IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE **CIVIL APPEAL NO. 66/09**
CITATION: [2010] SZSC 21

In the matter between

THE SWAZILAND MOTOR VEHICLE ACCIDENTS FUND **APPELLANT**

AND

SENZO GONDWE **RESPONDENT**

CORAM : RAMODIBEDI, CJ
DR. TWUM, JA
FARLAM, JA

HEARD : 17 MAY 2010 AND 9 NOVEMBER 2010
DELIVERED : 28 MAY 2010 AND 30 NOVEMBER 2010

SUMMARY

Motor vehicle accidents – Compensation – Claim for in terms of the Motor Vehicle Accidents Act No. 13 of 1991 – Whether regulations 4 (1) (a) (ii), (iii) and (iv) as well as 4 (1) (b) of the Motor Vehicle Accidents Regulations 1992 ultra vires *– The appellant abandoning the appeal in respect of regulation 4 (1) (a) (iv) – The impugned regulations not* ultra vires.

JUDGMENT

RAMODIBEDI, CJ

[1] Initially the issue for determination in this matter as foreshadowed in the appellant's grounds of appeal was broad, namely, whether regulations 4 (1) (a) (ii), (iii) and (iv) as well as 4 (1) (b) of the Motor Vehicle Accidents Regulations 1992 are *ultra vires* the empowering provisions of section 18 of the Motor Vehicle Accidents Act No. 13 of 1991 ("the Act"). At the hearing of the matter in this Court, however, the appellant abandoned the appeal in relation to regulation 4 (1) (a) (iv). This judgment is accordingly concerned only with regulations 4 (1) (a) (ii) and (iii) as well as 4 (1) (b).

[2] In his amended summons the respondent, as plaintiff, brought a claim in the High Court against the appellant for damages in the amount of E5,903,099.42 made up as follows:-

Hospital expenses	E283,638.88
Medical expenses	E110,787.54
Loss of earnings	E8,673.00
Future loss of earnings	E2,500,000.00

General damages for pain and suffering and permanent disability	E1,500,000.00
Estimated future medical expenses	E1,500,000.00.

The respondent also prayed for the costs of suit.

[3] The claim arose out of an accident which occurred on 17 April 2005 along the Tshaneni-Mliba Public Road at or near Mpala Ranch wherein a motor vehicle registration number SD 585 KN (hereinafter referred to as "SD 585 KN") overturned.

[4] The respondent attributed the sole cause of the accident to the negligent driving of one Siphesihle Dlamini who was the driver of SD 585 KN.

[5] The appellant filed a special plea couched in the following terms:-

> *"1. The Defendant pleads specially that it is not obliged to compensate Plaintiff in regard to his claim as per the particulars of claim by reasons of Plaintiff's failure to comply with the provisions of the Motor Vehicle Accidents Regulations 1992 as read with the Motor Vehicle Act 13, 1991 in the following respects:-*

1.1 In particular Plaintiff has failed to comply with Regulation (4) (1) (a) (ii), (iii) and (iv) in so far as:

1.1.1. No evidence has been produced to the satisfaction of the Defendant or at all, proving that the claimant took all reasonable steps to identify the owner or driver of the unidentified motor vehicle;

1.1.2. The Plaintiff has failed to show that its inability to establish the particulars and requirements to prove liability in terms of section 10 of the Motor Vehicle Accidents Act is not due to any act or omission on his part;

1.1.3. No evidence has been produced to the satisfaction of the Defendant or at all that the unidentified motor vehicle (including anything on in or attached to it) came into physical contact with the Plaintiff or the vehicle in which he was conveyed or any other object which directly or indirectly caused or contributed to the injury allegedly sustained by the Plaintiff.

2. *In the alternative, Defendant pleads that in any case in the event the Defendant may be found to be liable to compensate the Plaintiff (which is denied) Defendant pleads that its liability is limited to a sum of* ***E5,000.00 (Five Thousand Emalangeni)*** *in terms of Regulation 4 (1) (b) of the Motor Vehicle Accidents Regulations 1992."*

[6] Besides the special plea, the appellant also pleaded over on the merits of the claim, attributing the sole cause of the

accident in question to the negligence of the driver of SD 585 KN.

