THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable

CASE NO. 139/2001

In the matter between

THE ROAD ACCIDENTS FUND **Appellant**

and

TOM CLAYTON **Respondent**

BEFORE: HARMS, MARAIS, ZULMAN, NAVSA and MTHIYANE JJA

HEARD: 14 MAY 2002

DELIVERED: 31 MAY 2002

The interpretation and application of article 43 of the Multilateral Motor Vehicle Accidents Fund Agreement in a case where the monetary limitation in article 46 applies.

JUDGMENT

ZULMAN JA

[1] This appeal concerns the interpretation and application of article 43 of the Agreement which established the Multilateral Motor Vehicle Accidents Fund (the MMF). The Agreement is set out in a schedule to the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 (the Act). The Act was repealed by section 27 of the Road Accident Fund Act, 56 of 1996. It is, however, the repealed Act which is of application in this matter.

[2] The respondent (the plaintiff) sued the appellant, the successor to the MMF, in the Magistrate's Court, Cape Town for damages arising from a motor accident which occurred on 23 February 1992. The plaintiff was a passenger in a vehicle which was driven negligently. In the particulars of claim the plaintiff alleged that he suffered damages in a total amount of R66 400,00 made up as follows:

2.1	Estimated future medical expenses	R27 000,00;
2.2	Past loss of earnings	R14 400,00;
2.3	Estimated future loss of earnings	R25 000,00
		R66 400,00

He "abandoned" an amount of R41 400,00 of his claim reducing the total to R25 000,00, in order to bring the claim within the ambit of article 46 of the Agreement.

[3] Prior to the trial, the MMF invoked the provisions of article 43(a) of the Agreement and issued an undertaking limited to R25 000,00 in respect of the claim for future medical expenses. At the trial the MMF admitted its liability and the parties agreed that the plaintiff's claim for future

medical expenses was in excess of R25 000,00 and that the claim for loss of earnings amounted to the sum of R21 675,00. In the light of the admission and agreement the magistrate gave judgment for the full amount of the claim in respect of past and future loss of earnings, and, additionally ordered the MMF to furnish an undertaking "for the balance of R25 000,00". Certain costs orders were also made which are not here relevant. The MMF appealed to the court *a quo*. The appeal was dismissed with costs. The judgment of the court *a quo* is reported in 2001(3) SA 305 (C). The MMF appeals to this court with the leave of the court *a quo.*

[4] Articles 40, 43 and the relevant portion of article 46, provide as follows:

> Article 40
>
> "The MMF or its appointed agent, as the case may be, shall subject to the provisions of this Agreement be obliged to compensate any person whomsoever (in this Agreement called the third party) for any loss or damage which the third party has suffered as a result of-
>
> (a) any bodily injury to himself;
>
> (b) the death of or any bodily injury to any person,
>
> in either case caused by or arising out of the driving of a motor vehicle by any person whomsoever at any place within the area of jurisdiction of the members of the MMF, if the injury or death is due to the negligence or other unlawful act of the person who drove the motor vehicle (in this Agreement called the driver) or of the owner of the motor vehicle or his servant in the execution of his duty".
>
> Article 43
>
> "Where a claim for compensation under Article 40-

(a) includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him, the MMF or its appointed agent shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the MMF or its appointed agent to furnish such undertaking, to compensate the third party in respect of the said costs after the costs have been incurred and on proof thereof;

(b) includes a claim for future loss of income or support, the MMF or its appointed agent shall be entitled, after furnishing the third party in question with an undertaking to that effect or a competent court has directed the MMF or its appointed agent to furnish such undertaking, to pay the amount payable by it or him in respect of the said loss, by instalments in arrear as agreed upon".

Article 46

"The liability of the MMF ... to compensate a third party for any loss or damage contemplated in Chapter XII which is the result of any bodily injury … shall be limited…

(a) …

(b) in the case of a person who was being conveyed in the motor vehicle concerned under circumstances other than the circumstances referred to in paragraph (a), to the sum of R25 000,00 in respect of loss of income or of support and the costs of accommodation in a hospital or nursing home, treatment, the rendering of a service and the supplying of goods resulting from bodily injury to or the death of one such person, excluding the payment of compensation in respect of any other loss or damage".

