

Reportable

Case No: 278/99

In the matter between:

**MUTUAL AND FEDERAL INSURANCE COMPANY
LIMITED**

APPELLANT

and

FAITH DAY
RESPONDENT

Marais, Navsa and Mpati JJA

Date of hearing: **27 February 2001**

Date of delivery: **26 March 2001**

Summary: **MVA - whether a forklift with certain features is a motor vehicle as defined in Article 1 of the Agreement Establishing a Multilateral Motor Vehicle Accidents Fund given the force of law in terms of s 2 of the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989.**

JUDGMENT

NAVSA JA:

[1] This is an appeal against a judgment of the Full Bench of the Eastern Cape Division of the High Court (“the Full Bench”) reported as ***Mutual and Federal Insurance CO LTD v Day 1999(4) SA 813(E)***. The only issue is whether a forklift involved in a collision giving rise to the present appeal is a motor vehicle as defined in Article 1 of the Agreement Establishing a Multilateral Motor Vehicle Accidents Fund (“the Agreement”) given the force of law in terms of s 2 of the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989. The forklift in question is a Komatsu model FD60 to which I will refer as

“the Komatsu”.

The background

[2] The respondent sued the appellant, an appointed agent in terms of the Agreement, for compensation for damages suffered as a result of bodily injuries sustained in consequence of a collision which occurred on 4 February 1993 in Byron Road, Kensington, Port Elizabeth. In her particulars of claim the respondent asserts that the Komatsu collided with a parked motor vehicle which in turn collided with her at a time when she was a pedestrian. The respondent claims that the collision was caused by the negligence of the Komatsu’s driver. The appellant denies negligence on the part of the driver and denies that the Komatsu is a motor vehicle as defined in the Agreement. If either contention is correct, the appellant cannot be held liable for such damages as may have been suffered by the respondent.

[3] At the commencement of proceedings in the South Eastern Cape Local Division of the High Court the parties agreed that Jennett J should at that stage decide only whether the Komatsu was a motor vehicle as defined in Article 1 of the Agreement. The learned judge who heard evidence on this aspect decided the question in favour of the respondent. The appellant appealed unsuccessfully against that decision to the Full Bench. Leave to appeal to this Court was sought and granted.

The definition in Article 1 of the Agreement and the decision in *Chauke v Santam Limited* 1997(1)SA 178(AD)

[4] The following is the applicable definition:

“ ‘ Motor vehicle’ means any vehicle designed or adapted for propulsion or haulage on a road by means of fuel, gas or electricity and includes a trailer, a caravan, an agricultural or any other implement designed or adapted to be drawn by such motor vehicle.”

[5] In the *Chauke* case, *supra*, this court considered whether a Clark model forklift with certain features fell within the definition. In that case as in the present one the question of the forklift being adapted did not arise. The words “designed for” were considered.

At **181 G-H** the Court said the following about the connotation of these words:

“... connotes the idea of a mental plan, the established form of a product, and the general idea of its purpose...”

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At **183 A-C** the Court stated:

“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”

[6] In the *Chauke* case at **181 I-J** Olivier JA had regard to section 253(1) of the English Road Traffic Act 1960 which provides:

“In this Act ‘motor vehicle’ means a mechanically propelled vehicle intended or adapted for use on roads...”

At **182 F-I** the learned judge of appeal considered a *dictum* from the English case of *Burns v Currel* [1963] 2 All ER 297 (QB) part of which reads as follows:

“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?” (per Lord Parker CJ at 300 E-F of the judgment in the *Burns* case.)

In the *Burns* case section 253(1) of the English Road Traffic act was being

considered.

At **182 J-183 A** of the *Chauke* case Olivier JA went on to state:

“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’.”

[7] At **183 D-F** of the *Chauke* case the features of the Clark model forklift were considered. It had neither lights nor indicators. It did not have a hooter. It had a top speed of 8 kmph. A hoist for lifting weights positioned on the forklift substantially obstructed the view of the driver when it was not in use. There were no brake lights. It was steered by its rear wheels. The Court considered that the forklift was used in and out of a warehouse and in a yard. It was not used on the road. After a consideration of these factors the Court in the *Chauke* case concluded as follows at **183 I-J**:

“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 headlights. That it may be required to cross a road, for example 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...”

