THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number : 19/03

In the matter between :

JONGISILE FONJANA	**APPELLANT**
and	
MULTILATERAL MOTOR VEHICLE ACCIDENT FUND	**FIRST RESPONDENT**
ROAD ACCIDENT FUND	**SECOND RESPONDENT**

CORAM : MPATI DP, MARAIS, BRAND JJA, JONES and PONNAN AJJA

HEARD : 18 MAY 2004

DELIVERED : 28 MAY 2004

Summary: Article 46 of Schedule to Act 93 of 1989 – meaning of phrase 'rendering military service' – not confined to active military service or combat service – connection between conveyance and military service not required by the article. Order in para 29.

JUDGMENT

BRAND JA/

BRAND JA :

[1] This appeal turns on the meaning of the expression 'military service' in a 46 of the schedule to the Motor Vehicle Accident Fund Act 93 of 1989 ('the 1989 Act'). It arises from the following facts. On 1 September 1996 the appellant sustained bodily injuries when the motor vehicle in which he was a passenger left the road and overturned. He instituted action in the Ciskei High Court for damages resulting from his injuries. The action was brought against the Multilateral Motor Vehicle Accident Fund as first defendant (now first respondent), alternatively against the Road Accident Fund as second defendant (now second respondent). The reason why the two respondents were joined in this manner seems to have its origin in the provisions of the Road Accident Fund Act 56 of 1996 ('the 1996 Act'). In terms of the latter Act, the 1989 Act was repealed with effect from 1 May 1997. Though s 2 of the 1996 Act created the second respondent and at the same time announced the demise of the first respondent, s 28(1) provided that, notwithstanding the abolition of the first respondent, 'this Act shall not apply in relation to a claim for compensation in respect of which the occurrence concerned took place prior to the commencement of this Act'. This apparently gave rise to some uncertainty in the minds of the appellant's legal representatives as to which of the two defendants should be held liable

for the appellant's damages.

[2] Be that as it may, at the commencement of the proceedings in the court *a quo*, the identity of the right defendant no longer mattered because the second respondent ('respondent') conceded that, in principle, it was liable for the appellant's damages. Its contention was, however, that its liability was limited to an amount of R25 000 in terms of a 46 of the schedule to the 1989 Act, by reason of the fact that the appellant was a passenger in the vehicle concerned. The appellant's response to this contention was that, although he was a passenger, he was 'rendering military service' when the accident occurred and therefore fell within the purview of the exception to the limitation of passengers' claims provided for in a 46.

[3] Since the other issues relating to the quantum of the appellant's damages would only become relevant if the alleged limitation to the respondent's liability did not apply, the court *a quo* acceded to a request by both parties that the limitation issue be determined first. No evidence was led by either party. Instead, both of them based their opposing arguments on the facts that were common cause. In the end the court *a quo* (Ebrahim J) found, in a judgment which has since been reported (2004 (2) SA 158 (Ck)), that the appellant was not 'rendering military

service' as contemplated by the exception in a 46 when the accident occurred. From this finding it followed that the appellant's claim was limited to the sum of R25 000. The appellant's appeal against that judgment is with the leave of the court *a quo*.

[4] The wording of the exception to the limitation of a passenger's claim in a 46 is almost exactly correspondent to that of its counterpart in s 18(1) of the 1996 Act. It pertains to a passenger

'who was conveyed in or on a motor vehicle other than a motor vehicle owned by the Defence Force … during a period in which he rendered military service or underwent military training in terms of defence legislation applicable …'.

It is not in dispute that the 'defence legislation applicable' is to be found in the Defence Act 44 of 1957. Likewise it is common cause that the motor vehicle involved was not owned by the Defence Force, now the South African National Defence Force ('SANDF') and that the appellant was not at the time of the accident undergoing any military training.

[5] The central issue is therefore whether the accident occurred 'during a period in which the appellant rendered military service' in terms of the Defence Act. As I have indicated, no one led any evidence at the trial. Both parties relied on the agreed facts. Unfortunately the agreed facts turned out to be somewhat meagre and not entirely clear. What was

eventually admitted on behalf of the respondent in this court was that, at the time of the accident, the appellant was a permanent member of the SANDF. It also appears to be common cause that, at that time, he was stationed in East London; that on the afternoon of Friday 30 August 1996 he came off duty and that he was only to resume his duties at 07:30 on Monday 2 September 1996. In all the circumstances the most likely inference appears to be that he was on his way back to his base when the accident occurred at about 22:00 on the Sunday. However, counsel for the respondent, in this court, strenuously disavowed any admission to that effect. Indeed, his argument was that it would make a vital difference to the outcome of the appeal if it had been established that the appellant was in fact returning to his base when the accident occurred. I do not agree with this argument. For reasons that will presently become apparent, I do not believe that the purpose of the appellant's journey would be of any consequence. Accordingly, I will consider the matter on the basis that we do not know where the appellant was going when the accident occurred.

