ACCIDENTAL STARTING OF A MOTOR VEHICLE AND SECTION 20(1) OF THE ROAD ACCIDENT FUND ACT OF 1996

Oliphant v Road Accident Fund 2008 4 All SA 239 (SCA)

1 Facts

The facts of this case fully appear from the unreported judgment of Ebrahim, J in *Oliphant v Road Accident Fund* Orange Free State Provincial Division (case no 2865/2006), the appeal to the full bench (*Padongelukkefonds v Sanna Suzan*

Oliphant Orange Free State Provincial case A161/06) and from the judgment of Cachalia JA. The claimant was rendered a paraplegic when a very old and dilapidated Chevrolet 1.4 motor vehicle was set into motion while the claimant's husband was attempting to tighten the nut of the vehicle's petrol pump and accidentally dropped a spanner which started the vehicle, simultaneously setting it in rearward motion. The claimant on the other hand testified that she observed her husband working on the motor vehicle and walked around the vehicle while the engine was running, when it was set in motion, and drove over her without any person at the wheel or anyone directing the course of the motor vehicle and then struck a shed where it came to a stop. She was pinned under the motor vehicle. The claimant's husband testified that the driver's door was open and that he had unsuccessfully attempted to stop the vehicle.

From the evidence it was clear that the relevant motor vehicle was in a very poor mechanical state. It was equipped with an automatic gearbox but due to the age and disrepair of the vehicle the gearbox was not functioning normally. The switch on the neutral gear had been bridged to enable the motor vehicle to be started even if it was not in "Neutral" or "Park". The handbrake was inoperative and the vehicle could only start if the choke was used. The expert evidence indicated that the vehicle could not have come into motion by merely accidentally dropping a spanner onto the starter contact points. The evidence further showed that the automatic gearbox was in such a dysfunctional state that it was difficult to set the motor vehicle in motion by using the gear selector mounted on the steering wheel. There was no evidence regarding the topography of the scene of the accident and it is unclear whether the vehicle could have been set into motion by gravity.

2 Findings

The court *a quo* accepted the evidence of the husband and seemingly also accepted that the assumption of the parties that the motor vehicle was driven and was under the control of the husband within the meaning of section 1(2) of the Compulsory Motor Vehicle Insurance Act 56 of 1972 as was held in *Unie-Nasionaal Suid-Britse Versekeringsmaatskappy Beperk* 1974 4 SA 283 (NC) was sufficient to establish the RAF's liability. On the basis that the event was foreseeable, the court of first instance held that the husband was negligent and that the Road Accident Fund was liable. The Road Accident Fund appealed this finding to the full bench of the Orange Free State Provincial division. On analysis of the evidence Van der Merwe J (delivering the judgment of the full bench) held that the vehicle could only have come into motion if the engine was running. For this to have occurred the spanner must have remained in contact for a sufficiently long period for the engine to start, the ignition must have been on, the gearbox must have been in reverse gear and the engine must have gained enough revolutions for the vehicle to have come into motion. The court held that in view of the evidence regarding the difficulty in starting the vehicle and its mechanical state, the evidence of the husband was improbable. The Full Bench rejected the evidence of the husband and the appeal succeeded with costs. The claimant, with leave of the Supreme Court of Appeal, appealed this judgment. In his judgment Cachalia JA analysed both the findings of Ebrahim J and the court *a quo.* In his judgment Cachalia dealt with the requirements for negligence and held that the manner in which the vehicle came into motion was such a remote possibility that it could not be reasonably foreseeable and that no negligence had been proved.

The court held that it was a "freak" accident for which no one could be held responsible. The appeal was dismissed with costs.

3 Discussion

3 1 Requirements for liability of the Road Accident Fund

The one glaring aspect of the case under discussion is the matter-of-fact assumption by all concerned that the conduct requirement (in the form of driving) in section 17(1) of the Road Accident Fund Act 56 of 1996 was met. Section 17(1) of the RAF Act of 1996 provides:

> "17. Liability of Fund and agents. – (1) The Fund or an agent shall–
> (a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;
> (b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,
>
> 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: . . ."

