IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 490/99

In the matter between :

THE ROAD ACCIDENT FUND
APPELLANT

and

M H HANSA
RESPONDENT

CORAM : NIENABER, SCHUTZ, STREICHER JJA, CONRADIE and CLOETE AJJA

HEARD : 16 AUGUST 2001

DELIVERED : 31 AUGUST 2001

Repeal of Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 by the Road Accident Fund Act 56 of 1996 - Multilateral Motor Vehicle Accidents Fund not surviving as a separate juristic person but subsumed in the Road Accident Fund.

JUDGMENT

NIENABER JA/

NIENABER JA :

[1] The Multilateral Motor Vehicle Accidents Fund ('the MMF'), a juristic person, was established by the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 ('the MMF Act'). The purpose of the MMF, broadly speaking, was to administer and dispose of claims for compensation for personal injury caused by the wrongful driving of motor vehicles.

[2] On 1 May 1997 the MMF Act was repealed by s 27 of the Road Accident Fund Act 56 of 1996 ('the RAF Act'). The RAF Act created a new juristic person, the Road Accident Fund ('the RAF'), with functions similar to those of the MMF. The RAF conducts its business at the same premises, in the same manner and with the same personnel as before.

[3] The main issue in this appeal is whether (as the respondent contends) the two funds, operating separately, continued to exist side by side, the one dealing exclusively with accidents occurring before and the other with accidents occurring after 1 May 1997; or whether (as the appellant contends) the MMF ceased to exist and was superseded by the RAF, which was enjoined nonetheless to administer claims arising before the repeal date in accordance with the provisions of the now defunct MMF Act.

[4] The dispute between the parties arose as follows: On 1 November 1994, prior to the repeal of the MMF Act by the RAF Act, the respondent (hereinafter referred to as the plaintiff) was injured when the motor vehicle he was driving overturned somewhere on the road between Zeerust and Lehurutshe. It is an issue between the parties whether the cause of the accident was the bursting of a tyre of the plaintiff's vehicle or the negligence of the unknown driver of an unidentified vehicle which may or may not have collided with the plaintiff's

vehicle.

[5] A claim was instituted on behalf of the plaintiff against the MMF which it repudiated, after independently investigating the circumstances of the accident, on 17 January 1997, a few months before the repeal of the MMF Act.

[6] Some time after the repeal, and in September 1998, summons was issued by the plaintiff against the MMF (not the RAF) under case number 23944/98 for payment of R5 951 114.50.

[7] Due to a concatenation of circumstances (and not because it was believed that the wrong defendant was cited), no notice of intention to defend the action was delivered. Some explanation for the blunder was tendered on behalf of the RAF. The details thereof do not for the present purpose matter, save perhaps to record that the whole incident reflected poorly on the RAF's administration, procedures and personnel.

[8] Because of the failure to respond to the summons the plaintiff, on 23 October 1998, duly obtained judgment by default against the MMF in the Transvaal Provincial Division of the High Court of South Africa. An order was granted by Hartzenberg J, who, separating the merits and quantum, declared that the defendant (the MMF) was one hundred per cent liable to the plaintiff. The determination of quantum was postponed *sine die* and the MMF was ordered to pay the plaintiff's costs to date.

[9] On 11 November 1998 the RAF (and not the MMF) launched an application in the same Court for the rescission of the default judgment and for leave to defend the action. It is with those proceedings that this appeal is concerned.

[10] The plaintiff, as the respondent to the application, took a point. It was that the RAF lacked the requisite *locus standi* to bring the application; it should have been brought, so it was contended, in the name of the designated

defendant, the MMF. This was the only point argued.

[11] The Court *a quo* (Spoelstra J) upheld the point and dismissed the application with costs. It arrived at that conclusion on the basis of the wording of ss 2(2)(a) and 28(1) of the RAF Act.

[12] Section 2(2)(a) of that Act provides as follows:

> '(2)(a) *Subject to section 28(1)*, the Multilateral Motor Vehicle Accidents Fund established by the Agreement concluded between the Contracting Parties on 14 February 1989, shall cease to exist, and all money credited to that fund immediately before the commencement of this Act shall vest in the Fund, all assets, liabilities, rights and obligations, existing as well as accruing, of the first-mentioned fund shall devolve upon the Fund, and any reference in any law or document to the said Multilateral Motor Vehicle Accidents Fund shall, unless clearly inappropriate, be construed as a reference to the Fund."
>
> (My emphasis.)
>
> ('Fund' is defined in s 1 as the 'Road Accident Fund established by section 2(1)'.)

