

Reportable

Republic of South Africa
**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No: 20352/2008

In the matter between:

NOMATSHAKA SWARTBOOI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT DELIVERED ON 17 APRIL 2012

MANTAME, AJ

A. INTRODUCTION

[1] This is a claim by Plaintiff for damages against the Defendant for emotional shock. The claim arose as a result of a motor vehicle accident that occurred on 24 September 2006. As a result of this accident, Plaintiffs son Luxolo "*the deceased*" died due to fatal injuries sustained. Plaintiff suffered emotional shock and/or psychological trauma as a result of the death of her son. The Defendant is the Road Accident Fund established in terms of Road Accident Fund Act 56 of 1996, hereinafter referred to as "*the Act*", and responsible for

payment of compensation in terms of the said Act for loss or damage wrongfully caused by the driving of motor vehicles.

[2] Plaintiff was represented by Ms. Mahomed and Defendant by Mr. Smuts. **B.**

FACTS

[3] The facts of this case are by and large common cause. On 24 September 2006 the deceased was a passenger for reward in a taxi with registration number CA705732, the insured vehicle, in terms of the Act. The said vehicle was driven by one Z R Cebenca, who is referred to hereinafter as the insured driver in terms of the Act. The said vehicle was driving at about 120 km/h when it sustained a tyre burst, and the driver thereby losing control, left the road and capsized.

[4] As a result of such accident the deceased died and Plaintiff was informed telephonically by the deceased's girlfriend that the taxi had been involved in an accident and the deceased died. Plaintiff thereafter suffered emotional shock.

C. ISSUES TO BE DECIDED

[5] The case raises an important legal question, namely whether the Plaintiffs claim for emotional shock is limited in terms of Section 18 of the Road Accident Fund Act 56 of 1996.

[6] Ms. Mahomed, counsel for the Plaintiff argued that, in order to determine whether Plaintiff is entitled to compensation for emotional shock and psychological trauma, the starting point would be to analyse the wording of Section 17 of the Act in some detail as this claim is based on that section.

[7] Mr. Smuts on the other hand conceded the facts of this matter without the need for formal proof, and that the Defendant could compensate Plaintiff for proven damages limited to R25 000.00 in terms of Section 18.

D. APPLICABLE LAW

[8] Section 17 (1) of the RAF Act relates to the liability of the Defendant and reads as follows:-

"The Fund or an agent shall:-

(a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;

(b) subject to any regulation made under Section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,

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: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.

AND

Section 18(1) reads as follows:

"The liability of a Fund or an agent to compensate a third party or any loss or

damage contemplated in Section 17 which is the result of any bodily injury to or the 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, shall, in connection with any one occurrence, be limited, excluding the costs of recovering the said compensation, and except where the person concerned was conveyed in or on a motor vehicle other than a motor vehicle owned by the South African National Defence Force during a period in which he or she rendered military service or underwent military training in terms of the Defence Act, 1957 (Act 44 of 1957), or another Act of Parliament governing the said Force, but subject to subsection (2) -

a) to the sum of R25 000.00 in respect of any bodily injury or death of anyone such person who at the time of the occurrence which caused that injury or death was being conveyed in or on the motor vehicle concerned - (i) for reward..."

E. APPLICATION OF LAW

[9] Ms Mahomed submitted that in terms of Section 17(1), the Defendant is obliged to compensate any person for any loss or damages that the third person has suffered as a result of bodily injuries to himself or herself or death of any bodily injuries to any other person. Section 18(1) is not applicable in this instance as the said section is designed to assess the liabilities of the Fund, on whether to compensate third parties, or losses resulting from bodily injuries or death of a person who was conveyed in an insured motor vehicle. Such claims are limited to an amount of R25 000.00. Plaintiff in this regard was not a passenger. Plaintiff was rather an innocent by-stander who suffered from emotional shock as a result of the negligent driving of the insured driver. In this particular matter, "*bodily injury*" embraces mental injury, and this is an established principle in law. In this regard, Ms Mahomed referred to **Bester v Commercial Union**¹, **Barnard v Santam**² and **RAF v Sauls**³.