[7] Thereafter, the respondent replicated, in his amended replication, that regulations 4 (1) (a) (ii), (iii) and (iv) as well as 4 (1) (b) of the Motor Vehicle Accidents Regulations 1992 were *ultra vires* the empowering provisions of the Act.

[8] At the trial the High Court (Mabuza J) dismissed the appellant's special plea with costs. She upheld the respondent's point raised in his replication and declared regulations 4 (1) (a) (ii) (iii) and (iv) as well as 4 (1) (b) *ultra vires* the provisions of section 18 of the Act on the ground that "the Minister had no power to abrogate the provisions of the Act." This appeal is directed against that order. As indicated earlier, it is important to stress at the outset, however, that at the beginning of his argument in this Court Adv. Van Niekerk SC, who appeared with Adv. Van der Walt for the appellant, abandoned the appeal in relation to regulation 4 (1) (a) (iv) which requires physical contact with the offending motor vehicle. This Court shall, therefore, refrain from expressing any concluded opinion on whether or not this regulation is *ultra vires* since the point no longer arises for determination in this matter.

[9] Now, in relevant parts section 18 of the Act provides as follows:-

> *"18. (1) The Minister may make regulations for the better carrying out of the purposes and provisions of this Act, and, in particular may make regulations with respect to any of the following matters –*
>
> *(a) prescribing anything required by this Act to be prescribed, and the manner in which any form so prescribed shall be completed or rendered;*
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> *(b) prescribing the powers and duties in connection with the administration of this Act which may be exercised or performed by such persons as the Minister may designate;*
>
> *(c) ……*
>
> *(d) ……;*
>
> *or prescribing or otherwise dealing with any matter which may under this Act be prescribed or otherwise dealt with by regulations."*

[10] The regulations under attack in turn provide as follows:-

> *"4. (1) The liability of the MVA Fund under the Act in respect of claims for bodily injury or death arising from the driving of a motor vehicle of which neither the owner's nor the driver's identity can be established, hereinafter referred to as the "Unidentified motor vehicle", shall be subject to the following conditions:*
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> *(a) no liability shall be incurred by the MVA Fund unless –*
>
> *(i) …..*

(ii) evidence is produced to the satisfaction of the MVA Fund proving that the claimant took all reasonable steps to identify the owner or driver of the unidentified motor vehicle;

(iii) the claimant's inability to obtain judgment in terms of section 10 of the Act is not due to any act or omission on his part; and

(iv) ....

(b) the liability of the MVA Fund to compensate any person or persons or any third party or parties, irrespective of the number of persons or parties based on a claim arising out of the same occurrence shall not exceed an amount of E5,000 in respect of any one person or E50,000 in respect of any number of persons."

Regulation 4 (1) (d) would no doubt provide a useful guide to a proper determination of the matter in as much as it envisages that the Minister may, by regulations, lay down conditions for liability. It reads as follows:-

"(d) the provisions of section 10 of the Act and of regulation 3 (2) shall mutatis mutandis *apply to liability of the MVA Fund by virtue of this regulation."*

The fact of the matter, however, is that the Motor Vehicle Accidents Regulations 1992 do not contain regulation 3 (2).

[11] For the sake of completeness it is convenient to reproduce section 10 (a) (b) of the Act. It provides as follows:-

> *"10. (1) The MVA Fund shall, subject to the provisions of this Act and to such conditions as may be prescribed, be utilised for the purpose of compensating any injured person or, in the event of death, any dependent (sic) of the deceased or, where reasonable funeral expenses only is payable, the relatives of the deceased (in this Act called "the third party") for any loss or damage which the third party has suffered as a result of:*
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> *(a) any bodily injury to himself;*
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> *(b) the death of or any bodily injury to any person;*
>
> *which in either case is caused by or arises out of the driving of any motor vehicle by any other person at any place in Swaziland and the injury or death is due to the negligence or other unlawful act of the person driving the motor vehicle (in this Act called "the driver") or of the owner of the motor vehicle or his servant in the execution of his duty."* (Emphasis added.)

The words "such conditions as may be prescribed" are in my view plainly a reference to the Regulations made by the Minister.