Section 28 of the RAF Act provides as follows:

> '(1) *Notwithstanding section 2(2)*, this Act shall not apply in relation to a claim for compensation in respect of which the occurrence concerned took place prior to the commencement of this Act in terms of a law repealed by section 27, and any such claim shall be dealt with as if this Act had not been passed.
>
> (2) The repeal of any law by section 27 shall not affect –
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> (*a*) the previous operation of such law or anything duly done or permitted under such law; or
>
> (*b*) any right, privilege, obligation or liability acquired, accrued or incurred under such law; or

(*c*) any penalty, forfeiture or punishment incurred in respect of any offence committed in terms of such law; or

(*d*) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment,

and any such investigation, legal proceedings or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if this Act had not been passed.'

(Again my emphasis.)

[13] The reasoning of the Court *a quo* may be summarised as follows:

(a) Having regard to the italicised opening words of the two sub-sections the legislature accorded a clear preference to s 28(1).

(b) Taking s 28(1) at face value it means that the provisions of the RAF Act and s 2(2)(a) in particular do not apply to a claim such as that of the plaintiff which accrued to him prior to the date of repeal. Such a claim is to be 'dealt with as if this Act had not been passed'.

(c) If the RAF Act which provided for the demise of the MMF and the creation of the RAF is to be disregarded, it is implicit that the MMF is to continue to exist if only for the limited purpose of 'dealing with' the plaintiff's claim.

(d) Accordingly it was the MMF and not the RAF which should have applied for rescission of the default judgment.

The Court *a quo* put it thus:

'Die bepaling in artikel 28(1) is myns insiens duidelik naamlik eerstens dat artikel 2(2) nie van toepassing is nie en verder dat Wet 56 van 1996 in die geheel nie van toepassing is nie op 'n voorval wat voor 1 Mei 1997, (dit is die datum van inwerkingtreding) plaasgevind het. Daardie eise

moet afgehandel word asof Wet 56 van 1996 nie aangeneem is nie. Dit beteken dat Wet 56 van 1996 verontagsaam moet word, insluitende die voorskrifte van artikel 2(2)(a).'

…

'Vir doeleindes van daardie eise bestaan die MMF voort asof Wet 56 van 1996 nooit op die wetboek geplaas is nie.'

…

'Die argument van mnr Geach [for the plaintiff] mag baie tegnies voorkom maar is juridies korrek en lei onvermydelik tot die gevolgtrekking dat die applikant [the RAF] nie aansoek kan doen dat die vonnis wat teen die MMF gegee is ter syde gestel moet word nie.'

[14] Leave to appeal to this Court was denied by the Court *a quo* but granted on petition by this Court.

[15] The keystone of the reasoning is the italicised words 'Subject to section 28(1)' in section 2(2)(a) and 'Notwithstanding section 2(2)' in section 28(1). These are linking rather than ranking phrases. Without them the two provisions would clash. Section 2(2) is a general provision designed to introduce a new regime; section 28(1) is a particular provision designed to preserve rights which accrued under the old regime. Section 2(2) provides generally for the termination of the MMF and the assumption by the RAF of all its functions, funds, liabilities and commitments. This is clearly expressed in the subsection: all money credited to the MMF as at the date of appeal shall immediately vest in the RAF; existing liabilities, which would include claims such as that of the plaintiff, devolve on the RAF. The sub-section, in short, provides for a form of universal succession by the RAF to all the MMF's rights

and obligations.

[16] From the wording of s 2(2) it follows that legal proceedings instituted after the repeal of the MMF Act as well as proceedings previously instituted against the MMF under that Act are to be against the RAF. What is thus said must, however, be read 'subject to s 28(1)'. Does the cross-reference to s 28(1) predicate that the MMF, which is declared defunct in terms of s 2(2), is to be resuscitated and kept artificially alive for the sole purpose of disposing of pre-repeal claims? A strictly literal reading of s 28(1), considered in conjunction with s 28(2)(d), might indeed convey that impression. On that reading s 28(1) will not qualify s 2(2), it will contradict it. An interpretation to that effect would require a drastic restructuring and recasting of what is provided for in s 2(2). It would also verge, in its practical implications, on the absurd.