The facts of the present case

[8] The Komatsu has a number of features that the forklift in *Chauke's* case did not have. It has headlights with a bright and dim facility, a hooter, indicators and brake lights. It is equipped with reflectors, two rear view mirrors and can, as an option, be fitted with a windscreen. It has pneumatic tyres which aid suspension and it has better wheel clearance. The Komatsu has a top speed of 32 kmph. It also has improved forward vision when compared to the forklift in the *Chauke* case. However, it must be said that a photograph produced at the trial shows that its mast still provides a substantial obstruction to a driver's forward vision.

[9] There was uncontested evidence that the Komatsu often travelled on public roads close to the yard in which it was principally employed. It was used to lift and shift loads in a yard some 2-3 hectares in extent. It also travelled distances(unloaded) on public roads to reach places where it was to serve its primary purpose, namely lifting and moving goods. In order to reach a venue at which maintenance operations were performed on it the Komatsu travelled a distance of some 8 kilometers.

[10] The Komatsu's size, steering mechanism and a counterweight attached to its rear are important features which require further and careful consideration. In this regard the evidence of Mr Barry Grobbelaar ("Grobbelaar"), an automotive engineer with expertise in vehicle design, deserves attention. Grobbelaar testified in support of the appellant's case.

[11] The Komatsu is a larger forklift than the one in the *Chauke* case. It has the ability to lift 6 tons and therefore has a sizeable counterweight. Like the forklift in the *Chauke* case the Komatsu has a rear wheel steering system. This, according to Grobbelaar, makes steering it a difficult task. It is common cause that there is no other vehicle in use on public roads which has rear wheel steering. Rear wheel steering has the effect of swinging the rear of the vehicle outwards in a direction opposite to the one in which it is being steered. This is a phenomenon known as over-steering. Grobbelaar was adamant that sudden steering movements could lead to a loss of control with the probability that the Komatsu would capsize. He stated that this could occur even at a speed of 20 kmph. Grobbelaar testified that in the event of a sudden steering movement on a public road to avoid other vehicles or pedestrians the counterweight added to the risk of

the vehicle capsizing. He repeatedly stated that a skilled driver could not necessarily avoid such a consequence. Grobbelaar accepted that when the Komatsu was serving its primary purpose other forklifts and vehicles may be operating in the vicinity and personnel may be present. He also accepted that given its size it could be assumed that in serving its primary purpose the Komatsu would be employed in extensive areas such as timber mills or wharves. He was adamant that such an environment was very different to conditions that would be encountered on a public road. The essence of Grobbelaar's evidence is that the steering mechanism and counterweight are design limitations that render the Komatsu hazardous for general use on public roads.

[12] Mr Clarke ("Clarke") an engineer who testified in support of the respondent's case conceded that the design of the vehicle was such that over-steering was a problem but offered the simplistic and rather unpersuasive argument that he experienced no problem driving his motor vehicle in reverse. Clarke did not drive the Komatsu. Grobbelaar drove it and completed his expert report after doing so. In my view it is quite clear that Grobbelaar was the more impressive and more technically skilled witness in respect of the design characteristics of the Komatsu.

[13] Before us counsel for the parties were agreed that the Komatsu had superior design features when compared to the forklift in the *Chauke* case. They were also agreed that this did not necessarily mean that the vehicle was designed for use on a public road. These features all enhanced the Komatsu's capabilities in respect of its primary purpose. It was agreed that the Komatsu's primary purpose was to lift and move loads in places such as storage and lumbar yards, steel mills and wharves. It was also accepted that features such as headlights and a windscreen enhanced the vehicle for its primary purpose. For example, headlights may be used at night time in a particular location or even during the day in large dark storage sheds. A windscreen is useful in inclement weather. It should also be borne in mind that Regulation 436 of the Road Traffic Regulations promulgated in terms of Act 29 of 1989 prohibits the night time use on public roads of all forklifts.

[14] The fact that the Komatsu has a primary purpose does not mean that it could not have been designed for a secondary purpose such as for use on public roads thereby falling within the definition under consideration. It is clear that this was not a limitation sought to be imposed by the judgment in the *Chauke* case.

[15] It is significant that there is no reference, either in the Komatsu's operating manuals or in promotional material, to its public road use or capability. There is reference in the manuals to it being transported from venue to venue by way of a low-bed trailer.

