THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 293/07
REPORTABLE

In the matter between:

ROAD ACCIDENT FUND **APPELLANT**

v

ABDOOL-CARRIM ATO AND OTHERS **1st-1238th RESPONDENTS**

ALEXANDER FORBES COMPENSATION TECHNOLOGIES (PTY) LTD **1239th RESPONDENT**

ALEXANDER FORBES ACCIDENT COMPENSATION TECHNOLOGIES (PTY) LTD **1240th RESPONDENT**

Coram: Streicher, Navsa, Heher, Maya, Cachalia JJA

Heard: 4 March 2008

Delivered: 27 March 2008

Summary: Section 19(d) of the Road Accident Fund Act 56 of 1996 is applicable only to agreements made by third parties, not to those by suppliers.

Neutral citation: This judgment may be referred to as *Road Accident Fund v Abdool-Carrim* (293/2007) [2008] ZASCA 18 (27 March 2008).

JUDGMENT

CACHALIA JA

[1] This appeal concerns the proper interpretation of s 17(5) read with s 19(d) of the Road Accident Fund Act 56 of 1996.

[2] The appellant is the Road Accident Fund, established in terms of the s 2 of the Act. It has the statutory responsibility in terms of s 17(1) to compensate third parties for loss or damage suffered as a result of injury or death wrongfully caused by the driving of motor vehicles.[1] Such compensation may include the third party's medical costs incurred in respect of accommodation, treatment or services, which for convenience, I will refer to as medical services.

[3] Where a third party is entitled to compensation and has incurred costs in respect of medical services which are recoverable from the Fund, s 17(5) permits 'suppliers' who have rendered such services the right to claim their costs directly from the Fund without having to claim from the third party. It also provides, and this is the contentious part, that 'such claim shall be subject, *mutatis mutandis,* to the provisions applicable to the claim of the third party concerned . . ..' Section 19(d) renders a third party claim unenforceable against the Fund if he or she has entered into an agreement with someone other than an attorney or someone who falls within a class of persons referred to in s 19(c)(ii) in accordance with which he or she has undertaken to pay the person for their services after settlement of the claim. The narrow question in this appeal is whether the phrase 'subject *mutandis mutandis* to' in s 17(5) renders s 19(d) applicable not only to third party claims but also to those of suppliers in the sense that should a supplier enter into such an agreement the supplier's claim against the Fund becomes unenforceable.[2] It is necessary to refer briefly to the factual matrix within which this dispute

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[1] Section 17(1): The Fund or an agent shall —
. . .
be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee.'

[2] The relevant provisions appear below at para 6.

arises.

[4] Of the 1st to the 1238th respondents in this matter the majority are suppliers of medical services. I refer to them as 'the respondents.' The 1239th and 1240th respondents are public companies which may conveniently be referred to together in the singular as 'A-Fact'. A-Fact provides services to its clients, the respondents. The services include an assessment of the merits of the third party's claim and also of the supplier's prospects of recovery from the Fund. They are rendered in terms of written agreements which provide that the respondents pay fees to A-Fact for its services after the Fund has settled their claims. As A-Fact does not purport to practice as attorneys, these agreements would, on the face of it, be hit by s 19(d) if it is applicable to agreements of suppliers.

[5] The way the system works is that when a third party's claim is ready for submission to the Fund the documents are handed to an attorney serving on an A-Fact panel. The attorney then submits the claim to the Fund. Once the Fund approves the claim, it pays the attorney who in turn pays A-Fact. Thereafter A-Fact deducts its fees and pays the nett amount to the supplier. If it is necessary to resort to litigation the attorney attends to that.

[6] The system worked this way for a period of four years with the Fund's knowledge and agreement. However on 27 October 2006 the Fund stopped paying these claims after it took the view that the agreements between A-Fact and the respondents fell foul of s 19(d) – thus precluding the Fund's liability. It consequently refused to process some 49 000 affected claims involving a total claim value of R284 million. In the ensuing litigation the Pretoria High Court rejected the Fund's view. Mynhardt J held that s 19(d) applied only to agreements entered into by third parties, not to those by suppliers. He also refused the Fund leave to appeal. The present appeal is with this court's leave. I turn to the relevant

statutory provisions.

The Statutory Provisions

Section 17(5): 'Where a third party is entitled to compensation in terms of this section and has incurred costs in respect of accommodation of himself or herself or any other person in a hospital or nursing home or the treatment of or any service rendered or goods supplied to himself or herself or any other person, the person who provided the accommodation or treatment or rendered the service or supplied the goods (the supplier) may claim the amount direct from the Fund or an agent on a prescribed form, and **such claim shall be subject, mutatis mutandis, to the provisions applicable to the claim of the third party concerned,** and may not exceed the amount which the third party could, but for this subsection, have recovered.' (Added emphasis).

19 Liability excluded in certain cases

'The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage —

(a) . . .

(b) . . .

(c) if the claim concerned has not been instituted and prosecuted by the third party, or on behalf of the third party by —

(i) any person entitled to practise as an attorney within the Republic; or

(ii) any person who is in the service, or who is a representative of the state or government or a provincial, territorial or local authority; or

(d) where the third party has entered into an agreement with any person other than the one referred to in paragraph (c) (i) or (ii) in accordance with which the third party has undertaken to pay such person after settlement of the claim —

(i) a portion of the compensation in respect of the claim; or

(ii) any amount in respect of an investigation or of a service rendered in respect of the handling of the claim otherwise than on instruction from the person contemplated in paragraph (c) (i) or (ii); or

(e) . . .