3 2 Analysis

An analysis of this section clearly indicates that before the Road Accident Fund can be held liable, the injury or death must have been caused or have arisen "from the driving of a motor vehicle by any person at any place within the Republic" or 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". The conduct requirement is crucial to the enquiry of whether the Road Accident Fund is liable or not and is *the* criterion which distinguishes a claim against the Road Accident Fund from any other ordinary common law delictual claim. A disregard of this requirement can have unwanted consequences (see eg *Groter Johannesburgse Oorgangs Metropolitaanse Raad v Schwartz* 2002 5 SA 584 (T) and Klopper *Law of third party compensation* (2008) 58ff). The only slightest reference to the conduct requirement of driving or an other unlawful act, was the assumption by both the parties and the courts who considered this matter that the principle established in *Flynn v Unie-Nasionaal Suid-Britse Versekeringsmaatskappy Beperk* 1974 4 SA 283 (NC) (in respect of the presumption created by s 1(2) of the Compulsory Motor Vehicle Insurance Act 56 of 1972) was applicable, making any enquiry into this requirement superfluous.

Normally, claims against the Road Accident Fund are caused by or arise from the *driving of a motor vehicle*. Driving has a circumscribed technical meaning and is constituted by the intentional starting of a vehicle in order to drive it, setting a vehicle in motion, exercising control over the vehicle while it is in motion by using its controls including direction indicators and hooter and then bringing such vehicle to a standstill and all related and required conduct to achieve this (see *Wells v Shield Insurance Co* 1965 2 SA 865 (C) 870H; *Petersen v Santam Insurance* 1961 1 SA 205 (C) 209; *Jacobs v Auto Protection Insurance Co Ltd*

1964 1 SA 690 (W) 694A; *Khoza v Netherlands Insurance Co of SA Ltd* 1969 3 SA 590 (W) 591G 592G; *Rajamma NO v Union National Insurance Co Ltd* 1971 2 SA 86 (D) 88). The concept "driving" is to a certain extent extended by the presumptions found in section 20 of the RAF Act of 1996. The subsections of section 20 mainly determine who exercises control over a motor vehicle where a motor vehicle is not driven by a driver in the ordinary sense of the word and brought into motion other than by its own mechanical power, where it is moved by the force of gravity or where a vehicle was left at a specific place or came into motion of its own accord. Section 20 was preceded by other similar provisions, particularly by section 1(2)–(4) of the Compulsory Motor Vehicle Insurance Act 56 of 1972.

3 3 Extended meaning of driving

In the case under discussion, the RAF's liability will be founded only if it can be shown that the Chevrolet 1.4 motor vehicle was driven in the ordinary and extended sense of the word "drive". It is abundantly clear that it was not driven in the ordinary sense of the word "drive". The only other possibility remains that on the particular facts driving may be constituted by the extended meaning of "driving" created by the presumptions of sections 20(1)–20(3) of the current Act which is similarly worded to that of section 1(2) of the CMVI Act of 1972. As the vehicle concerned was not left or propelled by gravity, the only section which may be of use is section 20(1) (previously section 1(2) of the CMVI Act of 1972). Section 20(1) provides that:

> "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."