[17] So, for example, the MMF, contrary to what is stated in s 2(2), will *not* cease to exist; 'all' money credited to the MMF at the time of appeal will *not* 'immediately' vest in the RAF (since an unquantifiable amount of it will have to be retained in the books of the MMF in order to meet outstanding claims); and *not* 'all' but only some of the assets and liabilities of the MMF would vest in the RAF.

> [18] The Court *a quo,* in its judgment on the dismissal of the application for leave to appeal, referred to 'die fiksie dat eise wat onder die bepalings van die vorige Wet val, ingestel moet word en behandel moet word asof die huidige Wet nie van toepassing is nie.' A fiction, like a phantom, cannot be sued. Counsel for the plaintiff, appreciating this difficulty, contended that the MMF survived not as a fiction but as a fact. To the extent that the RAF Act created a new corporate entity it was not in substitution of the MMF, so it was contended, but in addition thereto. The old Fund, according to this approach, was not subsumed in the new Fund. The two Funds might share common premises and a common infrastructure, but legally speaking they were two parallel legal institutions dealing with different classes of claims – those originating

before and those originating after the date of repeal. But how the allocation of reserves and the distribution of funding and functions between the two co-existing corporate bodies within this single schizophrenic organisation was to be effected, was not explained; nor for how long this situation was to endure; nor what the situation would be if the budgeted reserve funds of this *ad hoc* MMF were depleted. So too, an official would presumably be employed by the one Fund or the other depending on the date of the incident with which he happened to be dealing at the time.

[19] The prospective anomalies do not end there. If the MMF were to survive the repeal, so too should its management structures. In terms of article 4 of the Agreement, which constitutes the core of the MMF Act, the members of the MMF included the Republics of Transkei, Bophuthatswana, Venda and Ciskei. They were required to appoint representatives on both the Council and the Board of the MMF to represent their respective interests. Yet these entities had ceased to exist when the RAF Act was promulgated.

[20] These are all illustrations of how unworkable the proposition is for which counsel for the plaintiff contended. It is fair to say that such ramifications, which are all self-evident, could not have been intended by the legislature and that if they were, they would have been catered for expressly. Section 28, being the savings clause, and more particularly s 28(2) which lists particular instances of exemption, would have been the appropriate place where provision would have been made for the MMF's perpetuation. That it says nothing of the sort, says much.

[21] From what has been said thus far it is evident that s 28(1) is badly worded. Its lax formulation creates the potential for the very misunderstanding mentioned in para 16 above. But when it is interpreted in the light of its purpose its true ambit becomes clear.

Section 28 is a savings clause. Its manifest purpose is to ensure that the pre-existing rights of injured parties who qualify for compensation in terms of the repealed Act are preserved and not compromised. To that extent the RAF Act is not to operate retrospectively (cf *National Iranian Tanker Co v MV Pericles GC* 1995 (1) SA 475 (A) at 483I-J). To such parties it cannot matter whether their claims are prosecuted against the MMF or against its newly constituted statutory successor in title, the RAF. But it may indeed matter to them, because it may well have adverse procedural or substantive consequences, if the legislation from which their claims for compensation derive, is repealed and replaced by a new enactment (cf *Malokoane v Multilateral Motor Vehicle Accidents Fund* 1999 (1) SA 544 (SCA) at 547A-B). It is accordingly for their protection that the *status quo* is to be preserved, but only to that limited extent. Section 28(1) is designed to perpetuate injured parties' rights and not the MMF's identity and status. It follows, first, that a plaintiff's claim is to be 'dealt with' by the RAF and secondly, that it shall do so, in so far as it relates to a plaintiff's rights, in accordance with the provisions of the MMF Act. The point taken is concerned with the first and not with the second of these aspects.

