MANU/SASC/0065/2020

Equivalent/Neutral Citation: [2020] ZASCA 72

SUPREME COURT OF APPEAL OF SOUTH AFRICA

555/19

Decided On: 22.06.2020

Road Accident Fund **Vs.** Mbele

Hon'ble Judges/Coram:
Maya P, Zondi, Plasket, Nicholls, JJA and Eksteen, AJA

Counsels:
For Appellant/Petitioner/Plaintiff: R Jaga SC and D Pillay Instructed by Mayats Attorneys, Claremont c/o Symington De Kock Attorneys, Bloemfontein

For Respondents/Defendant: R van Rooyen SC, E Benade and N Mashava Instructed by DSC Attorneys, Cape Town c/o Rosendorff, Reitz & Barry Attorneys, Bloemfontein

JUDGMENT

Zondi JA (Maya P and Plasket and Nicholls JJA and Eksteen AJA concurring)

[1] The issue in this appeal is whether a large industrial vehicle called a Reach Stacker is a motor vehicle as contemplated in s 1 of the Road Accident Fund Act 56 of 1996 (RAF Act). A photograph of this vehicle is attached to this judgment as annexure 'A'. The appellant, the Road Accident Fund (RAF), contended that a Reach Stacker is not a motor vehicle and that the respondent's claim was not competent in terms of the RAF Act. The precise nature of a Reach Stacker is important because it determines the competence of a claim under the RAF Act by a person who alleges that he or she has suffered damage or loss resulting from a collision with a Reach Stacker. The full bench of the Western Cape Division of the High Court (high court), reversing the decision of the court of first instance, held that a Reach Stacker is a motor vehicle as contemplated in s 1 of the RAF Act.

[2] The issue arose in the following circumstances. On 20 February 2010 Mr Simphiwe Robert Makutoana (the deceased) was a pedestrian at the Multipurpose Terminal, Cape Town Harbour, where he was employed as a stevedore when a Reach Stacker operated by one Mr Eugene Andrea collided with him. The deceased died as a result of the injuries he sustained in the collision. The respondent, Ms Thandiswa Linah Mbele, the deceased's common law wife, instituted action for loss of support in the high court against the RAF for the payment of damages she and her four minor children suffered as a result of the death of the deceased. Ms Mbele's claim against the RAF for loss of support was based on the provisions of the RAF Act.

[3] The RAF disputed liability and alleged, among others, that the Reach Stacker was not a motor vehicle as defined in the RAF Act, thereby asserting that Ms Mbele did not have a claim under the Act. By agreement between the parties the high court made an order in terms of rule 33(4) of the Uniform Rules of Court that the question whether the Reach Stacker was a motor vehicle as defined in the RAF Act be adjudicated first, and that all other issues be postponed for later determination.

[4] In the event, the trial proceeded before Desai J, who after hearing evidence on the separated issue, determined that the Reach Stacker was not a motor vehicle as contemplated in the RAF Act and dismissed Ms Mbele's claim. Ms Mbele, with leave granted by Desai J, appealed to the full bench of the same Division. The full bench (Gamble, Le Grange JJ and Sievers AJ concurring) upheld the appeal. It found that the Reach Stacker concerned was a motor vehicle as contemplated in s 1 of the RAF Act. The full bench accordingly set aside the order made by Desai J and ordered the RAF to pay Ms Mbele's costs, including the qualifying expenses of her expert witness, Mr Barry Grobbelaar. The appeal, with the special leave of this Court, is against this finding. The parties agreed to have it determined without an oral hearing in terms of s 19*(a)* of the Superior Courts Act 10 of 2013.

[5] As I have already stated, the issue is whether the Reach Stacker is a motor vehicle as defined in s 1 of the RAF Act. This section defines a 'motor vehicle' as 'any vehicle 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 such motor vehicle'. The definition displays three requirements before a vehicle qualifies as a motor vehicle for purposes of the RAF Act. The vehicle (a) must be propelled by fuel, electricity or gas and (b) must be designed for propulsion (c) on a road. Such a vehicle includes a trailer, caravan or implements designed to be drawn by a motor vehicle as defined.

The design of a Reach Stacker

[6] The Reach Stacker under consideration was designed primarily for lifting, manoeuvring and stacking containers in the container yards of small terminals or medium sized ports. It is able to transport containers for short distances relatively quickly and stack them. It is able to operate in tight spaces. For this purpose, the Reach Stacker is equipped with a boom capable of being extended and raised hydraulically. The boom is mounted on a chassis. The vehicle has six wheels. The four front wheels (two left and two right) are driven by the engine and the machine is steered by means of its rear wheels (one left and one right). It is the latter that provides the manoeuvrability in tight spaces. It is fitted with rear-view mirrors.