If one considers the wording of the section, the words: "propelled by any mechanical, animal or human power or by gravity or momentum" are the key to the proper interpretation of this section. If the words: "any mechanical" are considered with the words that follow thereafter ("animal, human power or by gravity or momentum"), it becomes clear that by applying the *eiusdem generis* rule of interpretation "any mechanical . . . power" is intended to mean mechanical or other power other than that of the motor vehicle concerned (see Steyn *Uitleg van wette* (1981) 30 38, and eg *Road Accident Fund v Mkhize* 2005 3 SA 20 (SCA); *September v Road Accident Fund* 2007 1 SA 159 (SE)). This in essence means that the operation of a motor vehicle's starter motor cannot result in section 20(1) being applicable as the operation thereof does not constitute "any mechanical . . . power" as intended by the legislature. In addition, the operation of the starter motor of a motor vehicle falls within the ambit of the ordinary meaning of "driving" (see *Sehire v Central Board for Co-operative Insurance Ltd* 1976 1 SA 524 (W) 527F; *Pretoria City Council v Auto Protection Insurance Co Ltd* 1963 3 SA 136 (T) 142–143; *Van Wyk v Netherlands Assurance Co* 1976 1 SA 528 (T)).

For this reason the correctness of the judgment in *Flynn* is to be doubted. Even if it accepted that the propulsion of a motor vehicle by means of its starter motor makes such movement subject to section 20(1), it still raises the question whether the mere inadvertent or even negligent *isolated operation of a starter motor* of a motor vehicle resulting in injury or death can render the RAF liable.

3 4 Intention required

In *Flynn* (a matter decided on exception) the court held that the motor vehicle had been driven. This finding was based on the fact that the mechanic working

on the motor vehicle in question and who caused the starter to turn over which in turn made the vehicle lurch forward pinning the claimant between the vehicle and a work bench, was in control of the motor vehicle and impliedly had the ability of intentionally setting the motor vehicle in motion by operating the starter. This impliedly indicates that the mere operation of a starter motor either by chance or otherwise, cannot render the RAF liable – intention to operate the starter in order to drive seems to be an added implied prerequisite.

Apart from the implied intention to drive required in conjunction with the use of a starter motor of a motor vehicle in order for operation of section 20(1) to be possibly applicable (see *Flynn*), normally the operation of the starter motor of a motor vehicle in itself can only constitute driving if it is accompanied by an intention to perform the act of driving. In *Sehire* the court held that the starting of a tractor was driving while there was doubt whether the starting of the tractor was in order to set the tractor and harvester combination into motion. If the ordinary meaning of "driving" is considered, the starting of a stationary, permanently installed and immobile combination can never constitute driving. In his judgment Melamet J states the following:

> "The switching on of the engine is an act designed to urge the vehicle into motion and the driver in the seat of the tractor will direct its course having switched it on. Thus, if these two elements, conjunctively, constitute the act of driving, I am of the view that any one of these elements, *in certain circumstances*, will constitute an act in the driving of the vehicle. The circumstances in the present instance, as set out above *were that the engine was switched on preparatory to the tractor moving off and pulling the harvesting machine*" (527F; own emphasis).

4 Conclusion

In view of the doubt that exists whether section 20(1) applies to a situation where a motor vehicle is accidentally set into motion by the inadvertent or accidental operation of its starter motor and the absence of the required intention to set a motor vehicle in motion subsequent to the operating of the starter, the facile and matter-of-fact assumption that the requirement of driving was complied with, has to be questioned. The case should have been dealt with on exception thereby considerably saving on court time and costs.

This particularly highlights the necessity of claims handlers, practitioners and the judiciary to take full cognisance of all requirements of liability rendering the RAF liable and in particular of the conduct requirement. It is suggested that in an enquiry into the liability of the RAF, this should be the first matter for consideration. Had this been done in the case under discussion in the first instance, the writing of this case note may never have come to pass and considerable costs could have been saved. Within the broader context of the law of delict, many a difficult decision can be facilitated (especially in the consideration of wrongfulness and negligence) if the requirements of liability (ie conduct, wrongfulness, fault, damage and causation) are used as a sequential matrix for the determination of liability. It is quite clear that in the absence of conduct an enquiry into wrongfulness and fault becomes redundant. Similarly, if wrongfulness is absent, there is no point in determining if the conduct was negligent or that damage was inflicted or that there was a causal link between the conduct and the damage. (See eg the discussion by Knobel "Thoughts on the functions and application of the elements of a delict" 2008 *THRHR* 650.)

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