THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

CASE NO: 355/2002

In the matter between :

ADRIAAN BEZUIDENHOUT Appellant

and

THE ROAD ACCIDENT FUND Respondent

Before:	**VIVIER, FARLAM, CAMERON, CONRADIE JJA & SHONGWE AJA**
Heard:	**13 MAY 2003**
Delivered:	**2 JUNE 2003**
Summary:	**Reg 2(1)(d) of the regulations promulgated in terms of s 26 of the Road Accident Fund Act 56 of 1996 held to be *ultra vires*.**

J U D G M E N T

VIVIER JA

VIVIER JA:

[1] The issue in this appeal is whether reg 2(1)(d) of the regulations promulgated in terms of s 26 of the Road Accident Fund Act 56 of 1996 ('the present Act') is *ultra vires* the empowering provisions of the Act.

[2] The appellant ('the plaintiff') sued the respondent ('the Fund') in the Transvaal Provincial Division for payment of compensation for loss or damage resulting from injuries suffered by him on 28 February 1999 when the vehicle in which he was travelling left the N1 highway. He alleged that this was caused by the negligent driving of a motor vehicle of which the identity of neither the owner nor the driver thereof had been established ('the unidentified vehicle'). The Fund pleaded that it was a single vehicle collision and that, if another vehicle was involved, there was no physical contact with the plaintiff's vehicle as required by reg 2(1)(d). The Fund accordingly denied that it was liable to compensate the plaintiff in terms of s 17(1) of the Act. The plaintiff replicated that reg 2(1)(d) was *ultra vires* s 26.

[3] At the trial Basson J agreed to deal first with the issue of the validity of reg 2(1)(d). During argument on this issue it was common cause that there had been no physical contact between the plaintiff's vehicle and the alleged unidentified vehicle. The learned judge held that reg 2(1)(d) was *intra vires* and granted an order 'dismissing the plaintiff's exception with costs'. As I have indicated this was not an exception. In effect the order granted was a declaratory order that the Fund was not liable to the plaintiff so that the order was appealable. Leave to appeal was granted pursuant to a petition to this Court.

[4] The date of commencement of the present Act was 1 May 1997 and the regulations were promulgated on 25 April 1997 with effect from 1 May 1997. The accident in question was accordingly governed by the provisions of the present Act and the regulations promulgated in terms thereof. The Act includes the regulations (s 1).

[5] Regulation 2(1)(d) provides:

> 'In the case of any claim for compensation referred to in section 17(1)(b) of the Act, the Fund shall not be liable to compensate any third party unless —
>
> (a) …….
>
> (b) ……..
>
> (c) ……

(d) the motor vehicle concerned (including anything on, in or attached to it) came into physical contact with the injured or deceased person concerned or with any other person, vehicle or object which caused or contributed to the bodily injury or death concerned.'

[6] Section 17(1) distinguishes between the liability of the Fund in the case of a claim for compensation where the identity of the owner or the driver of the vehicle involved has been established and the case of a claim for compensation involving an unidentified vehicle. Section 17 creates liability in both cases, the only difference being that in the case of unidentified vehicle claims the Fund's liability is made 'subject to any regulation made under s 26'. The question then is whether reg 2(1)(d) was a valid exercise of the powers granted by s 26 to the Minister to make regulations. Section 26(1) reads:

'The Minister shall or may make regulations to prescribe any matter which in terms of this Act shall or may be prescribed or which may be necessary or expedient to prescribe in order to achieve or promote the object of this Act.'

[7] In construing s 26(1) it must be borne in mind, as a starting point, that the present Act is the latest in a line of enactments dating back to 1942 designed to compensate persons injured, or the dependants of persons killed, through the negligent driving of motor vehicles. The intention throughout has been to give such persons the greatest possible protection. See decisions of this Court in cases such as *Aetna Insurance Co v Minister of Justice* 1960 (3) SA 273 (A) at 285 E-F; *S.A. Eagle Insurance Co Ltd v Pretorius* 1998 (2) SA

656 (SCA) at 659 J; *S.A. Eagle Insurance Co Ltd v Van der Merwe NO* 1998 (2) SA 1091 (SCA) at 1095J-1096B and *Padongelukkefonds (voorheen Multilaterale Motorvoertuigongelukkefonds) v Prinsloo* 1999 (3) SA 569 (SCA) at 574 A-B. In *Pretorius* this Court said the following about the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 ('the MMF Act') which was replaced by the present Act:

'Although since 1942 legislative amendments and new enactments were required from time to time in order to adapt to changing needs, and to refine and improve the whole system of compensation, the principles and object underlying the 1942 Act and its successors have remained unaltered. In the result the Act was also intended to provide the protection referred to in the *Aetna Insurance Co* case *supra*, and it must be interpreted accordingly.'