[5] It is common cause that the plaintiff was a passenger as envisaged in article 46(b). In the magistrate's court the MMF contended that in as much as the plaintiff's claim for damages included a claim for future medical expenses and that the MMF had elected to invoke the provisions of article 43(a) the magistrate was bound to direct the MMF to furnish the undertaking referred to in article 43(a) Since much of the potential value of the undertaking amounted to the sum of R25 000,00, (the maximum

permitted by article 46(b)) the plaintiff enjoyed no further claim against the MMF. It was therefore not competent for the magistrate to make an award in relation to other heads of damages and to limit the undertaking to the difference between R25 000,00 and the other amount. Put differently, the MMF having elected to invoke the provisions of article 43(a), there was no further *lis* between the parties entitling the magistrate to grant a judgment in respect of loss of earnings. The magistrate, so the MMF argued, should simply have confirmed the furnishing of the undertaking by the MMF and made an appropriate order as to costs.

[6] In my view the magistrate was correct in rejecting these contentions. She did so for the following sound reasons:

> "There is nothing in either Article 43(a), or the Marine case, [*Marine and Trade Insurance Co Ltd v Katz* NO 1979 (4) SA 961 (A)] which says that the Defendant, in the person of the Fund, can choose which head of damages they wish to satisfy and then bind the Plaintiff by their decision."

Indeed, counsel for the MMF was unable to point to any provision in either article 43(a) or any *dictum* in the *Marine and Trade* case which gave the MMF that choice. There is also nothing in any of the other provisions of the Agreement or in the Act to that effect. Counsel for the MMF argued somewhat faintly that the plaintiff had made an election which somehow or other entitled the MMF to apply its undertaking to the whole amount claimed by the plaintiff for future medical expenses after the "abandonment" of the sum of R41 400,00. There is no factual basis for this argument. This is apparent from the issue which the magistrate was

ultimately required by the parties to determine. The magistrate summarized the dispute between the parties in these succinct terms:

> "The dispute before me then, as I understand it, is whether the Plaintiff can insist on the sum of R21 675,00 in cash, to cover his loss of earnings, with an undertaking for the balance of R3 335,00, or whether the Court is obliged to give judgment in terms of the consent to judgment, and the undertaking, which covers future medical costs only."

The plaintiff is *dominus litis* and is perfectly entitled to elect which particular component of his total claim, albeit limited to R25 000,00, is to be prioritized. The mere sequence of the exposition of the components of the overall claim for damages in the particulars of claim cannot be regarded as an election by the plaintiff to require his claim for future medical expenses to be met before his other claims are met and in lieu of his other claims being met. It is for the plaintiff to say, if all his claims cannot be met, which of them he requires to be met.

[7] The court *a quo* in dismissing the appeal approached the matter on a different basis. It formulated the following two related questions of law for consideration:

7.1 Whether article 43 was applicable to limited claims under article 46; and

7.2 If so, how is article 43 to be applied.

[8] It found that a claim under article 40 meant a claim under that article only and did not include a claim where liability was limited in terms of article 46. It accordingly held that it was not competent

for the MMF to tender an undertaking in terms of article 43. Such an undertaking would only be competent where a claim had been made under article 40.

[9] The essence of the reasoning of the court *a quo* which led it to dismiss the appeal is set out in the following portion of the judgment at page 308 F to 309 D:

> "It appears to us that there are several *indicia* which point towards a construction that Article 43 has no application to a claim where the Fund's liability is limited by Article 46. In the first place, the language of Article 43 speaks only of Article 40. That is not dispositive, because a claimant under Article 46 has first to bring him or herself within the ambit of Article 40. In a sense, an Article 46 claimant has also to be an Article 40 claimant, but that in our view is also not dispositive. Secondly, there is no cross-referencing between Articles 43 and 46; no incorporation by reference, no "subject to", no proviso, no *mutatis mutandis*, no legislative guidance whatsoever. Thirdly, Article 46 expressly limits the Fund's liability "to the sum of R25 000,00". Although the sum has changed, this was always the language of the relevant provision, and still is. Article 46 does not expressly provide that the Fund's liability is limited to the specified sum *as qualified by an appropriate undertaking*. In particular, no such change accompanied the introduction of the Article 43 procedure. Nor has anything to similar effect been enacted since. Fourthly, to apply Article 43 to a claim under Article 46, raises a host of questions to which the answers are less than obvious. What entitles the Fund to issue an undertaking limited as to amount (as distinct from an apportionment)? Does this not run counter to the intention and effect of the provision as explained by Trollip JA in *Marine and Trade v Katz N O* supra? How is the relevant head of damages to be quantified, especially when the amount claimed is contentious? Mr Louw, who appeared for the Fund, was constrained to submit that the Fund could simply take the figure alleged by a claimant in his or her pleadings, which is an unconvincing solution. Again, does quantification not run counter to the judgment of Trollip JA? What entitles the Fund to displace a claimant's proven (and, in part, incurred) damages under some heads by tendering an undertaking in respect of another head (which is what the Fund wants to do in this case)? The answers to these questions, as we have said, are not manifest; and it is evident that to answer some of them, the Court would have to read words into Article 43 and Article 46. Courts are slow to imply words into a statute. Steyn "Uitleg van Wette" (5th ed) at 11 - 14.