[6] The appellant's case is, essentially, that his membership of the SANDF, in itself, was sufficient to constitute the 'rendering of military service' in terms of the Defence Act, as contemplated by the exception in

a 46. The respondent denies that this is so.

[7] The term 'military service' is not defined in either the 1989 Act or in the Defence Act. The court *a quo* therefore sought assistance in other provisions of the Defence Act. It found such assistance in the definition section of the Defence Act. More particularly, in the definition of the phrase 'service in defence of the Republic' which reads as follows:

'*"service in defence of the Republic"* means military service and *"operations in defence of the Republic"* means military operations –

(a) in time of war; or

(b) in connection with the discharge of the obligations of the Republic arising from any agreement between the Republic and any other state; or

(c) for the prevention or suppression of any armed conflict outside the Republic which, in the opinion of the State President, is or may be a threat to the security of the Republic;'

Broadly stated, it is clear from the definition that, in the context of the phrase 'service in defence of the Republic', the term 'military service' is confined to active military service or combat service.

[8] Based on this definition the court *a quo*'s reasoning went as follows (in para 23 at 164G-H):

'…The definition provided in the Defence Act for the phrase "service in the defence of the Republic" points to military service being service of a limited duration which is

rendered in extraordinary and specially defined circumstances.'

And (in paras 24 and 25 at 164J-165C):

'It is evident that the Legislature must have been cognisant of the provisions of the Defence Act since it prescribed that the military service or the military training had to be in terms of the aforesaid Act. … If the purpose was to make the exception [in a 46] available to every member of the Defence Force irrespective of the type of service such person was rendering it would have been a simple matter for the legislature to have said so. Instead, the legislature has used the specific wording that the exception would be applicable "during a period in which the person rendered military service or underwent military training". In my view, the use of such specific phraseology indicates that the Legislature intended that it was not the person's membership of the Defence Force that was the determining factor, but rather whether the person was rendering military service or undergoing military training at the time. In the circumstances I am of the opinion that the interpretation which is to be given to the phrase "military service" in [a 46] … is that it refers to service which a member of the Defence Force renders in the specific circumstances described in the definition of the phrase "service in the defence of the Republic".'

[9] Membership of the SANDF in itself, the court concluded, does not satisfy the requirement of 'rendering military service'. Since the appellant was not performing active military service at the time of the accident, the court held that he was not exempted from the limitation imposed on claims by passengers in a 46.

[10] Shortly prior to the judgment of the court *a quo* in this matter and obviously unbeknown to the court at the time, the Durban High Court (McClaren J) came to exactly the opposite conclusion in *Du Preez v Road Accident Fund and another* 2002 (4) SA 209 (D). Though the exception to the limitation of a passenger's claim considered in *Du Preez* was the one contained in s 18(1) of the 1996 Act, its wording is, for present purposes, the same as in a 46. Moreover, the matter was decided on substantially similar facts. Du Preez also sued for damages arising from injuries that he suffered as a passenger in the motor vehicle concerned. Like the appellant, he also contended that he was 'rendering military service at the time of the accident' solely by virtue of the fact that he was a permanent member of the SANDF. Unlike the court *a quo,* however, McClaren J came to the conclusion that, on a proper construction of the exception, permanent membership of the SANDF in itself was sufficient to satisfy the prerequisite of military service.

[11] I return to the court *a quo's* reasoning that underlies its interpretation of the term 'military service'. I agree with the point of departure, that since a 46 specifically refers to 'military service' in terms of the Defence Act, the meaning of the phrase is first to be sought with reference to that Act. From there onwards, I find myself unable to agree

with the court's reasoning. More particularly, I cannot agree with the conclusion that the restrictive interpretation of the term 'military service' in a 46, to connote active or combat service, is supported by the definition of 'service in defence of the Republic' in the Defence Act. On the contrary, as I see it, that definition is an indication in the opposite direction. I say this for two reasons. First, if the legislature intended to limit the exception in a 46 to military personnel performing combat service, the obvious way of doing so would have been to refer to those rendering 'service in defence of the Republic' and not to 'military service' as such. Second, the mere fact that it was found necessary to circumscribe the term 'military service' for the purposes of the definition, is an indication that 'military service' on its own has a wider, more general meaning.