[22] The RAF, to all intents and purposes, is the *ex lege* successor to the MMF. The RAF was accordingly the correct entity to apply for rescission of the default judgment granted earlier against the MMF; and it could do so without formally applying for its substitution as the appropriate defendant. Section 2(2) provides that any reference in a document (which would include a pleading) to the MMF is to be read as a reference to the RAF. It also follows that the Court *a quo* was wrong in refusing the application before it on the ground that the RAF lacked the requisite *locus standi*.

[23] In this Court counsel for the plaintiff sought to advance two new grounds

why the judgment of the Court *a quo* should nevertheless be supported. The first was that the RAF had perempted its appeal and the second was that it recognised the continued existence of the MMF in another unrelated matter and was consequently precluded from taking up an inconsistent position in the current appeal. Since neither ground appeared from the record the plaintiff brought a separate application in this Court to adduce further evidence. The evidence he sought to rely on was a matter of public record. Its admission was not opposed by counsel for the RAF. The RAF filed an answering affidavit which was likewise admitted.

[24] The first ground, the peremption argument, was founded on the fact that the RAF, as first applicant, and the MMF, as second applicant, launched a joint application in case number 24089/99 for the setting aside of the default judgment granted by Hartzenberg J in matter number 23944/98. This was on 19 August 1999 after Spoelstra J, on 20 May 1999, had refused leave to appeal against his order not to set the default judgment aside. Such conduct, so it was submitted, was wholly inconsistent with the prosecution by the RAF of its appeal against that order and thus amounted to the peremption thereof.

[25] In its answering affidavit the RAF explained that it followed that procedure at the time ‘as a precautionary measure’ should its current appeal prove to be unsuccessful. Far from an unequivocal election not to proceed with its appeal (*Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA) at 443E-G), it exemplified a determination to persist in it. In this Court counsel for the

plaintiff readily conceded that he could not usefully pursue the point and no more need be said about it.

[26] The second ground is equally without merit. It was that the MMF, on 5 October 1999, after the repeal of the MMF Act and after the judgment of Spoelstra J in this matter, petitioned the Chief Justice for special leave to appeal in another completely unrelated matter, case number 19217/95, *The Multilateral Motor Vehicle Accidents Fund v Johannes Mathebula*. The submission was that such conduct showed that the continued existence of the MMF was by implication recognised, and that the RAF, in the current matter, accordingly cannot be heard to say that the MMF ceased to exist.

[27] Once again, the procedure adopted in that case was explained in the RAF's answering affidavit. It was that the matter, having commenced and judgment having been given against the MMF under the old Act, was continued under that name as a matter of routine. The official who dealt with the particular claim and who was responsible for the affidavit on which the plaintiff now sought to rely stated:

> 'After the RAF came into operation, I did not distinguish between the MMF and the RAF as if the MMF was still in existence. I accepted that the RAF was sometimes referred to as the MMF and I followed the same practice. For me it did not matter whether the RAF was being referred to as the MMF or the RAF.'

But in any event, as counsel for the plaintiff conceded in argument, the subjective belief or objective conduct of a party cannot alter a statutory position. If the correct view is, as was explained earlier in this judgment, that the MMF was subsumed in the RAF, the actions of officials ostensibly in conflict with that position would be to no legal effect. This ground can accordingly also be

disregarded.

[28] In the final result the appeal should succeed with costs. The Court *a* quo should not have dismissed the application for rescission on the ground stated. It follows that the plaintiff is to be held responsible for the costs of the day; so too, that the application for rescission of the default judgment granted by Hartzenberg J should be remitted to the Transvaal Provincial Division to be dealt with *de novo*. It will be a matter for that Court on that occasion whether it should consider a special order for costs against the RAF, even if the RAF should succeed in having the default judgment set aside, since it was entirely due to the laxness of its personnel that judgment by default was allowed to be entered against the RAF in the first instance.

[29] The following order is made:

1. The appeal is upheld with costs.
2. The order of the Court *a quo* is set aside.
3. The respondent is ordered to pay the costs of the hearing before Spoelstra J.
4. The application for the rescission of the default judgment issued in matter number 23944/98 is remitted to the Transvaal Provincial Division of the High Court of South Africa to be reconsidered *de novo*.

……

P M NIENABER

JUDGE OF APPEAL

Concur:

Schutz	JA
Streicher	JA
Conradie	AJA
Cloete	AJA