor vehicle as defined (par 5).

5 1 The vehicle must be propelled by fuel, electricity or gas

The Reach Stacker in question was designed primarily for lifting, manoeuvring and stacking containers in the container yards of small terminals or medium-sized ports. The Reach Stacker is able to transport containers for short distances relatively quickly and stack them. It is also able to operate in tight spaces. The Reach Stacker consists of a boom capable of being extended and raised hydraulically (par 6). The vehicle has six wheels. It has rear-view mirrors and is equipped with full road-going lighting, including high-beam and low-beam headlights, tail lights, indicators,

brake lights, reverse lights and position lights. It is fitted with windscreen wipers and washers, a hooter and a handbrake (par 7). The Reach Stacker is fitted with a four-speed automatic gearbox with four forward and four reverse gears. The Reach Stacker is registered for use on public roads and has the registration number CA825213. It is fitted with a Scania six-cylinder, four-stroke diesel engine with a 12-litre capacity (par 8).

It is evident from the characteristics and features of the Reach Stacker described above that the vehicle is self-propelled. It is not pulled (or hauled) by any other vehicle. The question that then arises is whether the Reach Stacker is a "vehicle designed or adapted for propulsion … on a road" (par 9).

5 2 On a road

The term "road" is not defined in the Act. Therefore, the term "road" must be given its ordinary meaning, which is: "a line of communication, especially a specially prepared track between places for use by pedestrians, riders and vehicles" (see *Chauke v Santam Ltd* 1997 (1) SA 178 (A) 181G; *Bell v Road Accident Fund* 2007 (6) SA 48 (SCA) par 10).

The legislature has not restricted the meaning of "road" to a "public road". In *Road Accident Fund v Mbendera* 2004 (4) All SA 25 (SCA), the court held conclusively that the Act applies throughout the Republic of South Africa and not just on public roads (*RAF v Mbendera supra* par 13). To this extent, it can therefore be said that the Reach Stacker meets two of the requirements of the definition section – that is, "propulsion by diesel on a road".

5 3 The vehicle must be designed for propulsion

There are a number of cases decided at appellate level that have dealt with the definition of "motor vehicle" in the Act, all with particular reference to the size and nature of the vehicle (*Chauke v Santam Ltd supra; Mutual and Federal Insurance Co Ltd v Day* 2001 (3) SA 775 (SCA); *RAF v Mbendera supra*; *Road Accident Fund v Vogel* [2004] ZASCA 6; 2004 (5) SA 1 (SCA); *Road Accident Fund v Van den Berg* 2006 (2) SA 250 (SCA) and *Bell v RAF supra*). As the case law has developed, the focus has shifted from the nature of the vehicle in question, and its utility, to the areas of operation and whether these are to be construed as public roads, roads generally or otherwise (High Court judgment par 8).

In *Chauke v Santam Ltd* (*supra*), a case that concerned whether a forklift was a motor vehicle, the learned Judge Olivier JA conducted a detailed assessment of the relevant statutory provisions and applicable case law since 1942, the year in which compulsory third-party insurance was introduced into South Africa through legislation. The learned Judge stated that while there was some initial statutory disharmony in relation to the definition of a "motor vehicle", this was clarified under the Compulsory Motor Vehicle Insurance Act 56 of 1972, in which the definition was formulated in the same terms as one finds today in section 1 of the Act (High Court judgment par 9).

Olivier JA in *Chauke v Santam Ltd* (*supra*) considered South African and foreign case law and stated: "just because a vehicle can be used on a road by no means implies that it was 'designed for propulsion on a road'". The learned Olivier JA concluded that the test to be applied to determine whether a vehicle is a motor vehicle as defined in the Act is as follows:

> "The correct approach to the interpretation of the legislative phrase quoted above is to take it as a whole and to apply to it an objective, common sense meaning. The word 'designed' in the present context conveys the notion of the ordinary, everyday and general purpose for which the vehicle in question was conceived and constructed and how the reasonable person would see its ordinary, and not some fanciful, use on a road. If the ordinary, reasonable person would perceive that the driving of the vehicle in question on a road used by pedestrians and other vehicles would be extraordinarily difficult and hazardous unless special precautions or adaptation were effected, the vehicle would not be regarded as a 'motor vehicle' for the purposes of the Act. If so adapted such vehicle would fall within the ambit of the definition not by virtue of being intended for use on a road but because it had been adapted for such use." (*Chauke v Santam Ltd supra* par 183 A–D).