[12] The next question is whether there are any other indications in the Defence Act that the rendering of 'military service' in terms of that Act, which is contemplated by a 46, should be restricted to 'active military service'. In the definition section of the Act, the term 'military service' is not defined. There is, however, a definition of 'military'. According to this definition the term 'military' refers to the four branches of the SANDF, ie, the army, the air force, the navy and the medical service. The indication

is therefore that the term 'military' in itself has nothing to do with combat or war. In the rest of the Defence Act, the term 'military service' is used on very few occasions (see eg ss 71 and 146). Again it is apparent, however, that on these occasions 'military service' is not intended to refer to combat service. Unlike 'military service', the term 'service' is used on numerous occasions throughout the Act. So, for example, there is reference to 'service in the Permanent Force' (ss 9(4) and 15); 'service in the Citizen Force' (s 22) and 'service in the Commandos' (s 44). With regard to the meaning of 'service' in the Act, I find myself in agreement with the views expressed by McLaren J in the *Du Preez* case, first, that the 'service' provided for in the Defence Act can only be understood as 'military service' (221 A) and, second, that, so understood, 'military service' does not refer to active service at all (221A-227A). 'Service in the Permanent Force', in particular, patently means no more than permanent employment by the SANDF.

[13] In this light I hold the view that, when the term 'military service' in a 46 is interpreted with reference to the provisions of the Defence Act, there is no justification for restricting the ambit of the exception in the manner suggested by the court *a quo.* Moreover, no other reason has been suggested why the phrase 'rendering military service' in the

exception should not be understood in its ordinary sense. So understood, the stated requirement would, in my view, be satisfied if, at the time of the accident, the passenger concerned was in the 'service of the military'. Or, as explained by H B Klopper, *Law of Third Party Compensation*, 225, the exception applies if, at the relevant time, the passenger was under the control and discipline of the military authorities.

[14] The conclusion that I have arrived at regarding the meaning of 'military service' in a 46 is, in my view, supported by the legislative history of the exception. A recordal of this history is to be found in previous judgments (see eg *Santam Insurance Ltd v Taylor* 1985 (1) SA 514 (A) 527C-530B; *Du Preez v Road Accident Fund and another supra* 214I-219B). Repetition will serve little purpose. Suffice it to say, in my view, that, although the phrase 'rendering military service' has been consistently employed in almost all the predecessors of a 46, it was never limited to 'active service'.

[15] On the contrary, at one stage of its development, the exception required that the passenger 'was conveyed whilst proceeding on authorised leave or returning to his base from such leave during the period in which he renders military service' (see s 22 of Act 56 of 1972 as amended by s 2(a) of Act 23 of 1980 and by s 1 of Act 4 of 1983).

Consequently, if the soldier was on duty, let alone performing combat service, he did *not* qualify for the benefits of the exception. Although the requirement relating to authorised leave has been omitted from the exception since 1986 (see s 9(1) of Act 84 of 1986), it goes without saying that such abolition was not intended to exclude those on vacation from the ambit of the exemption, but to extend its benefits also to those who are not on vacation.

[16] For these reasons I agree with the conclusion arrived at by McClaren J in the *Du Preez* case (226A-227B) that, having regard to the provisions of the Defence Act as well as the legislative history of the exception, the phrase 'rendering military service' in a 46 must be understood in accordance with its ordinary meaning. Accordingly, no reason has been suggested – and I can think of none – why permanent membership of the SANDF in itself should not be regarded as sufficient to constitute the rendering of 'military service', as was contended for by the appellant.

[17] During oral argument in this court, counsel for the respondent, for the first time, raised an alternative argument in answer to the appellant's case. This answer was based on three propositions. First, if the term 'military service' is not limited to 'active service', the ambit of the

exception must be restricted in another way for the reason that any construction of the exception which would extend its protection to all permanent members of the SANDF without limitation, will lead to unfair discrimination against other passengers. This proposition was illustrated by reference to the example of the permanent force member who is stationed in Pretoria. While on holiday in Cape Town, he is a passenger in a vehicle driven by his friend on a journey that has no connection with his military service. Why, so the question was posed, should this passenger be in a more favourable position than his fellow passenger who works for, say, the Department of Justice?