[7] This specific Reach Stacker is equipped with full road-going lighting, including high beam and low beam headlights, tail lights, indicators, brake lights, reverse lights and position lights. It is furthermore fitted with windscreen wipers and washers, a hooter and a handbrake. The overall length of the Reach Stacker (without the boom) is 11.5m. The height and width of the reach stacker are indicated in the specifications as being 4.5m and 4.15m, respectively. Its service weight is 71 800kg.

[8] The Reach Stacker has no suspension system between the wheels and the body. Suspension is only provided by the spring characteristics of the pneumatic tyres. The top speed of the Reach Stacker is 24.5km/h when it is unloaded, and 22km/h at the rated load. It is fitted with a four speed automatic gearbox with four forward and four reverse gears. The Reach Stacker is registered for use on public roads and has the registration number CA825213. It is fitted with a Scania six cylinder, four-stroke diesel engine with a 12 litre capacity. The power and torque ratings of the engine are provided as being 243kW at 2 100rpm and 1 589Nm at 1 400rpm.

[9] It is clear from its features that the Reach Stacker is propelled by means of diesel fuel and the evidence was that it transported containers on roads within the port premises. This Court in *Road Accident Fund v. Mbendera* 2004 (4) All SA 25 (SCA)

(para13) held that the word 'road' in s 1 of the RAF Act is not limited to a public road. To that extent the Reach Stacker meets two of the requirements of the definition section, that is, 'propulsion by diesel on a road'. The question is whether the fact that it was designed primarily for use in container yards and to load containers onto ships, off load them and stack them, disqualifies it from being a 'motor vehicle' as contemplated in the RAF Act. Put differently, the question is whether the Reach Stacker was designed for or adapted for propulsion or haulage on a road.

Whether the Reach Stacker was designed for or adapted for propulsion or haulage on a road

[10] The meaning of the words 'motor vehicle' appearing in s 1 of the RAF Act has received judicial attention in cases such as *Chauke v. Santam Limited* MANU/SASC/0014/1996 : [1996] ZASCA 120; 1997 (1) SA 178 (SCA); [1997] 4 All SA 59 (A); *Road Accident Fund v. Mbendera*, supra; *Mutual and Federal Insurance Co Ltd v. Day* 2001 (3) SA 775 (SCA); [2001] 4 All SA 6 (A); *Road Accident Fund v. Vogel* 2004 (5) SA 1 (SCA); *Road Accident Fund v. Van den Berg* 2006 (2) SA 250 (SCA); and *Bell v. Road Accident Fund* 2007 (6) SA 48 (SCA).

[11] This Court in *Chauke*, which concerned whether a forklift is a motor vehicle, set out the test to be applied in determining whether a vehicle is a motor vehicle as defined in the RAF Act as follows (at 183A-D):

> 'The correct approach to the interpretation of the legislative phrase quoted above is to take it as a whole and to apply to it an objective, common sense meaning. The word "designed" in the present context conveys the notion of the ordinary, everyday and general purpose for which the vehicle in question was conceived and constructed and how the reasonable person would see its ordinary, and not some fanciful, use on a road. If the ordinary, reasonable person would perceive that the driving of the vehicle in question on a road used by pedestrians and other vehicles would be extraordinarily difficult and hazardous unless special precautions or adaptation were effected, the vehicle would not be regarded as a "motor vehicle" for the purposes of the Act. If so adapted such vehicle would fall within the ambit of the definition not by virtue of being *intended* for use on a road but because it had been *adapted* for such use.'

[12] The test whether a vehicle is designed for use on a road is objective. The question is whether a reasonable person viewing the vehicle in question would come to the conclusion that such vehicle when used on a road will not create a danger to other road users. In this regard, design features such as lights, indicators, field of vision, hooter, maximum speed and engine output are all considerations which apply in deciding whether or not there is compliance with the definition.

[13] Courts have not been consistent in their application and interpretation of the *Chauke* test. *Chauke* concerned a 'Clark forklift'. The forklift in question had neither lights nor indicators. It did not have a hooter. It had a top speed of 8km/h. It was not used on a road. It was used in and out of the warehouse and in the yard. The evidence established that it operated in a restricted area and under limited conditions. The forklift drivers were not allowed to drive out of the premises. It could not be registered in terms of the statutory licensing rules unless modified.

[14] In *Day*, a 'Komatsu forklift' was not held to be a motor vehicle as it posed a hazard to other road users and steering it in traffic was considered extraordinarily difficult and

hazardous.