According to Zondi JA, whether a vehicle is designed for use on a road is an objective test (*Chauke v Santam Ltd supra).* The question, therefore, is whether a reasonable person viewing the vehicle in question would consider that such a vehicle when used on a road would not create a danger to other road users. Consequently, the design features of the vehicle in question (the Reach Stacker) – such as the lights, indicators, field of vision, hooter, maximum speed and engine output – are all considerations that apply in deciding whether or not there is compliance with the Act (SCA judgment par 12).

The courts have been consistent in their interpretation and application of the test established by the court in *Chauke v Santam Ltd* (*supra*), which concerned a forklift that was not used on a road. It was used in and out of the warehouse and in the yard. Outside the warehouse, it was not required to move along demarcated lines or lanes. The evidence was also that when the need arose to transport the forklift from one locality to another, this was done with a trailer. It could not be registered in terms of the statutory licensing rules unless modified. The forklift drivers were not allowed to drive out of the premises. If a forklift is driven on a public road, according to the witness, "[y]ou could knock somebody over". Olivier JA confirmed the finding of the trial court in that matter – namely that the forklift in question was not a motor vehicle as defined under the applicable Act (*Chauke v Santam Ltd supra* par 183 A–D).

In *RAF v Vogel* (*supra*), Marais JA expressed doubt about the soundness of the suggestion in *Chauke v Santam Ltd* (*supra*) that the words "designed for" have a less subjective connotation than the words "intended for". Marais JA stated:

> "Indeed, when Olivier JA ultimately formulated his own interpretation (*Chauke v Santam Ltd supra* 183B) of what the word 'designed', in the context of the Act, conveyed, he posited both a subjective and an objective test. To say that the word 'conveys the ordinary, everyday and general purpose for *which the vehicle was conceived and constructed*' [court's own emphasis] is to postulate a subjective test. To add 'and how the reasonable person would see its

> ordinary, and not some fanciful, use on a road' postulates an objective test." (*RAF v Vogel supra* par 10)

Marais JA stated that it was clear from the *Chauke* court's interpretation of section 1 of the Act that the road referred to in the definition was not just any kind of road but a road that the public at large and other vehicles are entitled to use and do use, and which may be considered to be a public road. Marais JA concluded that the mere fact that an item is capable of being driven on a public road is not *per se* sufficient to bring it within the definition (*RAF v Vogel supra* par 3–4).

Marais JA pointed out that the appropriate test is whether general use on public roads is contemplated. The learned Judge stated:

> "If, objectively regarded, the use of the item on a public road would be more than ordinarily difficult and inherently potentially hazardous to its operator and other users of the road, it cannot be said to be a motor vehicle within the meaning of the definition (*Chauke v Santam Ltd supra* 183C). (I infer that this is because it then cannot reasonably be said to have been designed for ordinary and general use on public roads." (*RAF v Vogel supra* par 6)

He went on to add:

> "That an item may have been designed primarily for a purpose not covered by the definition of motor vehicle in the Act does not necessarily disqualify it from being regarded as a motor vehicle as defined. If it was also designed to enable it to be used on public roads in the usual manner in which motor vehicles are used and if it can be so used without the attendant difficulties and hazards referred to in para [6], it would qualify as a motor vehicle as defined. In short, such latter use need not be the only or even the primary use for which it was designed." (*RAF v Vogel supra* par 8; see also *Mutual and Federal Insurance Co Ltd v Day supra* par 14)