[10] In her further analysis of Section 17, Ms Mahomed argued that in order to prove the

¹ 1973(1) SA 769 A at 779 E - H

² 1997 (4) SA 1032 (T)

³ 2002 (2) SA 55 (SCA)

claims for emotional shock, the Plaintiff will have to show that the "bodily injury" (mental injury) which she sustained was:

10.3. Caused by or arose from the driving of a motor vehicle;

10.2. By any person at any place within the Republic;

10.3. That the injury was due to the negligence or other wrongful act of the driver/owner of the motor vehicle.

[11] Furthermore, she argued that **Bantam v Santam** (*supra*), and the present case have commonality in that, in the Bantam case, the Appellant had lost a teenage son and that she had not witnessed the accident but had been telephonically informed of her son's death. In *casu*, Plaintiffs son was involved in an accident and Plaintiff was advised of his death by way of a telephone call by the deceased's girlfriend.

[12] Counsel for the Defendant, Mr Smuts, submitted that Plaintiffs claim is based on Sections 17(1) and 18 (1) (a), and should be limited to R25 000.00 by the provisions of Section 18(1) (a) (i). Those two sections should be interpreted together and understood in its ordinary grammatical meaning. He submitted further that in the case of a dependency claim, or a parent or guardian who has incurred necessary expenses as a result of injuries to a dependant minor or a mother who has suffered emotional shock as a result of the death of her child, in such instances, the claim may be limited in terms of Section 18(1) (a). This has been applied on numerous occasions whenever a claim by a third party arises from the death or injury to another.

[13] Counsel for the Plaintiff went on to submit that the driver's negligence being the legal cause of the Plaintiff's emotional shock was confirmed in **Barnard v Santam** and the **RAF V**

Sauls {*supra*) respectively. Regarding Section 18, the words "*in connection with any one occurrence, be limited ...*" the occurrences referred to therein seem to be bodily injury or death of the person being conveyed in or on the motor vehicle. Therefore, such authority was irrelevant to the present case as Plaintiff was not being conveyed in the insured vehicle driven by the negligent insured driver. Plaintiff is an innocent by-stander who suffered such injury as a result of the negligent driving of the insured driver. Plaintiff's claim is not limited in terms of Section 18 and therefore should be unlimited.

[14] Mr. Smuts for the Defendant submitted that the cases of **Barnard v Santam** and **RAF v Sauls** as quoted by Plaintiff's counsel do not take the matter any further than the concessions already made in paragraph 7 (*supra*). These cases were only concerned with causality and negligence in circumstances where the deceased's death was caused by a different vehicle from the one in which the deceased was travelling; or where the injured person was a pedestrian; and accordingly not with the applicability of Section 18. He argued then that this matter should be decided upon the application of ordinary principles of interpretation to Section 18(1) (a). Further such section should be read and interpreted in the light of the provisions of Section 17(1).

[15] Defendant's counsel however conceded in argument that this claim arose from the injuries sustained by the third party herself, and not by "*any other person*" who was a passenger for reward. Nevertheless, counsel submitted further that the differentiation on the claimants is immaterial as the two sections have to be read together. In am unable to agree with this assertion. The two sections are independent and capable of being interpreted separately. The argument by the Mr. Smuts is misplaced. Even if one were to employ the ordinary grammatical meaning of the two sections, each one of them is independent from another.

[16] This court is called upon to decide whether the Plaintiff's claim for damages for emotional shock is limited in terms of Section 18 of the Act. In my view Section 18(1) was set to operate in a situation where the claim is for compensation of third parties, or losses resulting from bodily injuries or death of a person who was conveyed in an insured motor vehicle, i.e. a passenger. Such a claim is limited to an amount of R25 000.00. In *casu*, Plaintiff does not fall under the category of persons mentioned in Section 18. She suffered from emotional shock as a result of the negligent driving of the insured driver that caused death of her son.

[17] Emotional shock is defined as shock suffered by a person without necessarily personally sustaining bodily injury. This kind of shock is caused when a third party observes or is mortified by an unpleasant or disturbing event, for example, the killing of a relative or a person with whom the third party had a close emotional relationship, of which that was the case in *casu*.

