

## Aantekeninge/Notes

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### **“Quad motorcycle” qualified as a motor vehicle in terms of the RAF Act 56 of 1996 – requirements relaxed in *Jeffrey v Road Accident Fund* 2012 4 SA 475 (GSJ)**

#### **1 Introduction**

A claimant can only be successful with a claim against the Road Accident Fund (RAF) if the claimant was in fact injured by the negligent driving of a “motor vehicle” or “other unlawful” act connected to a “motor vehicle or the driving thereof” (Klopper *Third Party Compensation* (2012) 64). Thus the definition of a “motor vehicle” is of paramount importance. If the injury or death of a person was caused by something other than the driving of a “motor vehicle” or “other unlawful act” then the claimant would not be able to claim from the RAF (Klopper 56). Section 1 of the Road Accident Fund Act 56 of 1996 (the Act) defines a “motor vehicle” as:

[a]ny 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. (our emphasis)

From the definition it is apparent that in order for a vehicle to qualify as a “motor vehicle”, what must be established is: how the vehicle is propelled, in other words is it propelled by gas, fuel or electricity (also referred to as the “propulsion test”); and was the vehicle designed or adapted for use on a road (also referred to as the “design test” – see Klopper 57-63). Most “motor vehicles” pass the “propulsion test” but some have failed the “design test”. In the following cases the vehicles were not considered “motor vehicles” due to them failing the design test (see further Klopper 61): a forklift (see *Chauke v Santam Ltd* 1997 1 SA 178 (A); *Mutual and Federal Insurance Co Ltd v Day* 2001 3 SA 775 (SCA)), a ride-on lawnmower (see *Matsiba v Santam Versekeringsmaatskappy Bpk* 1997 4 SA 832 (SCA)), a midget racing car, a go-kart and self-propelled vehicle designed to provide power to a jet (see *Road Accident Fund v Vogel* 2004 5 SA 1 (SCA)). Of importance in the “design test” is the special features of the vehicle (lights, brakes, indicators, rear and side mirrors, reflectors, etc) and in particular whether it will be safe to use the vehicle on a road. The concept of a “road” is these days not at issue anymore since Olivier JA in *Chauke v Santam Ltd* (*supra* 181G) pronounced that a road is “a line of communication, especially a specially prepared track between places for use by pedestrians, riders and vehicles”. More recently in *Road Accident Fund v Mbendera* (2004 4 All SA 25 (SCA) par 9)

Lewis JA indicated that the concept of a “road” should not be narrowly defined to mean only a “public road”. In *Bell v Road Accident Fund* (2007 6 SA 48 (SCA) 51D-H) it was held that the Act is applicable throughout the Republic and not just on public roads and in *Prinsloo v Santam Insurance Ltd* (1996 3 All SA 221 (E) 225C-E) it was held that the natural meaning of a road should be referred to as “a prepared surface having a determined path leading from one place to another and to which a number of people and vehicles may have access at any given time”. In *Berry v SPE Security Patrol Experts* (2011 4 SA 520 (GNP)) the court held that the parking area at the hospital used by pedestrians and cars falls within the definition of a road (524B-C, 529H). In light of recent decisions it seems as if any pathway being used by pedestrians, even a footpath on a public park (*Jeffrey v Road Accident Fund* 2012 4 SA 475 (GSJ) 480E), would be regarded as a “road” for purposes of the Act.

In *Jeffrey* the court had to decide whether a “quad motorcycle” was a “motor vehicle” for purposes of claiming from the RAF. The claim was founded on a hit-and-run collision and the plaintiff was unable to recall in detail the salient features of the vehicle. The court found the “quad motorcycle” to be a “motor vehicle” (483I-J) thereby entitling the plaintiff to claim compensation from the RAF and in so doing seemed to have relaxed the requirements pertaining to what qualifies as a “motor vehicle”.

