Reportable Appeal No
710/1994

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

WILLIE CHAUKE Appellant

and

SANTAM LIMITED Respondent

Court: E M Grosskopf, Kumleben, Nienaber,
Olivier and Zulman JJA Date
heard: 12 September 1996 Date delivered: 27 September 1996

JUDGMENT

Olivier JA:

The appellant, an employee of Messrs Unitrans in Johannesburg, seems to have been dogged by misfortune at his place of employment. Some years ago, in the course of his duties, he was seriously injured when crushed by a crane. Then, on 11 June 1988, in the incident which has given rise to the present proceedings, he was injured by a forklift while walking about the Unitrans yard in the course of his

employment. The yard is an open area occupied by warehouses and workshops where vehicles, machinery and people co-exist in seemingly hazardous conditions.

Believing his injury to have been caused by the negligence of the driver of the forklift, he instituted action in the magistrates' court against the respondent, the appointed agent in terms of the Motor Vehicle Accidents Act, 84 of 1986 ('the Act').

He was met by a special plea in which the respondent denied liability on the grounds that the forklift was not a 'motor vehicle' as envisaged by the Act.

Section 1 of the Act defines a motor vehicle as

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

The magistrate decided to dispose of the special plea apart from the other issues arising from the dispute. The respondent called on Mr Bhayla, the foreman at the central workshops of Unitrans to testify. With the aid of several photographs he gave

a full description of the forklift and explained its operation. The appellant did not produce any
evidence.

The magistrate upheld the special plea with costs.

The appellant subsequently appealed to the Witwatersrand Local Division of the Supreme Court. This appeal was heard by Streicher J and Burger AJ.

The appeal was dismissed with costs. The judgment is reported as Chauke v Santam Ltd 1995 (3) SA 71 (W) .

Pursuant to leave granted by that court, the matter is now before us. The appellant was granted leave to appeal in forma pauperis by this Court.

Since the introduction of compulsory third party insurance in our country by legislation in 1942, the legislator has experienced difficulty in saying exactly what a 'motor vehicle' is supposed to mean for the purposes of the legislation. The courts repeatedly have been asked to interpret the various definitions. The apparent simplicity of this task is deceptive. As will shortly be demonstrated, the legislator and the courts in England have experienced the same difficulties.

4 In the initial compulsory insurance legislation, the Motor Vehicle Insurance Act, 29 of 1942, section 1 (i) a 'motor vehicle' was defined as

> 'any vehicle designed for propulsion on a road by means of any power (other than human or animal power) without the aid of rails, but does not include:
>
> (1) a vehicle designed for propulsion by means of human power with the assistance of mechanised power;
>
> (2) a vehicle weighing not more than five hundred pounds which is specially constructed for the. use of persons who suffer from a physical defect or disability, and which is designed to carry only one person;
>
> (3) a roller.'

The genealogy of the expression 'designed for...' can be traced back at least as far as section 1 (4) (e) of the Motor Carrier Transportation Act 39 of 1930 (as amended by section 1 of Act 31 of 1932), which created an exemption under that Act for a motor vehicle 'designed or intended' for the conveyance of not more than seven persons.

The definition of 'motor vehicle' in the 1942 Act proved to be most unhappy and gave rise to a number of disputes which ended up in court. The definition had finally to be amended significantly. Thus, on the question whether a trailer is a motor vehicle as originally defined in the Act under discussion this Court first answered in the negative (Mathie v Yorkshire Insurance Co Ltd 1954 (4) SA 731 (A)) and subsequent to an amendment in 1959 positively (Santam Versekeringsmaatskappy Bpk v Kemp 1971 (3) SA 305 (A)).

The 1942 Act was replaced by the Compulsory Motor Vehicle Insurance Act, 56 of 1972, 'motor vehicle' then being defined in sec 1 (i). as

> '... any vehicle designed or adapted for propulsion or haulage on a road by means of any power (not being exclusively human or animal power) without the aid of rails, and includes any trailer of such a vehicle, but does not include a vehicle weighing not more than 230 kilograms, which is specially constructed for the use of a person who suffers from a physical defect or disability, and which is designed to carry one person.'

