THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 209/03
Reportable

In the matter between

ROAD ACCIDENT FUND	**Appellant**
and	
S MBENDERA	**First Respondent**
JK MOTSWAPULENG	**Second Respondent**
TROLLOPE MINING SERVICES	**Third Respondent**

CORAM: HARMS, LEWIS JJA and PATEL AJA

HEARD: *7 May 2004*

DELIVERED: *17 May 2004*

Summary: A truck designed and suitable for use on haul roads is a motor vehicle as defined by s 1 of the Road Accident Fund Act 56 of 1998.

JUDGMENT

CH LEWIS JA

[1] The question to be determined in this appeal is whether a Caterpillar 769 truck is to be regarded as a motor vehicle for the purpose of the Road Accident Fund Act 56 of 1996. If it is then the first respondent will be entitled to sue the Road Accident Fund for damages suffered by her, and her children, as a result of the death of her husband in a collision between the truck and a taxi in which the deceased had been a passenger.

[2] The second respondent was the driver of the truck when the collision occurred and it was alleged that it was solely through his negligence that the deceased was killed. The third respondent was the latter's employer. The action was brought against the RAF and the other respondents, each of whom pleaded that the others were liable. The trial court (Botha J in the Pretoria High Court), at the request of the parties, ruled that the question whether the truck was a motor vehicle for the purposes of the Act would be adjudicated separately in terms of Uniform rule 33(4). The trial court found for the plaintiff that the truck was a motor vehicle for the purpose of the Act. It is against this finding that the appeal lies with the leave of that court.

[3] The definition of a motor vehicle in the Act – 'any vehicle designed or adapted for propulsion or haulage on a road by means of fuel, gas or electricity . . .'. – has been fertile ground for litigation, as were the definitions in the previous statutes that dealt with the question of compulsory third-party insurance. A brief account of the legislative history of compulsory motor vehicle insurance is set out in *Chauke v Santam Ltd* 1997 (1) SA 178 (A).

[4] In *Chauke* the court was required to determine whether a forklift was a motor vehicle for the purpose of the Act. Olivier JA stated the test to be applied as follows (at 183A-D):

'The correct approach . . . is to take [the definition] 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.'

[5] The soundness of this dictum was questioned by this court recently in *Road Accident Fund v Vogel* (as yet unreported, case 113/03, handed down on 11 March 2004, paras 10-12). The court in *Vogel* clarified the apparent conflict between the 'subjective test' posed (the purpose for which the vehicle was conceived and constructed) and the 'objective test' (the reasonable person's perception of the vehicle) by stating that 'while the legislature has not entirely ignored the subjective test 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.'

[6] The balance between the subjective view of the designer, and the suitability of the vehicle for general use on roads, is not, however, the principal issue in this appeal. The appellant argues that on any basis the truck is not a motor vehicle designed for use on a *public* road. It does not argue that the truck is not a vehicle as normally understood; such an argument would not be tenable, given that the truck is designed and used precisely for travelling on roads (albeit of a special nature), and transporting large quantities of rubble and materials mined. The essence of the appellant's argument is that the truck is not suitable for use on public or

'ordinary' roads. Before dealing with that contention, however, I shall describe briefly various features of the truck.

[7] It is, according to the manufacturer's description, an off-highway diesel-powered haul truck designed for use in the mining and construction industry. It is very large, being five metres wide, four metres high, and weighing in the order of 68 tons. It is too heavy and too wide for use on typical roads: it is designed for use on specially prepared haul roads, on which it can travel at approximately 75 kilometres per hour. According to the uncontested evidence of experts there is a large network of such roads in South Africa, especially for opencast mines, and these roads also carry other vehicular and pedestrian traffic. The truck is fitted with various safety features indicative of design and suitability for use on roads that carry traffic. It has direction indicators, side and rear-view mirrors, brake lights, reverse lights, parking lights and a hooter.

[8] It is common cause that the truck is neither designed nor suitable for use on ordinary roads: it is simply too large. It can in fact be used on an ordinary road provided that the road is wide enough. But it cannot *safely* be driven other than on haul roads.

(The collision which resulted in the death of the first respondent's husband occurred on a public road, the driver allegedly having taken the truck for his own purposes.) But does this preclude the application of the Act?