CONCLUSIONS

[16] It was submitted on behalf of the respondent, with reference to the *Burns* case, *supra*, that the use to which the Komatsu was put is a relevant consideration.

In *Chauke's* case at **182J** it was clearly stated that just because a vehicle can be used on a public road does not mean that it was “designed” for propulsion on a road. In *Matsiba v Santam Versekeringsmaatskappy 1997 (4) SA 832 (SCA)* at **834 H**, Marais JA, in considering whether a type of lawnmower was a vehicle within the definition presently under consideration, stated:

“Dat dit moontlik is om hierdie grassnyer op ‘n pad te bestuur, is nie deurslaggewend nie.”

The question remains: was the Komatsu “designed” for use on a public road?

[17] Both the trial court and the Full Bench thought it significant that regulation 436 of the Road Traffic regulations provides for the use of forklifts on public roads. Before us it was submitted on behalf of the respondent that regulation 436 bolstered the respondent’s case. At **819 D - 819 F** of the judgment of the Full Bench the following appears:

“A consideration of the requirements laid down in reg 436 of the Road Traffic Regulations shows that not only does the Komatsu comply with those requirements but it in fact has features that are not required in terms of the regulations which improve its suitability for use on a road. In this case the fact is not merely that the Komatsu ‘can be used on a road’. The various features referred to above, all part of its original design, show that it is because of its design, show that it is because of its design that it is suitable for propulsion on a road. There is nothing fanciful in the idea that a manufacturer may design a forklift which would be suitable to move from one workplace to another along a road in order to eliminate the necessity of having it transported by other means.”

[18] Regulation 436 exempts forklifts and other specialised equipment such as mobile cranes, straddle trucks, drilling and roadmaking machines from some of the standard requirements for other vehicles. It provides, however, that such

exempted vehicles should have certain minimum features in order to qualify for operation on public roads. It does not follow that a forklift with these minimum features is a motor vehicle within the meaning of the definition under consideration. The expert witnesses for both parties testified that as far as they knew all forklifts have rear wheel steering. It is, however, conceivable that in a particular case a forklift owner, designer or manufacturer may be able to persuade a Court that the kind of steering problem described by Grobbelaar has been overcome. Regulation 436 must be read subject to the definition under consideration.

[19] I agree with the submission on behalf of the appellant that the trial court and the Full Bench unjustifiably paid little or no attention to the safety concerns raised by Grobbelaar. In his judgment Jennett J deals cursorily with Grobbelaar's misgivings about the forward view afforded to a driver of the Komatsu. Insofar as the hazards of driving the Komatsu is concerned the learned Judge said the following (at p10):

“ I do not perceive anything in the driving thereof on roads as ‘extraordinarily difficult and hazardous’.”

In the judgment of the Full Bench, Liebenberg J did not refer to Grobbelaar's evidence relating to the Komatsu's steering difficulties and its inherent design limitations.

[20] Applying the test set out in *Chauke's* case it appears to me to be clear that the Komatsu cannot be defined as a motor vehicle within the definition under consideration. The Komatsu poses a hazard to other road users and steering it in traffic, confronted with the emergencies that commonly arise on public roads, as distinct from steering it within its accepted field of operation, should, in my view, be considered extraordinarily difficult and hazardous. Whilst this conclusion may appear to have harsh consequences for the respondent it should be borne in mind

that she was not without other remedies and could have chosen to sue the local authority which owns the Komatsu or could have joined it in the action against the appellant.

[21] It follows that in my view the appeal should be upheld. I make the following order:

1. The appeal is upheld with costs including the costs of the application for special leave to appeal to this court.
2. The order of the Full Bench is set aside and for it is substituted the following:
 - 2.1 The appeal succeeds with costs; including the costs of the application for leave to appeal.
 - 2.2 The order of the Trial Court is set aside and the following is substituted:
 - 2.2.1 The forklift vehicle in the present case, registration number CB 234 050, is not a “motor vehicle” as defined in Article 1 of the Agreement Establishing a Multilateral Motor Vehicle Accidents Fund given the force of law in terms of s2 of the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989;
 - 2.2.2 The plaintiff is to pay the defendant’s costs including the qualifying expenses of Mr Grobbelaar and the pre - trial inspection *in loco*.

**M S NAVSA
JUDGE OF APPEAL**

**CONCUR
MARAIS JA
MPATI JA**