In *Bell v RAF* (*supra*), the plaintiff (a baggage controller at Cape Town International Airport) was injured when knocked over by a "flatbed transporter" operating on the airport apron – by definition, an area with restricted access to the public. The court held that a "flatbed transporter" operating on the airside area of the airport was a motor vehicle. It was used at the airport to "transport baggage cargo from its place of origin within the confines of the terminal to next to an aircraft, on the airside of the airport" (*Bell v RAF supra* par 6). The flatbed transporter was described by Theron AJA as follows:

> "According to the manufacturer's brochure admitted in evidence, it is a self-propelled vehicle designed for the transportation of baggage and cargo. It is used at airports to transport baggage and cargo from its place of origin within the confines of the terminal to next to an aircraft on the airside of the airport (the tarmac and runway area where the planes arrive and take off). The flatbed transporter operates only within the confines of the airport." (*Bell v RAF* par 6)

In *Mutual and Federal Insurance Co Ltd v Day* (*supra*), a "Komatsu forklift" was held not to be a motor vehicle as it posed a hazard to other road users and steering it in traffic was considered extraordinarily difficult and hazardous (par 14).

In *RAF v Van den Berg* (*supra*), the court had to consider a claim under the Act for damages arising out of a collision involving a piece of heavy-duty

road building equipment called a "pneumatic tyre roller*"* (or PTR), which, like a steam-roller, is used to compact the road surface in the construction phase of road-building. Streicher JA stated his understanding of the comments made by the court in *Chauke v Santam Ltd* (*supra*). He disagreed with the interpretation by Marais JA in *RAF v Vogel* (*supra*). Streicher JA stated that Olivier JA in *Chauke v Santam Ltd* (*supra*) made it clear that he was of the view that "an objective, common sense meaning" should be applied to the phrase "designed for". According to Streicher JA, when Olivier JA immediately thereafter said that the word "designed" in the present context conveys the notion of the ordinary, everyday and general purpose for which the vehicle in question was conceived and constructed, he was, in Streicher JA's view, referring to the general purpose for which the vehicle, objectively determined, was conceived and constructed (*RAF v Van den Berg* par 7). Streicher JA went on to add that in *RAF v Van den Berg* (*supra*) it was common cause that the PTR (pneumatic tyre roller) was used to compact road surfaces. According to Streicher JA, it did not follow that it was not designed to be used for other purposes as well. If one of those other purposes for which it was designed is to travel on a road, it falls within the definition and qualifies as a motor vehicle as defined (*RAF v Van den Berg* par 8). Streicher JA concluded that in light of the fact that the PTR was in fact generally used for travelling on a public road from one construction site to another and that its design was such that it can safely be done, it was possible to conclude that it was designed for that purpose, whatever other purposes it may have been designed for (*RAF v Van den Berg* par 17).

The full bench in the High Court in the present case applied the reasoning by the court in *RAF v Van den Berg* (*supra*). The court held that it was clear that the Reach Stacker was designed and equipped to be self-propelled around the harbour along roads and over areas such as parking and storage lots adjacent thereto, in the ordinary course of its work (High Court judgment par 29). The fact that it may need to be escorted along certain of those routes does not, in the court's view, detract from the fact that this is part and parcel of its everyday work, just as an abnormal load, low-bed trailer transporting a large piece of heavy equipment such as an electrical transformer would similarly be required to be escorted along a public road owing to the fact that it exceeds the permissible width for travel without an escort (High Court judgment par 29).

The appellant raised two criticisms with regard to the reasoning of the full bench in the High Court. According to the appellant, the full bench in the High Court had erred in its application of the law by basing its conclusions on the judgment in *RAF v Van den Berg* (*supra*). The appellant argued that *RAF v Van den Berg* (*supra*) was distinguishable from *Chauke v Santam Ltd* (*supra*). The appellant argued that when Streicher JA in *RAF v Van den Berg* (*supra*) applied the reasonable person test, he did so from the point of view that the PTR was designed for road use, and that the only design limitation, being the maximum speed, did not constitute a danger of such magnitude as to "conclude that the vehicle was not designed for use on a road" (SCA judgment par 21).

