THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 437/2022

In the matter between:

NDIDZULAFHI NEMANGWELA **APPELLANT**

and

ROAD ACCIDENT FUND **RESPONDENT**

Neutral citation: *Nemangwela v Road Accident Fund* (437/2022) [2023] ZASCA 90 (8 June 2023)

Coram: MOCUMIE and MOLEFE JJA and NHLANGULELA, DAFFUE and MASIPA AJJA

Heard: 19 May 2023

Delivered: 8 June 2023

Summary: Claim for damages under the Road Accident Fund Act 56 of 1996 – whether a Hyster 250 forklift is a 'motor vehicle' as defined in the Road Accident Fund Act – purpose of use taken into account in objectively determining the use for which it had been designed – held that a Hyster 250 forklift is not a motor vehicle as defined in the RAF Act.

ORDER

On appeal from: Limpopo Local Division of the High Court, Thohoyandou (Kgomo ADJP, sitting as court of first instance):

The appeal is dismissed, each party to pay its own costs.

JUDGMENT

Molefe JA (Mocumie JA and Nhlangulela, Daffue and Masipa AJJA concurring):

[1] The issue in this appeal is whether a Hyster 250 forklift is a 'motor vehicle' as contemplated in s 1 of the Road Accident Fund Act 56 of 1996 (the RAF Act). The appeal is against the order of the Limpopo Division of the High Court, Thohoyandou (the high court). It held per Kgomo ADJP that the forklift is not a 'motor vehicle' as contemplated in the RAF Act. This appeal is with leave of the high court.

[2] The issue arose in the following circumstances. On 4 November 2016, Ms. Ndidzulafhi Nemangwela[1] was knocked down by a Hyster 250 forklift driven by Mr. Mashudu Tshishonga at her workplace at Nzhelele Spar, Vhembe district, Limpopo. She instituted an action against the RAF for damages arising out of the injuries she sustained in the accident. The RAF conceded the merits at 80/20% in favour of Ms. Nemangwela, but on the assumption that the high court finds that the forklift is indeed a motor vehicle.

[1] Ms Nemangwela as per ID (although from the papers she is interchangeably referred to as Menangwele which seems to be a typo).

[3] In its plea the RAF did not expressly deny that the forklift that caused the damage was a motor vehicle. It claimed no knowledge of the allegations relating to the incident, denied them and put Ms Nemangwela to the proof thereof. At the trial, and before evidence was led on the merits, the parties agreed that the only remaining issue in respect of the merits was whether the particular forklift was a motor vehicle or not.

[4] Ms. Nemangwela was the only witness called upon to testify in her case. She testified that on 4 November 2016, at approximately 06h45, she reported for duty. She was merchandising for Sasko at the premises of the Nzhelele Spar store. At her workplace inside the Spar premises she saw the forklift reversing towards the receiving bay. The forklift knocked her, causing her to fall where after it drove over her leg. She sustained injuries and was admitted to hospital. In her testimony, she described a few key points in relation to the accident area. She testified that the forklift was generally used to carry loads within the Nzhelele Spar premises; that the receiving zone is used for stock loading; and the receiving zone is separated from the outside parking area by a gate. The forklift would however, sometimes be driven outside the Spar premises, crossing over the public road to Boxer store.

[5] The driver of the forklift testified on behalf of the RAF. He testified that he was licensed to drive the forklift and had been driving it for nine months before the incident occurred. He was trained on its operation and use by its manufacturers and/or distributors. He used the forklift for loading and offloading goods from the Spar receiving area. He denied that the forklift would sometimes be driven outside the premises or around the parking areas. He testified that he was specifically told and trained not to drive the forklift on the main road. In his day-to-day activities he carried the load from the receiving zone to the store, but avoided the store entrance used by the customers.

[6] As I already stated, the issue is whether the Hyster 250 forklift is a motor vehicle as defined in s 1 of the RAF Act. This section defines a ‘motor vehicle’ as ‘any vehicle designed or adopted 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’.

[7] There are three requirements to be met for a vehicle to qualify as a 'motor vehicle' under the RAF Act. The vehicle must: (a) be propelled by fuel, gas or electricity; (b) be designed for propulsion; and (c) on a road. The high court found that the forklift that knocked Ms. Nemangwela down cannot be classified as a motor vehicle for the purpose of the RAF Act. It held, furthermore, that the collision occurred in an area militated against the RAF incurring liability for her injuries.

