

***IN THE SUPREME COURT OF APPEAL  
OF SOUTH AFRICA***

**REPORTABLE  
Case Number : 557 / 03**

**In the matter between**

**ROAD ACCIDENT FUND**

**APPELLANT**

**and**

**ZWELAKHE JEROME MKHIZE**

**RESPONDENT**

**Coram :**

**SCOTT, MTHIYANE and CONRADIE JJA**

**Date of hearing :**

**10 NOVEMBER 2004**

**Date of delivery :**

**30 NOVEMBER 2004**

**SUMMARY**

**Passenger in cab of disabled tanker in tow – injured when tanker capsized – injury caused by negligence of tow truck driver – respondent a passenger as contemplated by s 18(1) of the Road Accident Fund Act 56 of 1996.**

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**J U D G M E N T**

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**CONRADIE JA**

[1] Scarcely any betting man would fancy odds on a break-down truck with a disabled tanker in tow colliding with a road grader. Yet that is what happened and the issue before us is this: Does s 18(1) of the Road Accident Fund Act 56 of 1996 ('the Act') limit to R25 000 the claim of the plaintiff (now the respondent) who was seated in the cab of the articulated tanker and who was injured when it capsized solely due to the negligence of the tow truck driver? It was raised as a preliminary point before Jappie J in the court *a quo* who decided in favour of the respondent that the limit imposed by s 18(1) did not apply to his claim. The appellant appeals with his leave.

[2] Section 17 (1) of the Act confers on anyone (called a third party) an unlimited claim against the Road Accident Fund ('the Fund') for loss or damage suffered by the third party as a result of the death of or bodily injury to someone arising from the driving of a motor vehicle if the death or injury is due to the negligence or other wrongful act of the driver or owner of the vehicle. Section 18(1) which, exceptionally, limits the liability of the Fund where the injured person was being conveyed as a passenger 'in or on the vehicle concerned, reads as follows:

'The liability of the Fund .... to compensate a third party for 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 cost of recovering the said compensation, .....

- (a) to the sum of R25 000 in respect of any bodily injury or death of any one 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; or
  - (ii) in the course of the lawful business of the owner of that motor vehicle; or
  - (iii) in the case of an employee of the driver or owner of that motor vehicle, in respect of whom subsection (2) does not apply, in the course of his or her employment; or
  - (iv) for the purposes of a lift club where that motor vehicle is a motor car; or
- (b) ....’

[3] The ‘driver’ of a vehicle in terms of the definition of that term in section 1 of the Act is ‘the driver referred to in section 17(1)’. That is the person whose driving of a motor vehicle caused injury or death. If a claimant is a passenger in or on the vehicle driven by that driver he or she is hit by s 18(1). The question, then, is whether the tanker (as well as the tow truck) was being driven by the person whose driving caused the injury.

[4] A driver obviously drives a vehicle when he or she propels it by manipulating its controls.<sup>1</sup> A person who is not within the ordinary meaning of the term ‘driving’ a vehicle, but is nevertheless in control of a vehicle being propelled by mechanical, animal or human power, or by gravity or momentum, is by s 20(1) of the Act deemed to be the driver of that vehicle.<sup>2</sup> A person who is in control of a vehicle is the one who ‘can make it move or not as he pleases’.<sup>3</sup> Since the tanker was at the time of the occurrence a vehicle being propelled by the mechanical power of the tow truck and W J Lehmkuhl, the driver of the tow truck, was the one who could make it move or not as he pleased, Lehmkuhl is deemed to have been its driver.

[5] Someone who is deemed to be the driver of a vehicle is in law, although perhaps not in fact, the driver of that vehicle and must be treated as though he or she were manipulating the controls and making it move.<sup>4</sup> Lehmkuhl, the driver of the tow truck, was also the (deemed) driver of the tanker because he was in control of it. He was the driver of two vehicles at the same time.<sup>5</sup> There is nothing

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<sup>1</sup> There is a full description of what driving involves in *Wells and another v Shield Insurance Co Ltd and others* 1965 (2) SA 865(C) at 870H -871E.