The second criticism raised by the appellant against the reasoning of the full bench was that the court had incorrectly applied the test enunciated in

Chauke v Santam Ltd (*supra*) in its determination of the features, purpose and intended use of the Reach Stacker (SCA judgment par 23). The appellant argued that, in relying on *RAF v Van den Berg supra*, the full bench ignored the fact that the design features and limitations of the vehicles were distinguishable in *Chauke v Santam Ltd* (*supra*) and *RAF v Van den Berg* (*supra*) respectively. The appellant argued further that in *RAF v Van den Berg* (*supra*) the court did not consider the second leg of the *Chauke* test – that is, the "ordinary use" as perceived by a reasonable person – because the court, at the outset, had determined that the PTR had been designed to travel on roads, and safely so, from the time it was "conceived and constructed" (SCA judgment par 23). It was accordingly submitted by the appellant that, had the full bench properly applied the *Chauke* test to the vehicle under consideration, as was applied in *Mutual and Federal Insurance Co Ltd v Day* (*supra*) and *RAF v Vogel* (*supra*), it should have found that the "ordinary, everyday and general purpose" of the Reach Stacker and its "ordinary use" on the road, did not render it a "motor vehicle" in terms of the Act (SCA judgment par 23).

According to Zondi JA, the criticism of the full bench's reasoning was unjustified. Zondi JA stated that the full bench of the High Court had made it clear that

> "[o]bjectively viewed, the designers of the Reach Stacker would have contemplated that it would be required to be propelled along such roads in the harbour." (High Court judgment par 32)

It reached this conclusion after the court had analysed evidence regarding the Reach Stacker's area of operation as well as its design features. The intended utility of the Reach Stacker is wholly different to the vehicles in *Mutual and Federal Insurance Co Ltd v Day* (*supra*) (a Clark forklift) and in *RAF v Vogel* (*supra*) (a mobile Hobart ground power unit, whose primary function was to supply power to stationary aircraft). The vehicle under consideration is designed and suitable for travelling on a road within the port. Zondi JA stated that the SCA in *RAF v Mbendera* (*supra*) made it clear that the purposes of forklifts, cranes, lawnmowers and mobile power units are very different (SCA judgment par 24).

Zondi JA held that he was of the view that the Reach Stacker was a motor vehicle as defined in section 1 of the Act. This was so despite the vehicle's imposing and gigantic size in terms of mass, width and speed limitation. According to the learned Judge, objectively viewed, it could not be said that driving it on a road used by pedestrians and other vehicle would be extraordinarily difficult and hazardous. The Reach Stacker is fitted with all the controls and features that are fitted on a motor vehicle so as to enable it to be safely used on a road outside the container yard and port terminal. The Reach Stacker was used on Transnet premises and had also been adapted for use on public roads and, because of this, the Reach Stacker was duly registered for use on public roads in terms of the National Road Traffic Act (SCA judgment par 27).

6 Conclusion

The SCA was satisfied that the three requirements set out in the definition of the Act had been met. The court indicated that the Reach Stacker was designed and equipped to be self-propelled around the port along roads and over parking and storage spaces. Furthermore, the SCA confirmed that, viewed objectively, the Reach Stacker was designed to be required to be propelled along roads within the port (par 24). The SCA concluded that the Reach Stacker was fitted with all the controls and features that are required to be fitted to a motor vehicle so as to enable it to be used with safety on a road outside the container yard and port terminal where it primarily operates. As a result, the SCA concluded that because of its operation on Transnet premises, the Reach Stacker was required to be registered and was registered for use on public roads in terms of the Act (par 26–27). The primary purpose of the Act is to provide appropriate cover to all road users within the borders of South Africa, to rehabilitate persons injured, and to compensate for injuries or death (Millard and Smit "Employees, Occupational Injuries and the Road Accident Fund" 2008 3 *TSAR* 600). This must always be the main consideration by the courts when interpreting the provisions of the Act. This judgment was important because adequate compensation will now be provided and expanded to incidents involving a Reach Stacker.

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