[12] Before proceeding further, it is regrettably necessary to record one glaring contradiction contained in paragraphs [18] and [24] of the court *a quo's* judgment. It is convenient, however, to reproduce paragraph [17] first in

order to understand the contradiction in context. It reads as follows:-

> *"[17] **No one shall be a judge in his own cause.** The second argument advanced on behalf of the Plaintiff was that the **maxim nemo iudex in sua causa** applies to regulations 4 (i) (a) (i), (ii) and (iii). The argument being that these regulations provide for the Motor Vehicle Accident Fund to make the decision whether it is liable or not: by deciding its own liability it is being a judge in its own cause. The Fund is the arbiter and yet has an interest in the decision which is to determine its liability to make that very decision. **See S v Malindi and Others** 1990 (1) SA 962 at 969 G-I. See also **De Lange v Smuts N.O. and Others** 1998 (3) SA 785 at 835 F and 836C."*

Paragraphs [18] and [24] in turn read as follows:-

> *"[18] If I were to declare the impugned regulations invalid on this ground the entire workframe and operations of the MVA Fund would grind to a halt. A new mechanism would have to be put in place. This argument fails for this reason even though it is sound."*
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> *[24] In the event Regulation 4 (1) (a) (ii) and (iii) and 4 (1) (b) of the Motor Vehicle Accidents Regulations 1992 issued in terms of section 18 of Act 13 of 1991 are hereby declared* **ultra vires** *and invalid."*

I shall return to the point concerning the maxim *nemo iudex in sua causa* in due course.

[13] As can be seen from paragraph [9] above, the Minister has the power under section 18 (1) (a) to make regulations "prescribing or otherwise dealing with any matter which may under this Act be prescribed". The MVA Fund ("the Fund") is to be utilised for the purpose of compensating any injured person for any loss or damage suffered as a result of any bodily injury which is caused by or arises out of the driving of any motor vehicle and is due to the negligence or other unlawful act of the driver or owner of the vehicle or his servant. This, however, is expressly made subject to the provisions of the Act and "to such conditions as may be prescribed". I do not think that the prescribing of conditions of liability to ensue in the cases of injury or death caused by the driving of an unidentified vehicle to the effect that the claimant took all reasonable steps to identify the driver or owner (regulation 4 (1) (a) (ii)) and that his inability to obtain judgment in terms of section 10 is not due to any act or omission on his part (regulation 4 (1) (a) (iii)) can be said to abrogate the provisions of the Act. While there may be a problem on whether or not regulation 4 (1) (a) (iii) is void for vagueness the point was neither raised nor argued. Neither did the court *a quo* deal with it. It is, therefore, unnecessary for this Court to decide the point.

[14] In my view the Act empowered the Minister to make the liability of the Fund subject to conditions and as long as these conditions are for the better carrying out of the purposes of the Act I see nothing wrong with them. It is eminently sensible to prevent a person who did not take reasonable steps to identify the driver or owner of the offending vehicle or whose own act or omission caused him to be unable to identify the driver or owner from being able to benefit from the "legislative largesse" arising from the provisions of the Act which give injured claimants a right to recover from the Fund in circumstances where, but for the Fund, they would not be able to institute claims for damages because they did not know whom to sue. See the judgment of Marais JA in **Road Accident Fund V Makwetlane 2005 (4) S.A. 51 (SCA).** There, the Supreme Court of Appeal of South Africa declared regulation 2 (1) (c) made under the corresponding South African Act not *ultra vires.* It is instructive to refer to what the learned Judge said at paragraphs [42], [43] and [45] of his judgment, namely:-

> "*[42] In a hit and run case, pragmatically viewed, there will be nobody against whom proceedings could actually have been instituted at common law. The existence in theory of such a remedy will be cold comfort to the victim. Happily, s 17 (1) (b) of the Act, subject to regulations made under s 26 of the Act, provides a remedy, against the Fund. However, as I have already said, the position of the Fund in such a situation is invidious. It will have no driver's version available to it and, if it has to pay the*

claimant, the right of recourse which s 25 of the Act gives it in such circumstances will be valueless. To expect, as a matter of course, equality of treatment of two such differently placed claimants is, in my opinion, an unsound and unjustifiable point of departure. Apples cannot be equated with oranges.