[18] Such discrimination, so it was contended, would be arbitrary and irrational and consequently unfair (see eg *Hoffmann v South African Airways* 2001 (1) SA (1) (CC) para 24 at 15D-F). This contention forms the basis of the second proposition by counsel for the respondent, namely, that since unfair discrimination is proscribed by s 9 of the Constitution (Act 108 of 1996) the court is enjoined by s 39(3) of the Constitution, to avoid such unfair discrimination by construing the exemption in favour of military personnel contained in a 46 in a more limited way.

[19] Counsel's third proposition was that the required limitation to the

exemption can be brought about by introduction of the prerequisite, that there must be some link between the conveyance of the passenger and his rendering of military service. This link, so it was suggested by counsel, must be 'something akin' to the requirement encountered in the sphere of vicarious liability, namely, that the servant must have acted in the course and scope of his employment. The proposed limitation is therefore, if I understood the argument correctly, that the ambit of the exemption will not extend to all passengers who are rendering military service, but only to those who were conveyed in circumstances that could be described as 'something akin to the course and scope of their military service'. As to when this requirement would be satisfied, counsel suggested the example of the soldier returning to his base in order to resume his military service, when the accident occurred.

[20] I find this line of argument unpersuasive in all three of its constituent parts. The 'irrational discrimination against other passengers' contended for is founded on the premise that the exception in favour of those rendering military service is exclusively aimed at the protection of the favoured passengers themselves. This premise is not a valid one. The purpose of the exception is not only to protect the passengers themselves; it is also aimed at protecting motorists who are encouraged

to give lifts to soldiers (see eg *Bray v Protea Insurance Co Ltd v Road Accident Fund* 1990 (1) SA 776 (T) 790F-H; *Du Preez v Road Accident Fund supra* 216D-F; Klopper *op cit* 225 n 38). Herein lies the answer to the question posed by the respondent's counsel as to what the difference is between a passenger who is a soldier and one who, say, works for the Department of Justice. Soldiers are often away from their homes and families and they are often dependent on the goodwill of motorists to provide them with transport.

[21] Whenever the claim of a passenger against the respondent is limited in terms of a 46, the motorist is liable in common law for the balance of the passenger's claim. Without an exemption from such limitation, motorists who give lifts to soldiers would therefore expose themselves to the risk of financial ruin through no more serious a wrongdoing than momentarily losing concentration behind the steering-wheel. An important reason for the exception, if not the dominant one, is therefore to allay the motorist's fear of such exposure. In the circumstances, it could operate very unfairly against the motorist if, apart from the obvious prerequisite that the passenger must be a soldier, the operation of the exemption is made subject to additional requirements. More often than not the motorist would have no way of knowing whether

the additional requirements had been complied with. This is a lesson learnt through legislative experience. As I have already indicated, the requirement was introduced in 1980 that, apart from rendering military service, the passenger had to be 'conveyed whilst proceeding on authorised leave or returning to his base from such leave' when the accident occurred. (See the amendment to s 22 of Act 56 of 1972 introduced by s 2(a) of Act 23 of 1980). It is not difficult to conceive how these additional requirements could cause serious hardship to the unwary motorist. How was he to know that his soldier/passenger was actually absent without leave? Or that the corporal who signed his soldier/passenger's weekend pass was not authorised to do so? (Cf *Van Eyssen v Protea Versekeringsmaatskappy Bpk* 1992 (1) SA 610 (C) and *Bray v Protea Assurance Co Ltd, supra*). What makes it worse, is that the unwary motorist would have been lulled into a sense of false security by the very existence of the exception itself. Knowledge of the exception would have led him to believe that he would be exempted from liability to a passenger who was a soldier, while, because of facts unbeknown to him, he was not.

[22] It is therefore not surprising that in 1983 the formulation of the requirement regarding authorised leave was drastically changed.

Subsequent to the 1983 amendment (introduced by s 1 of Act 4 of 1983) the exemption pertained to a passenger who:

'was conveyed in … the motor vehicle in question while proceeding on authorised leave or returning to his base from such leave during any period in which he rendered military service or underwent military training in terms of the Defence Act … or while dressed in a uniform of the South African Defence Force during such period, or under circumstances where the owner or driver of the motor vehicle believed upon reasonable grounds that he was a person rendering such service or undergoing training and dressed in such uniform.'