[8] There is no express indication in the present Act of an intention or general object any different from that of the previous enactments. According to its long title the present Act provides for the establishment of the Fund and matters connected therewith. Section 3 states the object of the fund to be 'the payment of compensation in accordance with the Act for loss or damage wrongfully caused by the driving of motor vehicles'. There is no express provision in the Act limiting or excluding liability in the case of unidentified vehicle claims on the basis of lack of physical contact.

[9] Counsel for the Fund submitted that s 26(1) by implication empowers the Minister to impose by regulation the requirement of physical contact.

Since the exclusion of liability in non-contact cases could hardly be said to 'achieve or promote the object of this Act', he argued that these modifying words at the end of s 26(1) were intended to apply only to the phrase which immediately precedes it namely 'regulations . . . . . which may be necessary or expedient to prescribe'. The submission was therefore that regulations made by the Minister in terms of the first part of the section namely 'to prescribe any matter which in terms of this Act shall or may be prescribed', such as the regulations referred to in s 17(1)(b), may validly widen and travel beyond the object and purpose of the present Act.

[10] It is certainly not clear whether the modifier at the end of s 26(1) modifies the whole section or only the words which immediately precede it. In my view, however, this is of no consequence since it must in any event be implied that s 26(1) cannot empower the making of regulations which widen the purpose and object of the present Act or which are in conflict therewith. See *R v Hildick-Smith* 1924 TPD 69 at 92 and Caney, *Statute Law and Subordinate Legislation* 88. Bennion, *Statutory Interpretation* 3rd ed (1997) at 189 points out that underlying the concept of delegated legislation is the basic principle that the legislature delegates because it cannot directly exert its will in every detail. All it can in practice do is to lay down the outline. This means that the intention of the legislature, as indicated in the enabling Act, must be the prime guide to the meaning of delegated legislation and the extent

of the power to make it. Bennion continues as follows:

'The true extent of the power governs the legal meaning of the delegated legislation. The delegate is not intended to travel wider than the object of the legislature. The delegate's function is to serve and promote that object, while at all times remaining true to it.'

In the case of *Utah Construction and Engineering (Pty) Ltd and Another v Pataky* [1966] 2 WLR 197 (PC), [1966] AC 629 (PC), the Privy Council considered the validity of a regulation made in terms of a statutory provision which empowered the Governor of New South Wales to 'make regulations not inconsistent with this Act prescribing all matters which are required or authorised to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act'. Dealing with the argument that the regulation in issue could be justified as being within the empowering section, the Privy Council said at 202 (adopting a statement in the judgment of the High Court of Australia in *Shanahan v Scott* (1956) 96 CLR 245 at 250) that the power delegated by an enactment:

'does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends.'

[11] The exclusion of liability in non-contact cases falls outside the object and purpose of the present Act. In fact it runs counter to the intention of the present Act which, as I have said, is designed to give the greatest possible protection to victims of the negligent driving of motor vehicles.

[12] There is good reason for the provision in s 17(1)(b) making the Fund's liability in the case of claims involving unidentified motor vehicles subject to regulations issued in terms of s 26(1). As Harms JA pointed out in the case of *Mbatha v Multilateral Motor Vehicle Accidents Fund* 1997 (3) SA 713 (SCA) at 718 H, the possibility of fraud is greater in unidentified vehicle cases since it is usually difficult for the Fund to find evidence to controvert the claimant's allegations. Regulations of a regulatory or evidentiary kind designed to eliminate fraud and facilitate proof would thus fall within the power to regulate. But these would be truly incidental or ancillary to the object of the Act. The exclusion of liability in reg 2(1)(d), however, allows the delegate to travel wider than the object and purpose of the legislature and must accordingly be held to be *ultra vires*.