[15] In *Bell*, a 'flatbed transporter' operating on the airside area of the airport was held to be a motor vehicle. It was used at the airport to 'transport baggage and cargo from its place of origin within the confines of the terminal, to next to an aircraft, on the airside of the airport'.[1]

[16] In *Vogel*, Marais JA pointed out that it was clear from this Court's interpretation of s 1 of the RAF Act that the road referred to in the definition 'is not just any kind of road however restricted public access, whether vehicular or on foot, may be, but a road which the public at large and other vehicles are entitled to use and do use; and in general parlance, a public road. . . [and] the mere fact that the item is capable of being driven on a public road is not per se sufficient to bring it within the definition.'[2]

> The learned judge emphasised that the appropriate test is whether general use on public roads is contemplated. He went on to state:
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> '[6] If, objectively regarded, the use of the item on a public road would be more than ordinarily difficult and inherently potentially hazardous to its operator and other users of the road, it cannot be said to be a motor vehicle within the meaning of the definition [*Chauke* at 183C]. (I infer that this is because it then cannot reasonably be said to have been designed for ordinary and general use on public roads.)

[7] I should add that I do not read the previous judgments of this Court as laying down that unless the item in question can be characterised as in para [6] it must be regarded as satisfying the requirements of the definition of motor vehicle. I understand this characterisation to be merely one of many conceivable indications that an item was not designed for general use on public roads. The use of a particular item on a public road may not be inherently difficult or dangerous but it may still not qualify as a vehicle designed for the purposes set out in the definition of s 1 of the Act.

[8] That an item may have been designed primarily for a purpose not covered by the definition of motor vehicle in the Act does not necessarily disqualify it from being regarded as a motor vehicle as defined. If it was also designed to enable it to be used on public roads in the usual manner in which motor vehicles are used and if it can be so used without the attendant difficulties and hazards referred to in para [6], it would qualify as a motor vehicle as defined. In short, such latter use need not be the only or even the primary use for which it was designed.'[3]

> [17] Marais JA doubted the soundness of the suggestion in *Chauke* that the words 'designed for' have a less subjective connotation than the words 'intended for'. He stated at para 10:
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> > 'Indeed, when Olivier JA ultimately formulated his own interpretation [*Chauke* at 183B] of what the word "designed", in the context of the Act, conveyed, he posited both a subjective and an objective test. To say that the word "conveys the ordinary, everyday and general purpose for *which the vehicle was conceived and constructed*" (my emphasis) is to postulate a subjective test. To add "and how the reasonable person would see its ordinary, and not some fanciful, use on a road" postulates an objective test.' Footnotes omitted.

[18] In *Van den Berg*, Streicher JA rejected Marais JA's interpretation of the *Chauke* test. He stated at para 7 that:

> 'Olivier JA made it clear that he was of the view that "an objective, common sense meaning" should be applied to the phrase "designed for". When he immediately thereafter said that the word "designed" in the present context conveys the notion of the ordinary, everyday and general purpose for which the vehicle in question was conceived and construed, he was, in my view, referring to the general purpose for which the vehicle, *objectively determined*, was conceived and construed.'

[19] Streicher JA went on to say at paras 8 and 17:

> '[8] It is common cause that the PTR [pneumatic tyre roller] is used to compact road surfaces. It does not, however follow that it was not designed to be used for other purposes as well. If one of those other purposes it was designed for is to travel on a road it falls within the definition and qualifies as a motor vehicle as defined.'

> '[17] In the light of the fact that the PTR is in fact generally used for travelling on a public road from one construction site to another and that its design is such that it can safely be done, I am of the view that one cannot but conclude that it was designed for that purpose, whatever other purposes it may have been designed for.'

[20] The full bench in this matter, applying the reasoning in *Van den Berg*, held at para 29 that 'it is clear that the Reach Stacker was designed and equipped to be self-propelled around the harbour along roads and over areas such as parking and storage lots adjacent thereto, in the ordinary course of its work. The fact that it may need to be escorted along certain of those routes does not. . . detract from the fact that this is part and parcel of its everyday work, just as an. . . electrical transformer, would similarly be required to be escorted along a public road due to the fact that it exceeds the permissible width for travel without an escort.'

[21] The appellant attacked the reasoning of the full bench on two grounds. First, that it erred in its application of the law by relying upon the findings in *Van den Berg* in its judgment. The appellant argued that *Van den Berg* was distinguishable from *Chauke*. The argument was that when Streicher JA in *Van den Berg* applied the reasonable person test, he did so from the point of view that the PTR was designed for road use, and the only design limitation, being the maximum speed, did not constitute a danger of such magnitude so as to '*conclude that the vehicle was not designed for use on a road*'.

[22] For this reason, so it was argued, Streicher JA did not have to fully apply the second leg of the *Chauke* test to all the design features and limitations of PTR, that is, determining whether a reasonable person would perceive the vehicle's '*ordinary use*' on a road as '*extraordinarily difficult and hazardous*'. This was because, the argument proceeded, the evidence showed that the PTR had been designed for propulsion on the road, and safely so, whether for compacting road surfaces or travelling between construction sites.