(f) . . ..'

[7] I turn to the point of contention – how the phrase 'subject *mutatis mutandis* to' in s 17(5) is to be interpreted. The starting point is to consider the statutory context within which the phrase is used. The object of the Act is to establish the Fund to pay compensation for loss or damage to third parties wrongfully caused by the driving of motor vehicles.[3] The Act's main purpose is to provide the widest possible protection to third parties.[4]

[8] Section 17(5), as I have mentioned, confers on a supplier the statutory right to recover its costs directly from the Fund. The benefit to the supplier is that the Fund guarantees payment subject only to the condition that the third party must be entitled to claim the amount as part of his or her compensation and that the amount that the supplier may recover may not exceed the amount which the third party is entitled to recover.[5] The advantage to third parties, who are often indigent, is that they receive medical services comforted by the knowledge that their medical costs are covered and that they are less likely to be faced with a claim before having been paid. So while the subsection was enacted for the benefit of suppliers, it sits neatly with the Act's main purpose referred to above. This is the statutory lens through which the contentious phrase must be interpreted.

[9] A-Fact and the respondents contend that the purpose of s 19(d) is to protect third party claimants who are often illiterate and indigent from being overreached by unscrupulous touts and claims consultants who deprive them of their compensation. These considerations, they say, do not apply to suppliers who are usually institutions and professionals.

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[3] See sections 3 and 17(1).
[4] *Aetna Insurance Co v Minister of Justice* 1960 (3) SA 273 (A) at 286E-F; *Padongelukkefonds v Prinsloo* 1999 (3) SA 569 (SCA) at 574B.
[5] *Van Der Merwe v Road Accident Fund* 2007 (6) SA 286 (SCA) para 7.

[10] The Fund's case on the other hand is that the service which A-Fact renders brings the respondents' claims within the ambit of sections 19(d) of the Act. This is because, in its submission, the effect of s 17(5) is to render the provisions of s 19, in so far as they are applicable to the claim of the third party, equally applicable to the claim of the supplier, but subject to the necessary changes to s 19 so as to afford logical sense to the provision when it is adjusted to apply to the claim of the supplier. Understood in this way, submits the Fund, the agreements between the respondents as suppliers and A-Fact, which as I have mentioned, is not a company of practising attorneys, fall foul of s 19(d), thus precluding any liability on the Fund's part to them.

[11] The phrase 'subject *mutatis mutandis* to' means literally 'subject, with the necessary changes, to'. Any alterations must in their context be 'necessary.'[6] By making the supplier's claim 'subject, *mutatis mutandis*, to the provisions applicable to that of the third party, the legislature, in my view, intended to make the supplier's right to claim from the Fund conditional upon the validity and enforceability of the third party's claim[7] and not to render the supplier's claim unenforceable against the Fund by reason of an agreement with a person other than an attorney to pay such person, after settlement of the claim a portion of the compensation in respect of the claim.

[12] Support for the above interpretation is to be found in the main purpose of the Act referred to earlier and also to the accessory nature of the supplier's claim. In my view, the Fund's interpretation of the effect of s 17(5) is incorrect. It is not necessary to substitute 'supplier' for 'third party' in s 19(d) to give efficacy to the subsection. On the contrary the substitution places it at odds with the Act's purpose, and from the Fund's perspective, achieves nothing. For if a third party's

[6] *Touriel v Minister of Internal Affairs, Southern Rhodesia* 1946 AD 535 at 545; *Big Ben Soap Industries Ltd v Commissioner For Inland Revenue* 1949 (1) SA 740 (A) at 751.
[7] *See Van der Merwe v Road Accident Fund* 2007 (6) SA 286 (SCA) para 7.

claim is valid and enforceable and the supplier's is not, the Fund would still be liable to compensate the third party who in turn remains contractually liable to the supplier. The consequence is that a third party may be faced with a claim from a supplier without having been paid and would be denied the benefit of s 17(5) without any fault on his or her part. This result could hardly have been what the draftsman intended. Moreover, it is illogical for the third party claim to be valid and enforceable but the supplier's accessory claim not (except where the supplier has not complied with the prescribed formalities).[8]

[13] It is understandable that the legislature would seek to protect third parties, many of whom are indigent, from entering into champertous agreements, which is probably what s 19(d) intends to achieve. But there is no apparent reason to restrict the contractual freedom of suppliers, many of whom are professional people, institutions or companies from contracting with whoever they choose to process their claims. They should be capable of looking after themselves.

[14] It follows that s 19(d) is not applicable to the agreements which are the subject of this appeal. The Fund was therefore wrong to impugn the agreements and to refuse to process the respondents' claims.

[15] A-Fact and the respondents were separately represented in this appeal, the former by two counsel. The Fund is liable for their costs incurred in opposing the appeal.

[16] The following order is made: The appeal is dismissed with costs. In the case of the 1239th and 1240th respondents, such costs are to include the cost of two

[8] In *Van der Merwe v Road Accident Fund* 2007 (6) SA 286 (SCA) para 7, the supplier's claim is characterised as an 'accessory claim'.

counsel.

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A CACHALIA

JUDGE OF APPEAL

CONCUR:

STREICHER JA

NAVSA JA

HEHER JA

MAYA JA