Fifthly, perhaps the simple, practical explanation is this: that claims limited under Article 46 were thought to be too small to warrant the administrative expense and trouble associated with implementing Article 43 in respect of such claims, hence the absence of provisions regulating the sort of questions which we have raised in the

previous paragraph."

[10] In my view the approach of the court *a quo* and the concerns it raised are unfounded. As the court *a quo* itself observed, the fact that article 43 speaks only of " a claim for compensation under article 40" and makes no mention of article 46 provides no positive support for the conclusion which it reached. But its related observation, namely, that "an article 46 claimant has also to be an article 40 claimant", is also not "dispositive" (meaning, presumably, that it provides no support for a conclusion contrary to that which it reached) is not, in my opinion, sound. It is plain that article 46 is not a provision which creates liability but one which limits a liability created by article 40. There is therefore no warrant for saying that article 43 (which is umbilically linked to Article 40 by its opening words: "Where a claim for compensation under article 40") must be read as *pro non scripto* in a case where article 46 is applicable. It would entail prefacing article 43 with very different language. Instead of saying "Where a claim for compensation under article 40", one would have to say "Where a claim for compensation under article 40 which is not subject to the limitation of liability for which article 46 provides". The very absence of any such qualifying language is in itself a powerful pointer away from the conclusion which the court *a quo* reached.

[11] To say, as the court *a quo* did, that the absence of cross-referencing between articles 43 and 46 or incorporation by reference or the like is supportive of its ultimate conclusion is, with respect, to turn the argument

on its head. For the reason I have just given, nothing of that kind was called for or necessary if article 43 was intended to be generally applicable whenever a claim for compensation under article 40 was made. Provisos such as "subject to article 46" and the like would have been required only if it was **not** intended that article 43 was to be generally applicable to claims under article 40.

[12] That the words "to the sum of R25 000,00" have always featured in the provision and ante-dated the introduction of the article 43 procedure do not seem to me to be of any moment. Unless the article 43 option is exercisable by the MMF or the court in all cases in which the claims under article 40 include claims for future costs or loss of the kind described in article 43 (irrespective of whether the claims are subject to limitation in terms of article 46) strange results will follow.

[13] To illustrate: Plaintiff A is a passenger for reward. His claim is not subject to the limitation imposed by article 46. He claims R15 000,00 for future medical expenses and R10 000 for pain and suffering (a total claim of R25 000,00). The *quantum* of his claim is admitted by the MMF. The availability of and entitlement of the MMF and the court to invoke the article 43 option could not be denied even although in fact the total claim does not exceed R25 000,00. Plaintiff B is a passenger whose claim is subject to the article 46 limitation of R25 000,00. He, too, claims R15 000,00 for future medical expenses and R10 000,00 for pain and suffering. The *quantum* of his claim is similarly admitted by the MMF. Why should the article 43 option be denied to the MMF and the court in the latter case but not in the former? The "administrative expense and trouble associated with implementing article 43 in respect of such (limited) claims" to which the court *a quo* referred, is no different in the two cases I have postulated. That factor therefore provides no justification for concluding that the article 43 option was not intended to be available where an article 46 limitation applies.