[13] Any doubt about the meaning of s 26(1) is, in my view, removed when regard is had to the pre-existing legislation (cf *Ebrahim v Minister of the Interior* 1977 (1) SA 665 (A) at 680 A-D and *Prinsloo's* case, *supra* at 567 A-B). Section 32(1)(b) of the Motor Vehicle Insurance Act 29 of 1942, as amended by s 22 of Act 60 of 1964, specifically empowered the Minister to make regulations 'limiting and controlling the right of any person' to payment from the Contribution Fund in a case involving an unidentified vehicle. Act 29 of 1942 was replaced by the Compulsory Motor Vehicle Insurance Act 56 of 1972. Section 32(1)(g) of this Act contained a similar provision empowering the Minister to make regulations restricting the MVA Fund's

liability to pay compensation in the case of an unidentified vehicle. Both these Acts thus expressly authorised the Minister to make regulations limiting or restricting liability to pay compensation in the case of an unidentified vehicle. Act 56 of 1972 was replaced by the Motor Vehicle Accident Act 84 of 1986 which was in turn replaced by the MMF Act. The two latter Acts contained no provision similar to those of its precursors empowering the Minister to limit or restrict liability in the case of claims involving an unidentified vehicle. Section 8 of Act 84 of 1986 and art 40 of the Agreement in the MMF Act provided in almost identical terms for the liability of the respective Funds without distinguishing between claims for compensation where the identity of the owner or driver of the vehicle involved had been established and claims for compensation involving an unidentified vehicle. Section 17(1) of Act 84 of 1986 empowered the Minister to make regulations as to:

'(a) ……

(b) any matter which in terms of this Act is required or permitted to be prescribed by regulation;

(c) in general, any matter which he may consider necessary or expedient to prescribe in order to attain or promote the objects of this Act.'

Section 6(1) of the MMF Act provided that 'the Minister may make regulations to give effect to any provision of the Agreement as applicable in the Republic'.

[14] It will be seen that s 26(1) of the present Act and s 17(1)(a) and (b) of Act 84 of 1986 provide for the same two categories of regulations in almost identical language. The two categories are regulations which shall or may be prescribed in terms of the Act and those which may be necessary or expedient to prescribe. In s 17(1) of Act 84 of 1986 the qualifying words 'in order to attain or promote the objects of this Act' appear only at the end of sub-para (c) whereas in s 26(1) of the present Act sub-paras (b) and (c) of s 17(1) of Act 84 of 1986 are conflated into one sentence appearing in one sub-section, with the

qualifier appearing at the end of the sentence. In my view the changes indicate an intention to apply the qualifier to both categories (cf *Collie NO v The Master*, 1972 (3) SA 623 (A) at 630A).

[15] In *Prinsloo* this Court considered the validity of reg 3(1)(a)(v) issued in terms of s 6 of the MMF Act. This was the precursor to the present reg 2(1)(d) and was identical to the present reg 2(1)(d). In holding that reg 3(1)(a)(v) was *ultra vires* Smalberger JA, who delivered the unanimous judgment of this Court, said at 574D-575A):

'Artikel 6 van die Wet magtig die Minister om regulasies uit te vaardig "ten einde gevolg te gee aan 'n bepaling van die Ooreenkoms soos in die Republiek van toepassing". Dit magtig nie die Minister om regulasies uit te vaardig buite die omvang en bestek van die Ooreenkoms wat nie redelikerwys nodig is om die doel van art 6(1) te bereik nie. Regulasies is ondergeskikte wetgewing voortvloeiend uit 'n gedelegeerde voorskrif. 'n Regulasie moet in die lig van die magtigende Wet uitgelê word, nie andersom nie (*Sekretaris van Binnelandse Sake v Jawoodien*, 1969 (3) SA 413 (A) op 423E). 'n Regulasie wat dus nie gevolg gee aan 'n bepaling van die Ooreenkoms nie, is ultra vires (*Mbatha v Multilateral Motor Vehicle Accidents Fund*, 1997 (3) SA 713 (HHA) op 718C).