The design of a Hyster 250 forklift

[8] Despite the absence of technical evidence and the specifications of the forklift by the manufacturer in the high court, the forklift under consideration was designed primarily for loading/offloading goods from the receiving area into the Spar store. For this purpose, both parties agreed that the Hyster 250 forklift is equipped with a diesel engine, a battery, and one seat for the driver. It has an accelerator, a brake pedal and a steering wheel. The rear wheels only turn when the steering wheel is turned. Although it is equipped with lights, indicators and a hooter, it has no speedometer, brake lights and mirrors. Notably, the loading gear is at the front, which can be a possible impediment to the driver. It is clear from these features that the Hyster 250 forklift is propelled by means of a battery and diesel fuel. The evidence presented showcased that it transported goods in and out of the Spar store particularly at the receiving area of the Spar premises.

[9] Counsel for the RAF argued that the incident occurred at the receiving bay which was a private loading facility and not a public road to be used by the general public at large. He argued that for a collision to occur within the context of the RAF Act, the driver must have driven the vehicle on a public road. He relied heavily on *RAF v Vogel*[2] where this Court referred repeatedly to use of a 'public road'. This reasoning was to mainly support the argument that since the Hyster 250 forklift was not used on a public road, it was not a motor vehicle. The court in *Vogel* held that the true use or general use of a vehicle on a public road is determinative of whether it is a motor vehicle as prescribed by the RAF or not. It was further held that:

[2] *RAF v Vogel* 2004 (5) SA 1 (SCA).

'If objectively regarded, the use of an item on a public road would be more than ordinarily difficult and inherently potentially hazardous to its operator and other road users of the road, it cannot be said to be a motor vehicle within the meaning of the definition.'[3]

Herein, the overriding consideration was the purpose of the unit, and its suitability to travel on a road. The mobile Hobart ground power unit that provided electrical power to stationary aircraft at airports (in Vogel) was therefore confirmed not to be a 'motor vehicle' designed for use on a road.

[10] In *RAF v Mbendera*[4] this Court held that the word 'road' in s 1 of the RAF Act is not limited to a public road. The issue in *Mbendera* was whether a Caterpillar 769 truck could be regarded as a motor vehicle for purposes of the RAF Act. The court held that the truck in issue looked like a motor vehicle, and its purpose was to travel on roads to haul loads. It was designed and suitable for that purpose, although not suitable for use on ordinary roads as it was simply too big. Also worthy of note, as stated in obiter dictum, is that the purposes of forklifts, cranes, lawnmowers and mobile power units are very different from the truck in that matter. The fact that they can travel on a road is incidental to their purpose. Therefore, this Court found that the Caterpillar 769 truck (in *Mbendera*) was a motor vehicle as defined in the RAF Act.

[11] The question in this appeal is whether the design of the Hyster 250 forklift disqualifies it from being a motor vehicle as contemplated in the RAF Act. In other words, was the forklift in question designed for or adapted for propulsion or haulage on a road?

[12] In *Chauke v Santam Ltd*,[5] a case involving a collision between a worker and a forklift in the enclosed area of a transport company, this Court reviewed relevant statutory provisions and applicable case authorities since 1942, when compulsory third party insurance was introduced into South Africa. The court noted that while there was initially some statutory disharmony in relation to the definition of 'motor vehicle', this was clarified under the Compulsory Motor Vehicle Insurance Act 56 of 1972. The definition was formulated in similar terms as the RAF Act. This Court in *Chauke*

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[3] Ibid para 5.
[4] *RAF v Mbendera* [2004] 4 All SA 25 (SCA).
[5] *Chauke v Santam Ltd* [1996] ZASCA 120; 1997 (1) SA 178 (SCA); [1997] 4 All SA 59 (A) at 183A-D.

concluded that 'just because a vehicle can be used on a road by no means implies that it was designed for propulsion on a road'. The forklift in question was therefore not a motor vehicle under the applicable Act.

[13] To rebut the abovementioned controversies, Counsel for Ms. Nemangwela submitted that the *Chauke* decision differed from this matter in that: Firstly, the forklift in *Chauke* did not have headlights and was only driven in the premises during day time, whereas the forklift in this matter had headlights. Secondly, that it did not have indicators whereas the forklift in this matter had indicators. Thirdly, the forklift was not used on the road but was only used in and out of the warehouse and in the yard, whereas the forklift in question was not restricted to a demarcated area and would be in the parking area where customers rested. It is important to note that the driver and the appellant were the only witnesses in this matter.