[43] Unlike the victim of an identified driver who is deprived of his or her common-law remedy against the driver and given instead a remedy against the Fund, the victim of a 'hit and run' driver is given a remedy against the Fund even although he or she would have had no enforceable remedy at common law. Such a victim is really the recipient of what may be called legislative social largesse. Had there been any constitutional imperative to bestow that largesse the approach to the questions which this case poses would have had to be very different but there is none. In short, to the extent that the obligation which the regulation imposes upon the victim of a 'hit and run' driver are discriminatory, the discrimination is not unfair to such a victim.

[45].....[A claim against the Fund brought by the victim of an unidentified driver] amounts to a gratuitious benefit given to a victim of the negligent driving of a motor vehicle in circumstances where the victim would have had no enforceable remedy against the culprit at common law because of inability to identify the culprit. This statutory remedy against the Fund was conferred despite the inability of the Fund to exercise a right of recourse against the culprit."

[15] In support of his contention that regulation 4 (i) (a) (ii) is invalid Adv. Kades SC, for the respondent, relied strongly on **Engelbrecht V Road Accident Fund and Another, 2007 (6) S.A. 96 (CC),** a decision, as the citation indicates,

of the South African Constitutional Court. In this case the Constitutional Court overruled **Makwetlane's** case. The ground on which it did so appears from paragraphs [21] and [22] of its judgment (at 102 B – E), which read as follows:

> *"[21] At common law a justiciable claim accrued to the applicant the moment he was injured and suffered loss or damage as a result of the wrongful and negligent driving of the unidentified truck, irrespective of whether its driver or owner could be traced. The remedy is part and parcel of a right* (ubi ius ibi remedium). *Support for this view is found in* ***Oslo Land Co Ltd v The Union Government*** *where Watermeyer JA held:*
>
> > *'In negligence cases the cause of action is an unlawful act plus damage, and so soon as damage has occurred all the damage flowing from the unlawful act can be recovered, including prospective damage....'*
>
> *[22] Knowledge of the identity of the debtor or owner or driver of the motor vehicle is relevant to the issue of when prescription begins to run but not to the existence of a justiciable claim. The SCA in Makwetane therefore erred when it held that the victim of an unidentified driver would have no justiciable claim or enforceable remedy at common law. It follows also that the related submission of the respondents referred to in paragraph [19] above has to be rejected."*

[16] I cannot agree with this criticism. As I read the judgment of Marais JA he did not commit the error attributed to him by the Constitutional Court. He did not hold that a victim of an unidentified driver would have no justiciable claim at

common law. As appears from paragraphs [43] and [45] in the SCA judgment (to which the Constitutional Court refers in support of its assertion that the SCA fell into error), read with paragraph [42], Marais JA accepted the "existence in theory" of a remedy belonging to the victim against the unidentified driver, but he held that the existence of this remedy will, as he put it, "be of cold comfort to the victim" because 'there will be nobody against whom proceedings could actually have been instituted at common law' (my emphasis). He went on to say in paragraph [43], entirely correctly, that a victim in those circumstances would have no enforceable remedy at common law. He accordingly was thus well aware that a plaintiff in those circumstances did have a justiciable claim but, as I have said, he correctly described it as unenforceable. He went on to make the point that the granting to such a person of a claim for compensation against the Fund amounted to "legislative social largesse". He had earlier said, in paragraph [42], that the granting of a claim against the Fund for compensation for loss or damage caused by an unidentified driver places the Fund in an invidious position for the reasons he stated. A result of this is that claimants exercising their rights to claim compensation in these circumstances may, quite appropriately, be treated differently from those enforcing a claim against the Fund where the driver of the offending vehicle is identified.

[17] There remains the *nemo iudex* point to which I said I would return. I do not think that it affords a basis for declaring regulation 4 (1) (a) (ii) invalid. The fact that it provides for evidence having to be produced to the satisfaction of the Fund that all reasonable steps were taken in an attempt to identify the driver or owner of the offending vehicle does not, in my view, render the Fund a judge in its own cause. I say that because the "satisfaction" of the Fund would have to be measured by a reasonable objective standard, which could be tested by the court: cf such cases as **NBS Boland Bank V One Berg River Drive 1999 (4) S.A. 928 (SCA),** where a provision in a bond giving the lender the right in its discretion to vary the interest rate payable was held to be subject to the *arbitrium boni viri* (the judgment of the reasonable man), which could be assessed by the court.