Die bepaling in reg 3(1)(a)(v) dat, as voorvereiste vir aanspreeklikheid aan die kant van die MMF, daar in die geval van 'n ongeïdentifiseerde voertuig fisiese kontak moet wees, vind, soos reeds aangedui, nie weerklank in óf die Wet óf die Ooreenkoms nie. Dit stel 'n beperking op aanspreeklikheid wat onbestaanbaar is met die wye betekenis van art 40 van die Ooreenkoms en wat die trefwydte daarvan verminder. Dit gee nie gevolg aan art 40 of enige ander bepaling van die Ooreenkoms nie; die teenoorgestelde is eerder waar (vgl *S v Grindrod Transport (Pty) Ltd and Others* 1980 (3) SA 978 (N) op 983F-G). Die Minister se bevoegdheid kragtens art 6(1) van die Wet is 'n suiwer regulerende bevoegdheid. 'n Verbod wat volgens so 'n bevoegdheid opgelê word, is ongeldig (*R v Williams* 1914 AD 460 op 465 en 467; *S v Perumal* 1977 (1) SA 526 (N)). Hierdie beginsel behoort eweneens te geld waar 'n reg ontneem word as gevolg van 'n omgemagtigde beperking van aanspreeklikheid, soos in die onderhawige geval. Ek stem ook saam met die Hof *a quo* dat "(a)rt 6 van die Wet dui nie die bedoeling aan tot die verleen van die bevoegdheid om aanspreeklikheidsuitsluiting by wyse van regulasie neer te lê nie" (sien die gerapporteerde uitspraak op 314e-f). Die plaas van 'n andersins omgemagtigde beperking op die MMF se aanspreeklikheid is ook nie redelikerwyse diensbaar ("reasonably incidental") aan die Minister se verleende bevoegdhede nie. Gevolglik het die Hof *a quo* myns insiens tereg bevind dat reg 3(1)(a)(v) *ultra vires* is.'

[16] What Smalberger JA said in the passage quoted above about the nature

and extent of the power conferred on the Minister in the empowering section of the MMF Act applies with equal force to s 26(1) of the present Act. The mere fact that s 17(1) of the present Act, unlike its precursors in Act 84 of 1986 and the MMF Act, distinguishes between claims involving identified and unidentified vehicles, is insufficient indication of an intention to widen the regulatory power under s 26(1) so as to authorise the Minister to make regulations which are inconsistent with the object and purpose of the Act. Had the legislature intended to empower the Minister to exclude liability by regulation it would have said so expressly as it did in the empowering sections of the 1942 and 1972 Acts.

[17] In *Prinsloo* Smalberger JA said at 575C-D that there was good reason for the requirement of physical contact in unidentified vehicle cases. He relied on the judgment in *Mbatha* at 718J where Harms JA did not mention the requirement of physical contact but merely stated generally, as I have indicated above, that there was good reason for having stricter requirements for unidentified vehicle cases. Smalberger JA also relied on *Khumalo v Multilateral Motor Vehicle Accidents Fund* [1997] 2 All SA 341 (N) at 346 f-g where Broome DJP gave the prevention of fraudulent claims as the reason for the requirement of physical contact. No other reason has been suggested for this requirement and I can think of none. Assuming a case of well-evidenced and fully proved negligent driving of an unidentified vehicle, as one should

do in considering the matter. The undifferentiated imposition of the requirement of physical contact may well be regarded as unreasonable. Postulate the case of the negligent driver of an unidentified vehicle swerving on to his incorrect side of the road, his vehicle just scraping one oncoming car, missing a second one altogether but forcing both these vehicles to leave the road in trying to avoid him. To exclude by regulation a claim for compensation in the one case but not in the other may well be said to be such unequal discrimination as to be invalid for unreasonableness since the intention could never have been to authorise it (*S v Mahlangu and Others* 1986 (1) SA 135 (T) at 144B-145A). It is not, however, necessary for me to decide this point.

[18] For the reasons I have given the Court *a quo* should have held that reg 2(1)(d) is *ultra vires*. The case of *Khasane v Road Accident Fund* [2002] 4 All SA 40 (W) must accordingly be regarded as having been wrongly decided.

[19] The appeal succeeds with costs including the costs of two counsel. The order of the Court *a quo* is altered to read:

'It is declared that reg 2(1)(d) of the regulations issued in terms of s 26(1) of Act 56 of 1996 is *ultra vires*.' The defendant is ordered to pay the costs of the hearing relating to the validity of reg 2(1)(d).

VIVIER JA

FARLAM JA)

CAMERON JA)

CONRADIE JA) CONCUR

SHONGWE AJA)