The first and dominant part of the definition

corresponded substantially with that of the former Act as amended. In turn the 1972 Act was replaced by the present Act and in sec 1 'motor vehicle' is now defined as follows

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

A comparison of the dominant and - for this Court's purposes - relevant part of the definition of 'motor vehicle' in the three Acts under discussion, bears out that

(4) the consistent intention was to use the phrase 'designed for propulsion on a road' as the dominant and decisive test;

(5) preference was given to 'designed' over 'intended' or 'designed or intended';

(6) 'road' was not defined and must, therefore, bear its ordinary meaning.

In the present case, there was no evidence that the

specific forklift had been adapted at all, or in any way that might modify its purpose as originally designed. The question remains: was the forklift 'designed' for propulsion on a 'road'?

Although there are any number of dictionary definitions of 'road' (see i.a, the discussion in Prinsloo v Santam Insurance Ltd [1996] 3 All SA 221 (E) at 224 j - 225 d) the one given in the Concise Oxford Dictionary, 7th ed, sv 'road', the concept seems, in my view, to encompass the general and acceptable meaning of that word, i.e. a line of communication, esp. a specially prepared track between places for use by pedestrians, riders and vehicles.

'Designed for' in the present context connotes the idea of a mental plan, the established form of a product, and the general idea of its purpose (op cit., s.v. design) . The idea of 'intended for' carries, in my view, a more subjective meaning. It usually refers to a particular person's purpose, object or aims (op cit. s.v. intention) though it may also mean, more objectively, 'a reasoned purpose, intent, and a method worked out for accomplishing something' (Microsoft Encarta 95 s.v. design).

In spite of its potential to offer a subjective

reading, the expression 'intended for' - in the present context of defining a motor vehicle - has been given an objective meaning in English law.

Section 253 (1) of the English Road Traffic Act, 1960 (8 and 9 Eliz. 2 c. 16) provides

> 'In this Act 'motor vehicle' means a mechanically propelled vehicle intended or adapted for use on roads...'

These words were also used in previous legislation and gave rise to the same problems of interpretation now facing this Court.

> In Daley and Others v Hargreaves [1961] 1 All ER 552 (QB) the court held that two dumpers (mechanically propelled vehicles used in the ordinary way for the construction of works) were not motor vehicles as defined in the said Act. Salmon J held that the words 'intended . . . for use on roads' should not be read subjectively, i.e. as referring to the intention of a particular person, e.g. that of a particular manufacturer, wholesaler, retailer, owner or user, but rather that the expression may mean no more than 'reasonably suitable or apt for use on roads'.

In Woodward v James Young (Contractors) Ltd 1958 SC

(J) 28 the Court of Session concluded that 'intended for use on roads' meant intended for use on roads for ordinary road purposes. In this case a tractor was held to be such a motor vehicle.

Finally, reference can be made to a case decided by the Queen's Bench Division in 1963, Burns v Currel [1963] 2 All ER 297 (QB). The court had to decide whether a Go-Kart was a motor vehicle as defined in the said Act. The vehicle had its engine at the rear, had a tubular frame mounted on four small wheels and was equiped with a single seat, steering-wheel and -column, and an efficient silencer. It had brakes which operated on the rear wheels only, and was not equipped with a horn, springs, parking-brake, rearview mirror or wings. There was no evidence that people generally used Go-Karts on the roads.