[18] Furthermore, the decisions on which Adv. Kades SC relied in support of his submissions on this part of the case, namely, **S V Malindi and Others 1990 (1) S.A. 962 (A)** at 969 G – I; **De Lange V Smuts NO and Others 1998 (3) S.A. 785 (CC)** at 835; **Rose V Johannesburg Local Road Transportation Board 1947 (4) S.A. 272 (W); Dumbu and Others V Commissioner of Prisons and Others 1992 (1) S.A. 58 (E);** and **Council of Review, South African Defence Force and Others V Monnig and**

Others 1992 (3) S.A. 482 (A), were all cases dealing with recusal or the rule against bias in the context of an adjudicative process. They do not deal with the validity of subordinate legislation._ _

[19] The legal position regarding the validity of regulations which provide that something must be done 'to the satisfaction' of some or other body was discussed by Caney J in **Shangase V Minister of Native Affairs and Others 1958 (4) S.A. 554 (N),** a case about the validity of a Government Notice issued by the Minister concerning the determination of a sub-economic group and providing for a person affected thereby to satisfy the urban local authority concerned that his income did not exceed a certain amount. It was argued that the relevant provision was invalid, *inter alia,* because the Minister had purported to confer on the local authority a jurisdiction to decide whether a particular person fell within the sub-economic group and thereby to oust the jurisdiction of the courts. Caney J (at 557 H – 558 B) dealt with the point as follows:

> *"[The determination] means no more than that [the person concerned] is to produce proof to the local authority. It does not have the effect of making the local authority the sole arbiter of the question. Even where by-laws require citizens to do something 'to the satisfaction of the Council', these words are to be regarded as surplusage where the question whether the citizen has complied is a question of fact capable of being decided apart from the opinion of the local authority; the*

> *matter then is not committed to the decision of the Council in accordance with its opinion and the Council is not the sole arbiter. The ultimate judge of the question is the Court. See* **Hulley V Johannesburg Municipal Council 1909 T.S. 115** at p. 118; **Reynolds and Williamson V Pretoria Municipality 1912 T.P.D. 540** at p. 543; **Kharwa V Inspector of Police, Durban 1931 N.P.D. 197** at p. 204."

[20] Insofar as regulation 4 (1) (a) (iii) is concerned it is instructive to observe that there is no reference to "the satisfaction" of the MVA Fund. In the circumstances the attack on regulations 4 (1) (a) (ii) and (iii) must fail. Nor do I think that this is a fit case to consider the collateral constitutional point raised in the respondent's supplementary heads of argument, challenging the impartiality and independence of the Fund on the basis of sections 20, 21 and 33 of the Constitution. It is not necessary to determine the matter on the basis of the Constitution in the circumstances of this case. See for example **Jerry Nhlapo and 24 Others V Lucky Howe N.O. (in his capacity as Liquidator of VIP Limited in Liquidation) Civ. Appeal No. 37/07** (unreported).

[21] The attack on regulation 4 (1) (b) should in my view also fail on the ground that the Minister's power to prescribe conditions to which the Fund's liability under section 10 is subject must necessarily include the power to place a cap on amounts payable by way of legislative social largesse. As

Adv. Van Niekerk SC pointed out, the principle of the placing of a limitation (or 'cap') on certain claims is already recognised in the Act: see section 11. Regard being had to the fact that claims in respect of unidentified drivers or owners result from the granting of 'legislative social largesse', I do not think there is anything legally objectionable about the limit created by regulation 4 (1) (b).

[22] (1) In the light of these considerations it follows that there is merit in the appeal. It is accordingly upheld (except as regards the point abandoned) with costs including certified costs consequent upon the employment of counsel.

(2) The Court *a quo's* order is set aside and replaced with the following order:-

> "The plaintiff's points raised in his replication seeking to declare Regulations 4(1) (a) (ii) and (iii) as well as 4 (1) (b) of the Motor Vehicle Accidents Regulations 1992 *ultra vires* the empowering provisions of s18 of the Motor Vehicle Accidents Act No. 13 of 1991 are dismissed. No order is made as to costs."

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M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

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DR. S. TWUM
JUSTICE OF APPEAL

I agree

_____
I.G. FARLAM
JUSTICE OF APPEAL

For Appellant : Adv. G.O. Van Niekerk SC
(with him Adv. J.M. Van der Walt)

For Respondent : Adv. N. Kades SC