[18] Plaintiff is now claiming for damages based on emotional shock. Damages in such instances can be recovered if the emotional shock was:

- 18.1. reasonably foreseeable and of a sufficiently serious nature so as to affect the general health of the claimant and require treatment;
- 18.2. if a reasonable man in the position of the wrongdoer would foresee the detrimental consequences of the emotional shock.

It is trite law that the abovementioned principle was recognized where a Plaintiff suffers a resulting detectable psychiatric injury where a person close to him or her dies as a result of an accident, the relationship between the primary and secondary victim is not necessarily the prime consideration. In determining such limitations, the court will take into consideration such relationship, but it remains a question of legal policy, reasonableness, fairness and justice,

and that reasonable foreseeability should also be a guide. In the event, the court upheld the action of a person engaged to the primary victim. See **RAF v Sauls** (*supra*), see also **Minister of Safety and Security v Sibili**⁴. This principle was further recognized and applied in an inadvertent baby swapping case, **Clinton-Parker v Administrator, Transvaal; Dawkins v Administrator, Transvaal**⁵. The case involved the parents of two babies who were born on the same day. The nursing staff swapped babies around, and the parents were informed of the mistake some two years later. A claim was brought against the hospital authorities and the court held in favour of the parents. The defendant owed the parents a duty of care, that this duty was breached and that the harm or injury suffered, in the form of emotional shock, was reasonably foreseeable.

[19] I do not agree with Defendant's argument that when the court determines this matter, Section 18(1) (a) should be read and interpreted in the light of the provisions of Section 17(1). In my judgment the two sections are standalone sections. They are capable of being interpreted independently.

[20] Due to the recent legal recognition of emotional shock as a head of damage in our law, very few notable judgments regarding the assessment of damages for emotional shock have been handed down, except **Barnard v Santam, Clinton-Parker, RAF v Sauls** (*supra*), **Majiet v Santam** et al.⁶ In these cases, it is clear that the extent and duration of the psychological consequences induced by emotional shock are the main factors which weighed heavily with the courts when assessing an amount for general damages.

⁴ 2003 (4) All SA 451 (TK)

⁵ 1996 (2) SA37 (W)

⁶ 1997 ALL SA 555(C)

[21] The answer to the legal question posed above is that the claim or liability should not be capped or limited in terms of Section 18 of the Act. By enacting Section 18 the Legislature could not, and did not intend to limit the claim and thereby altering the common law position. According to the law of delict, loss is recoverable if it was reasonably foreseeable. The express mention of categories entitled to claim in Section 18 is a clear indication that the Legislature, in enacting Section 18, did not intend to include other categories of claimants. The express mention of the one is surely the exclusion of the other. As a matter of logic and robust common sense, there would be no basis whatsoever for limiting claims in all categories other than those particularly mentioned in Section 18. It is my judgment that liability should not be limited to R25 000.00. Plaintiff is therefore entitled to whatever damages it can prove.

F. FINDINGS

[22] Judging from the medico-legal report compiled by Dr Neil Fouche, the psychiatrist, I have no doubt in my mind that Plaintiff fits the test that has been applied in the cases mentioned in paragraph 20 above, most importantly being:-

22.1. the severity of the shock and consequences thereof;

22.2. the duration of such consequences; and

22.3. the extent to which the consequences would influence the claimant's future emotional well-being.

[23] If regard is had to the above, and most importantly, taking into account the provisions of Section 17, it is untenable that Plaintiffs damages should be capped and limited to R25 000.00 in a situation where the harm was reasonable foreseeable by the insured driver. The insured driver failed to take reasonable steps to guard against an accident. The question on whether a

reasonable person would have taken steps to guard against reasonable foreseeable harm, involves a value judgment taking into account the degree or extent of the risk created and the gravity of the consequences. In my opinion, given the Plaintiffs personal circumstances she has gone through, it would be unreasonable to cap the damages. The imposition of a cap would be demonstrably unnecessary, unjustifiable and unreasonable in the circumstances. Regard should be had to the actual loss of the Plaintiff and in this instance, she retains the right to be fully compensated for the damages suffered.

G. CONCLUSION

[24] In the circumstances, I make the following order-Plaintiffs claim against the - - -

- Defendant must be determined in accordance with Section 17 and therefore be unlimited.

It follows that costs should be borne by the Defendant.

MANTAME, AJ