[23] Secondly, it was submitted by the appellant that the full bench erred in its application of the test enunciated in *Chauke* in its determination of the features, purpose and intended use of the Reach Stacker. The appellant argued that in relying on

Van den Berg the full bench ignored the fact that the design features and limitations of the vehicles were distinguishable between *Chauke* and *Van den Berg.* Further, in *Van den Berg* the court did not consider the second leg of the *Chauke* test, that is, the 'ordinary use' as perceived by a reasonable person, because the court, at the outset, had determined that the PTR had been designed to travel on roads, and safely so, from the time it was 'conceived and constructed.' It was accordingly submitted by the appellant that had the full bench properly applied the *Chauke* test to the vehicle under consideration, as was applied in *Day* and *Vogel*, it should have found that the 'ordinary, everyday and general purpose' of the Reach Stacker and its 'ordinary use' on the road, did not render it a 'motor vehicle' in terms of RAF Act.

[24] The criticism of the full bench's reasoning is unjustified. The full bench made it clear in para 33 of its judgment that '[o]bjectively viewed, the designers of the Reach Stacker would have contemplated that it would be required to be propelled along such roads in the harbour.' It reached this conclusion after analysing evidence regarding the Reach Stacker's area of operation as well as its design features. The intended utility of the Reach Stacker is wholly different to the vehicle in *Day*, a Clark forklift, and *Vogel*, a mobile Hobart ground power unit, whose primary function was to supply power to stationary aircraft. The vehicle under consideration is designed and suitable for travelling on a road within the port. This Court in *Mbendera* (para14) made it clear that the purposes of forklifts, cranes, lawnmowers and mobile power units are very different.

[25] In my view, the Reach Stacker under consideration is a motor vehicle as defined in s 1 of the RAF Act. Despite its imposing and gigantic size in terms of mass (71.8 tons), width (4.15m), length (11.5m), height (4.5m) and speed limitation of 24km/h, objectively viewed, it cannot be said that its driving on a road used by pedestrians and other vehicles would be extraordinarily difficult and hazardous. It is fitted with all the controls and features required to be fitted to a motor vehicle so as to enable it to be used with safety on a road outside the container yard and port terminal where it primarily operates.

[26] It has a number of features of a motor vehicle mentioned above and is driven in a manner similar to a motor vehicle. Mr Harry Sonnie, the RAF's expert witness, conceded that the Reach Stacker has been adapted for use on a road. It is apparent that certain features of the Reach Stacker such as its huge size, pneumatic tyres, four wheels at the front and a steering axle at the back, are there in order to enable it to perform its primary function of lifting heavy cargo containers including manoeuvring in very tight spaces. Its other features, such as its maximum speed of 24km/h, driving lights, indicators, windscreen wipers and a hooter enable it to be used with safety on a public road when it travels from port to port to either load or transport containers.

[27] Moreover, because of its operation on Transnet premises, the Reach Stacker was required to be registered and was registered for use on public roads in terms of the National Road Traffic Act. Mr Grobbelaar, the respondent's expert witness explained that that was so 'because there is other traffic on the road when it travels between two ports, it's on a road where there's other public traffic'. Mr Sonnie's contrary version that the Reach Stacker was registered 'solely for Bidvest's identification' as in general Reach Stackers are not required to have a roadworthy certificate, but only a load test one as they are built for the purpose of lifting cargo, cannot be correct. The reasons advanced by Mr Grobbelaar appear to me to be so compelling that I have no hesitation in accepting them. The probabilities are that the Reach Stacker was registered because of the nature of the area and the surroundings in which it operated.

[28] It was Grobbelaar's evidence that the use of the vehicle under consideration is not hazardous 'if it's used the way it's supposed to be used and. . . driven [the] way it's supposed to be driven' and he added that 'when it travels within the confines of … where the incident happened and where there is that road, there it travels on its own, and when it travels from where it's stored to where it works. But if it were to go outside that environment, it would have to have escort vehicles at the front and the back to take it, and it does, it does travel.' When asked why it would travel outside of the confined area, Mr Grobbelaar responded '[t]o take it to a different section in the harbour'. As regards the layout of the road of the scene of the incident, Mr Grobbelaar testified, based on the observation he made when he visited the scene, that the road used by the Reach Stackers to travel from one container yard to the other is 'a normal road between [the] buildings with a centre line, a broken centre line, and which carries traffic in both directions' and that they use 'a two-way road, where there's also other traffic, to convey these containers.' I did not understand Mr Sonnie to be disputing this evidence.

[29] In the result the appeal is dismissed with costs including costs of two counsel where employed.

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[1] *Bell* para 6.

[2] *Vogel* paras 3-4.

[3] *Day* para 14.