<sup>2</sup>Section 20(1) reads as follows: ‘For the purposes of this Act a motor vehicle which is being propelled by any mechanical, animal or human power or by gravity or momentum shall be deemed to be driven by the person in control of the vehicle.’

<sup>3</sup> *McCord v Cammell & Co Ltd* [1896] AC 57 (HC) at 67. The expression was used by Lord Herschell in attributing fault to a railway employee who had improperly scotched the wheels of a railway truck causing it to run away.

<sup>4</sup>*Santam Versekeringsmaatskappy Bpk v Kemp* 1971 (3) SA 305 (A) at 325E-F.

<sup>5</sup> The tow truck and the tanker were clearly both vehicles under the definition in s 1 of the Act which describes a motor vehicle as one ‘.... designed or adapted for propulsion or haulage on a road by means of fuel, gas or electricity, including a trailer, a caravan, an agricultural or any other implement designed or adapted to be drawn by

unusual about that. We often speak of the driver of a horse and trailer or the driver of a car and caravan.<sup>6</sup>

[6] In a passage from the minority judgment in *Santam Versekeringsmaatskappy Bpk v Kemp* 1971 (3) SA 305 (A) at 335C-D Jansen JA made the following remarks that do not conflict with any finding of the majority:

‘Behalwe dat dit miskien afwyk van gewone spraakgebruik, kan daar geen beginselbeswaar wees teen te praat van die “bestuur” van 'n sleepwa, as eers aanvaar word dat dit 'n selfstandige motorvoertuig is nie. Trouens, die bestuurder van 'n lokomotief bestuur in 'n sekere sin elke wa aan die trein. So ook kan gesê word dat die bestuurder van 'n motorvoertuig bestuur ook die sleepwa wat deur die motorvoertuig getrek word: hy beheer die stilhou en wegtrek, die spoed en die rigting van die sleepwa net soseer as dié van die trekkende motorvoertuig.’

[7] Where a driver drives two vehicles at once, the expression ‘conveyed in or on the motor vehicle concerned’ refers either to the vehicle that he actually drives or to the one he is deemed to drive, or perhaps even to both of them, for example, where a passenger straddling a tractor and trailer combination is injured while he is conveyed partly on the tractor actually driven and partly on the trailer deemed to be driven.

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such motor vehicle; ....’.

<sup>6</sup> Judicial acceptance of the position that two vehicles may be driven by the same driver and that either the insurer of the towing vehicle or that of the towed vehicle or both may be liable is to be found in *Churchill v Standard General Insurance Co Ltd* 1977 (1) SA 506 (A) at 515H-516F.

[8] The plaintiff was a passenger in the tanker propelled by the mechanical power of the tow truck and therefore in terms of s 20(1) of the Act deemed to be driven by Lehmkuhl. It capsized as a result of the latter's negligence. That is how the plaintiff was injured. He was, as counsel for the respondent fairly conceded, being 'conveyed' by Lehmkuhl. Whether he was in the motor vehicle actually driven or the one deemed to be driven does not matter.

[9] The respondent was not a social passenger. He was employed by the owner of the tow truck and was being conveyed in the course of the lawful business of,<sup>7</sup> or, perhaps also, in the course of his employment with,<sup>8</sup> the owner of the tanker. His claim is in terms of s 18(1)(a) limited to R25 000. If he is found to have been an employee as contemplated in s 18(2)(a), his claim might be subject to further downward adjustment.

[10] The appeal succeeds with costs. The order of the court *a quo* is replaced by the following:

- '(a) It is declared that the plaintiff's claim is limited to R25 000 as provided for in s 18(1) of the Road Accident Fund Act 66 of 1996.
- (b) The plaintiff is ordered to pay the costs of these proceedings.'

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<sup>7</sup> Section 18(1)(a)(ii)

<sup>8</sup> Section 18(1)(a)(iii)

**J H CONRADIE  
JUDGE OF APPEAL**

**CONCURRING:**

**SCOTT JA  
MTHIYANE JA**