[23] It is fairly obvious that the 1983 amendment was not aimed at affording additional protection to passengers. After all, why would the legislature deem it necessary to extend the protection to soldiers who were 'awol' and even to impostors who pretended to be soldiers? The only reasonable inference is that the amendment was aimed at extending the protection to motorists who have been taken in by appearances. But history repeated itself with regard to the requirement that the soldier/passenger had to be dressed in the uniform of the SANDF. In *Bray v Protea Assurance Co Ltd, supra,* for example, the question was whether a passenger who was dressed in a tracksuit issued by the SANDF and with his army beret in his possession, could be said to have complied with the uniform requirement. The court found

that he did not, inter alia, on the basis that his outfit did not constitute a 'uniform' as envisaged by the dress code of the SANDF. This again obviously raised the question: how was the motorist to know that? Although the requirement pertaining to uniform was repeated in subsequent legislation (see s 9(1) of Act 84 of 1986 and a 46 of the schedule to the 1989 Act in its original form), it was eventually deleted (from a 46 by s 6 of Proclamation 102 of 1991) with effect from 1 November 1991. Again the reason for the abolition of the requirement, I venture to suggest, was not to save the passenger the trouble of putting on a uniform when seeking a lift. It was to protect the unsuspecting motorist. In the end, the inference seems to be justified that the Legislature decided, as a matter of policy, that the only practicable way of protecting motorists was to restrict the requirements for the operation of the exemption to a single one, namely, that the passenger must be a soldier.

[24] Of course, the effect of drawing the line in this manner gives rise to differentiation between passengers which is sometimes difficult to justify. But that was obviously outweighed by the need to encourage motorists to assist soldiers and to provide motorists with effective protection from liability when they did so even if that meant that a passenger who might

not be deserving of it may occasionally not be subjected to the limitation of R25 000. Thus understood, the criticism of irrationality is, in my view, by no means justified.

[25] The second proposition advanced by counsel for the respondent, namely, that the unfair discrimination contended for should be removed by construing the exception restrictively, is in my view equally unsustainable. It hardly lies in the mouth of the respondent to contend that it should pay the appellant less than he would otherwise be entitled to in order to avoid discrimination against other passengers. The obvious way to remove the perceived unfair discrimination would not be to take away rights from those who qualify, but to extend the same rights against the respondent to those discriminated against. (Cf *President of the Republic of South Africa and another v Hugo* 1997 (4) SA 1 (CC) para 47 at 26A-E; *Schachter v Canada* 10 C.R.R. (2d) 1; [1992] 2 S.C.R. 679; Hogg, *Constitutional Law of Canada*, 4th ed (loose leaf) 37-7.)

[26] The third proposition by the respondent's counsel, that the exception is capable of the restricted construction for which he contended, is, in my view, also untenable. The suggested gateway for introducing such restriction into a 46, lies in the term 'rendering'. According to this argument, the requirement that the soldier must be

rendering military service at the time of the accident is an indication that there has to be some link between his conveyance as a passenger and his military service. However, the requirement is not '*while* he was rendering military service' but 'during a *period* in which he rendered military service'. The required link is therefore not between the 'conveyance' and the 'military service', but between the 'conveyance' and a particular 'period'.

[27] In any event, it hardly needs any motivation that the criterion for the existence of the required link suggested by counsel, namely 'something akin to course and scope of the military service' is so vague that it cannot be sensibly applied in the real world. Lastly, it is not without significance that the example suggested by respondent's counsel of a situation where the required link would be found to exist, is that of a soldier returning to his base to resume his military service. This is the very requirement that had once been employed by the legislature. However, it was found wanting, obviously for being unfair to the motorist who would normally have no way of knowing whether this requirement had been fulfilled.

[28] For these reasons I find that neither the limitation to the exception that was found to exist by the court *a quo* nor the limitation contended for by counsel for the respondent in his alternative argument, can be

justified. I therefore hold that, since the appellant was a permanent member of the SANDF, he was under the control and discipline of the military authorities and, consequently, that he was 'rendering military service' within the meaning of a 46 of the schedule to the 1989 Act when the accident occurred.

[29] The appeal is upheld with costs.

The order of the court *a quo* is set aside and replaced with the following:

'(a) The plaintiff is exempted from the limitations imposed on a passenger by a 46 of the Schedule to Act 93 of 1989.

(b) The second defendant is ordered to pay the plaintiff's costs.'

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F D J BRAND
JUDGE OF APPEAL

Concur:

Mpati DP
Marais JA
Jones AJA
Ponnan AJA