[14] In *Mutual and Federal Insurance Co Ltd v Day*,[6] this Court followed *Chauke*, to confirm that the Komatsu forklift which was able to travel at a top speed of 32 kilometers per hour, was not a 'motor vehicle' as defined in the RAF Act because it had amongst others, a rear wheel steering system which made steering in traffic difficult and could lead to the forklift capsizing and was therefore hazardous for general use on public roads. It also had a number of features that the forklift in *Chauke* did not have: it was registered with the authorities and boasted a registration number.

[15] Counsel for Ms. Nemangwela relied on *RAF v Mbele*[7] and argued that the Hyster 250 forklift is a 'motor vehicle' as contemplated in the RAF Act. In *Mbele*, this Court dealt with the issue of whether a Reach Stacker is a 'motor vehicle' as contemplated in s 1 of the RAF Act. A Reach Stacker is a large industrial vehicle that combines components of a forklift and a mobile crane and is designed primarily for lifting, maneuvering and stacking containers in the container yards of small terminals of medium sized ports. The vehicle has six wheels. The four front wheels are driven by the engine and the engine is steered by means of its rear wheels (one left, one right). It is fitted with rear-view mirrors. It is equipped with full road-going lighting, including high beam and low beam headlights, tail lights, indicators, brake lights,

[6] *Mutual and Federal Insurance Co Ltd v Day* 2001 (3) SA 775 (SCA).
[7] *Road Accident Fund v Mbele* [2020] ZASCA 72; 2020 (6) SA 118 (SCA).

reverse lights and position lights. It is fitted with windscreen wipers and washers, a hooter and a handbrake. This Court came to the conclusion in *Mbele* that the Reach Stacker satisfies the requirements to be classified as a 'motor vehicle' in terms of the RAF Act.

[16] Reliance on *Mbele* is misplaced. It is trite that the primary purpose of the RAF Act is to provide appropriate cover to all road users within the borders of South Africa, to rehabilitate people injured, and to compensate for injuries or death.[8] This case is distinguishable from *Mbele* in that s 1 of the RAF Act is clear that 'the vehicle must be designed …for propulsion on a *road*.' (My emphasis.) The Reach Stacker in *Mbele* was designed for use on the roads in the harbor although it had to be escorted (because of its size) when travelling on other roads. In the current matter the evidence is that the Hyster 250 forklift did not travel on the public road.

[17] It is significant to note that a 'road' is not defined under the RAF Act; therefore it must bear its ordinary meaning of 'a wide way leading from one place to another, especially one with a specially prepared surface which vehicles can use.'[9] This definition is partially aligned to the definition in the National Road Traffic Act 93 of 1996 which restricts its definition to only 'public road'. The focus on the definition of 'motor vehicle' for present purposes must therefore be on the words 'vehicle designed …for propulsion …on a road.'[10]

[18] The forklift in this case was used in and out of the Spar store at the receiving area in the yard. This case is therefore similar to *Chauke* since in that case, the forklift was not used on a road, but was used in and out of the warehouse in the yard. The receiving area is a private area and not a road. It is used only to receive and load goods and is not used by the general public. The Hyster 250 forklift therefore does not qualify to be classified as a motor vehicle for purposes of the RAF.

[19] Counsel for Ms. Nemangwela further submitted that legislation must be interpreted through the prism of the Bill of Rights, and that the definition of motor

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[8] *Millard and Smit Employees Occupational Injuries and the Road Accident Fund* 2008 (3) TSAR 600.
[9] Oxford English Dictionary; Oxford University Press (2016).
[10] *Op cit* footnote 8.

vehicle in the RAF Act should be aligned with the definition in the National Road Traffic Act. He submitted that this was in accordance with the injunction in s 39(2) of the Constitution. I have considered this issue and note that the development of the common law, is and was not an issue before the high court. If this court was to adopt that approach, this will have far reaching consequences to numerous government departments and private bodies like insurance companies who have not been invited as parties in the matter. Accordingly, I am of the view that this is not merited.

[20] On the evidence which is common cause between the parties, there is no basis for finding that this appeal was unnecessary. The appellant pursued an issue which was raised at the trial for the first time. It had not been pleaded pertinently. Her conduct cannot be said to constitute an abuse of court process. It would therefore be fair and just that each party bears its own costs in respect of this appeal.

[21] In the result, the appeal is dismissed, each party to pay its own costs.

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JUDGE OF APPEAL

Appearances

For appellant:	S O Ravele
Instructed by:	S O Ravele Attorneys, Louis Trichardt Phatshoane Henney Attorneys, Bloemfontein
For respondent:	L R Bomela
Instructed by:	Road Accident Fund, Pretoria State Attorney, Bloemfontein