[9] The appellant argues that the definition of motor vehicle requires that it be intended and suitable for use on a *public* road. Although the definition itself refers only to a road, the word has in two recent cases been interpreted by this court to mean a public road. The appellant argues that it is also implicit in the decision of Olivier JA in *Chauke* because the court referred there (at 182A-183A) to two English cases which had held that, for the purpose of the Road and Rail Traffic Act of 1933, and regulations thereunder, certain vehicles were not 'intended' (in the sense of being suitable or apt) for use on roads. In *Daley & others v Hargreaves* [1961] 1 All ER 552 (QB) the court was asked to determine whether mechanically-propelled dumpers were motor vehicles. And in *Burns v Currell* [1963] 2 All ER 297 (QB) the court dealt with the same question in relation to a go-kart. In both cases the appellants had been criminally prosecuted for using the vehicles on ordinary roads. And in both the courts found that there was insufficient evidence to prove beyond a reasonable doubt that the vehicles

would be regarded by a reasonable person as fit for use on a road. The relevant regulations thus did not apply. The English cases do not, in my view, support the proposition of the appellant: they do not deal with the nature of the road at all since the charges related to contraventions of the statute and regulations in using unlicensed vehicles on particular roads. And the determinative principle was whether the vehicle was 'intended or adapted for use on roads'.

[10] The central principle discussed in *Chauke* was whether the court must have regard to the designer's intention, or the objective suitability for driving on a road, in determining whether a vehicle falls within the ambit of the Act. The court, as indicated earlier, adopted a mixed formulation: the purpose for which the vehicle was conceived and constructed, on the one hand, and suitability for use on a road, as perceived by the ordinary, reasonable person on the other. (See also the gloss added in *RAF v Vogel*, above). The nature of the road was not in contention. The court was concerned merely to determine whether a forklift was designed and suitable for propulsion or haulage on a road. It decided that it was not. In reaching that conclusion Olivier JA adopted the definition of a road in the *Concise Oxford Dictionary* (7 ed): 'a line of communication, especially a specially prepared track between

places for use by pedestrians, riders and vehicles'. There is no suggestion in that case that a road must be generally accessible to the public in order for a machine to qualify as a motor vehicle.

[11] However this court in *Mutual and Federal Insurance Co Ltd v Day* 2001 (3) SA 775 (SCA) did invoke the *Chauke* test with reference to a 'public road' (paras 13 and 16) in determining whether another type of forklift was a motor vehicle. That it could be used on public roads, said the court, purportedly following *Chauke*, did not mean that it was suitable for such use (para 16). But the real issue in the *Day* case too was the nature and purpose of the forklift. It was common cause that its primary purpose was to 'lift and move loads in places such as storage and lumbar yards, steel mills and wharves'. Unlike the truck in this case, although it could and did travel on roads, its purpose was not to travel up and down them and it was not suitable for doing so. So too in *Prinsloo v Santam Insurance Ltd* [1996] 3 All SA 221 (E), the court, adopting a 'down-to-earth common sense approach' held that the forklift is issue was not a motor vehicle for the purpose of the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989. In reaching this conclusion the court had regard to the use to which a forklift is put – moving crates and pallets loaded with goods in

warehouses, and at airports and stations. The forklift in question was neither designed nor suitable for use on roads whether public or private.

[12] In *Road Accident Fund v Vogel* (above) the court referred repeatedly to use on a public road. But that case was also not concerned with a vehicle designed and suitable for travelling on roads of any kind. The court held that a mobile ground power unit that provided electric power to stationary aircraft at airports was not a motor vehicle for the purpose of the Act. Although it could be driven on a road, it was in general driven only within operational areas of airports, specifically on the apron. The conclusion of the court that the *raison d'etre* of the power unit – the provision of electrical power to aircraft – made it impossible to conclude that it was designed for general use on 'public roads' (para 24) is not in any way dependent on the nature of the road on which it was driven. The overriding consideration was the purpose of the unit, and its suitability for travelling on a road.

[13] The truck in issue in this case is of a different order. Its very purpose is to travel along specially constructed roads carrying loads. It is designed for that purpose and there is no suggestion at

all that it is unsuitable so to do. It is also constructed in such a way that it is safe for use on those roads when there is other traffic. That it is not safe for use on a *public* road cannot be a determinative criterion as to whether it is a motor vehicle for the purpose of the Act. It is designed and suitable for use on haul roads, and the Act applies throughout the Republic and not just to vehicles used on public roads. As counsel for the second and third respondents contended, if a standard motor vehicle were to collide with another and injure the driver or a passenger, or to injure a pedestrian, on a haul road, the injured party would be able to claim compensation under the Act. It would be anomalous to hold that where injuries were caused as a result of the negligence of the driver of a truck of the kind in question, no action would be available to the injured party against the Fund.

[14] I accept the contention of the second and third respondents that the court must adopt a common sense approach in determining whether a vehicle is a motor vehicle for the purpose of the Act. The truck in issue looks like a motor vehicle, and its purpose is to travel on roads to haul loads. It is designed and suitable for that purpose. The purposes of forklifts, cranes,

lawnmowers and mobile power units are very different. That they can travel on a road is incidental to their purpose.

[15] In my view, the truck is a motor vehicle as defined in the Act.

[16] The appeal is dismissed with costs.

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C H Lewis

Judge of Appeal

Concur:
Harms JA
Patel AJA