The court held that a Go-Kart fell outside the definition. The important point, however, is the formulation by Lord Parker CJ of the correct approach to the said definition. Referring to the decision of Salmon J in Daley's case mentioned above, he stated (at 300 D-H):

> 'Salmon, J., suggested that the word "intended" might be paraphrased as "suitable or apt". It may be merely a difference of wording, but I prefer to make the test whether a reasonable

person looking at the vehicle would say that one of its users would be a road user. In deciding that question, the reasonable man would not, as I conceive, have to envisage what some man losing his senses would do with a vehicle; nor an isolated user or a user in an emergency. The real question is: is some general use on the roads contemplated as one of the users? (my underlining). Approaching the matter in that way at the end of the case, the justices would have to ask themselves: has it been proved beyond a reasonable doubt that any reasonable person looking at the Go-Kart would say that one of its uses would be use on the road? For my part, I have come to the conclusion that there really was no such evidence before them as to satisfy them on that point according to the ordinary standard of proof. The evidence was that the appellant had used this vehicle on this day alone and that he had never used it before. There was no evidence that other people used these vehicles on the road, nor is it suggested by the justices that they came to their conclusion, as they would be entitled to up to a point, on their own experience and knowledge. As I have said, all that they had before them was that a Go-Kart had been used on a road to which the public had access on this one occasion. Looked at in that

> way, so far as this matter of "intended" is concerned, I do not think that the justices had any material on which they could feel sure so as to be able to convict.'

Not only do I; respectfully, agree with the approach of Lord Parker, but would add that the same reasoning should apply, in my view, to the even more objective definition in the South African legislation under discussion: a fortiori - just because a vehicle can be used on a road by no means implies that it was 'designed for propulsion on a road'.

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.

Turning to the facts of the present case: the vehicle under discussion is a Clark model forklift. It is a vehicle exclusively used for lifting, conveying and depositing heavy loads. It can lift and convey up to 2.5 tons. The vehicle has four small but sturdy wheels and a centre-mounted four cylinder Perkins diesel engine. There is a single open driver's seat above the engine. It has a steering-wheel, a foot brake which operates on the front wheels only, and a gearbox-mounted inching brake which is used to slow the vehicle when it is in motion without the risk of jerking. It is steered by the rear wheels. It has neither lights nor indicators, but is fitted with a hooter. It has a forward and a reverse gear, with two speeds in each gear. Its maximum speed in the slow gear is 5 kilometres per hour and in the fast gear 8 kilometres per hour. The load is lifted and lowered by means of a hoist, consisting of two horizontal prongs on which the load is placed, and a vertical hoist, which can lift the load in order to carry it from one point to another. The hoist, even when not in use, obstructs the view of the driver to a substantial degree. The vehicle is

not fitted with a speedometer, nor with brake lights.

The forklift 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. Under cross-examination Mr Bhayla stated that the forklift could be driven down Eloff Street in Johannesburg, but '... it is taking a chance.' It could not be registered in terms of the statutory licensing rules unless modified. The forklift drivers are not allowed to drive out of the premises. If a forklift is driven on a public road, according to the witness, '... you could knock somebody over'.

Applying the test discussed above it is clear that the forklift under discussion cannot fairly be defined as a motor vehicle for the purposes of the Act: its use on a road would be regarded as extraordinary and in fact as hazardous, and clearly, even in daytime, not an activity for which it was designed. Apart from its low speed and the driver's limited view, the driver cannot warn following traffic of his intention to turn or slow down or stop, the device not being fitted with appropriate indicators or lights. Furthermore, it would not be possible to use the

vehicle after dark as it has no head lights. That it may be required to cross a road, e.g. between warehouses (an example used by counsel for the appellant) does not detract from the conclusion reached above. Such use surely would be unusual; and the appropriate test is whether a general use on the road is contemplated (see also the approach in Matsiba v Santam Versekeringsmaatskappy Bpk [1996] 1 All SA 614 (T) at 618 h to 619 D).

Like the conclusion reached by the court in Prinsloo v Santam Insurance Ltd, supra, where a similar forklift was held not to be a motor vehicle under the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989, and where the definition is identical to that in the present Act, the conclusion reached by the court a quo cannot be faulted.

The appeal is dismissed with costs, including the costs of the application for leave to appeal in the court a quo.

Concur

E M Grosskopf

M Kumleben P M Nienaber R Zulman