[14] As for the absence of any qualifying reference in article 46 to an article 43 undertaking, that seems to me to be a factor which militates against the conclusion reached by the court *a quo*. If a claim for future costs or loss of the kind described in article 43 is either one of the claims or the only claim made by a claimant, the right to invoke the article 43 option arises on the plain wording of article 43. If it was not intended to be available in a case where the claim is limited by article 46, I would have expected an appropriate exclusionary proviso to have been incorporated in article 43 or a provision to like effect in article 46. Here again, with respect, the court *a quo* turned the point on its head. The very absence of a reference to article 46 in article 43 or vice versa points in the direction of claims subject to the limitation **not** being excluded from the provision of article 43.

[15] Finally, there are the questions raised as to the source of the MMF's

right to issue an undertaking limited as to amount and whether allowing that to happen would not run counter to the purpose and effect of the provision as explained by Trollip JA in *Marine and Trade Insurance Co Ltd v Katz NO*, supra (avoidance of the need to have to quantify expenses and loss which may or may not arise in future). The answer, I think, is that one must distinguish between two very different situations. The first is a case in which the MMF seeks **both** to contest the *quantum* of any such claim (and thus oblige the court to determine it as best it can) and then also to have the benefit of not having to actually pay the sum so determined but instead to furnish or ask the court to order it to furnish an undertaking to pay the sum so determined if and when the future costs and/or loss eventuates. That might well be having one's cake and eating it and that may be impermissible on the wording of the relevant provisions and in the light of the purpose for which they were created. It is unnecessary to decide the point on the facts of this case and I refrain from doing so.

[16] The second case (of which the present case is an example) is where no determination by the court of the *quantum* of such a claim is required because the MMF intends to invoke article 43 in respect of that particular component of the claim for compensation without requiring the court to quantify that component. Such a decision by the MMF does not strip the MMF of its right to have its overall liability limited in terms of article 46. If the MMF were to invoke article 43 that would not amount to a waiver of the limitation of its liability for which article 46 provides. Nor of course could a court's decision to do so have that effect.

[17] The MMF is not obliged to invoke the option of furnishing an undertaking. It may prefer to contest the issue of whether there will be any such future costs or loss or to have the *quantum* of its liability for them determined in a finite amount. It is true that in appropriate circumstances the court has the power to insist upon the MMF furnishing an undertaking but the fact remains that the court may not do so and that it may accommodate the desire of the MMF to have the *quantum* of the particular claim determined. In that event, the right of the MMF to rely upon the limitation of its overall liability to R25 000,00 could not be denied. Why then if the court insists upon the provision of an undertaking should it, too, not be subject to the limitation? There would be no difficulty in implementing the limitation. As soon as costs to the extent of the limitation have been incurred, proved and paid, the undertaking will have been fulfilled and there would be no further obligation to compensate the claimant for any further future costs or loss.

[18] There is an additional consideration. article 43 (b) also makes provision for the furnishing by the MMF of an undertaking to pay in agreed instalments the amount payable by it in respect of a loss of future income or support. Where, for example, a claim for future loss of income is R25 000,00 or less and the limitation of R25 000,00 is not applicable, the

MMF would plainly be entitled to exercise the option which article 43 (b) provides even although the claim does not exceed R25 000,00. Why then, one may ask, should the MMF not be able to do so when faced with an identical claim in a case where the limitation of R25 000,00 is applicable? No good reason suggests itself to me and there is nothing in the language in which the provisions are couched which lends itself to so incongruous an interpretation. If article 43 (b) is available for use even in a case where the article 46 limitation is applicable, what warrant is there for concluding that article 43 (a) is not available in a similar situation? I see none.

[19] In granting leave to appeal the court *a quo* referred to the unreported judgment of Combrink J in the Natal Provincial Division, in *Mwelase v Nokothula* (Case No 3846/95 judgment delivered on 20 May, 1997). Combrink J came to a conclusion contrary to that of the court *a quo*. The learned judge held, in effect, that article 46 applied to article 43. That case was concerned with a claim for future medical expenses only and not for claims made in respect of other heads of damage but that does not render the decision entirely irrelevant. The claim was met with a tender by the MMF in terms of article 43. The court found such a tender to be in order. The decision is consistent with the conclusion to which I have come.

[20] The appeal is accordingly dismissed with costs.

R H ZULMAN

JUDGE OF APPEAL

HARMS JA)

MARAIS JA **)** **CONCUR**
NAVSA JA **)**
MTHIYANE JA **)**