In this contribution the arguments of the parties and the courts’ interpretation of a motor vehicle will be discussed, as well as the unique circumstances in hit-and-run cases that could justify relaxing the requirements. In conclusion a prediction will be made on what the future holds for hit-and-run claims if the decision in *Jeffrey* is followed by other courts.

## **2 Facts and Arguments Raised by the Defendant and Plaintiff**

The plaintiff was involved in a hit-and-run collision. At the time of the collision the plaintiff was walking along a footpath in a public park when the unidentified “quad motorcycle” collided with him. As a result of the collision, the plaintiff sustained a bilateral fracture of the tibia, fibula and suffered abdominal trauma (476F-G). He claimed compensation from the RAF in respect of the bodily injuries sustained. The plaintiff (477A-B) could not recall whether the “quad motorcycle” had been fitted with side mirrors or indicators, but described the quad motorcycle as a vehicle with “(a) four large wheels with treads; (b) a headlight in front; (c) emitted a sound like a motorcycle; (d) travelled at a considerable speed; (e) being about a metre high from the ground; and (f) being blue and white in colour” (476I-J).

In an attempt to release the RAF of liability with regard to the plaintiff’s claim, the defendant argued that the “quad motorcycle” could not be considered a motor vehicle as per section 1 of the Act and, further, that

there was no evidence supplied by the plaintiff showing that the “quad motorcycle” had been adapted for “propulsion on the road” (479D-E).

According to the defendant’s expert witness, in general, a “quad motorcycle” is designed “primarily for off-road use” (477F; 478H-I; 481A-B). Motor vehicles are generally required to conform to the requirements as set out in the Road Traffic Act 93 of 1996 and regulations thereto, some of which include that a motor vehicle should have rear lights or break lights, rear view mirrors, red retro-reflectors to the rear as well as white retro reflectors to the front and indicator lights. However, the plaintiff could not recall whether the quad motorcycle was fitted with these features (477F-478B). Turning to the definition of a “motor vehicle” as per section 1 of the Act, the expert witness of the defendant stated that the “quad motorcycle” would probably comply with the “propulsion test” (478B; 478G) but was unsure whether it would comply with the “design test” due to the lack of information in respect of the fitted features required (478B-D; 478H-479B; 481A-B). The expert witness stated (478C-D):

With regards to the use thereof, a quad motorcycle is generally able to be used on roads (gravel and tarmac) and, in general, is used on roads in some instances though it is primarily designed to be used in an off-road environment. It cannot however be confirmed or rejected whether the quad motorcycle in question was adapted to be used on a road by providing it with indicator lights as well as rear view mirrors and it therefore cannot be confirmed or rejected that the quad motorcycle can be considered to be a motor vehicle as strictly defined in the RAF Act.

Based on this statement of the expert witness for the defendant not being contested by the plaintiff, and the fact that the plaintiff (on whom the burden of proof rests) admitted that he could not remember all the features of the quad motorcycle, the court should have come to the conclusion that the plaintiff did not prove on a balance of probabilities that the said motorcycle qualifies as a motor vehicle for purposes of the Act.

### **3 Decision**

On the contrary Mokgoatlheng J was satisfied that the plaintiff had proven his case in that he proved that he collided with a “quad motorcycle” and that there was no evidence provided in rebuttal of this allegation (480I-J). The judge went further to state that “a court should not place an unfair onerous burden of proof on a plaintiff regarding technical details relating to a vehicle whose existence is not disputed” (480H-I).

The judge (481D-E) acknowledged the remark by Olivier JA in *Chauke v Santam Ltd* (*supra* 183A) that “just because a vehicle can be used on a road does not mean that it was ‘designed’ for propulsion thereon”, furthermore just because it is capable of being driven on a road is not sufficient to conclude that it is a vehicle (see *Matsiba v Santam Versekeringsmaatskappy Bpk* (*supra* 834H). He (481E) stated that “the

overriding consideration should be the purpose for which the quad motorcycle was designed, and its suitability for travelling on a road as envisaged by s 1 of the Act”.

Mokgoathheng J (481I-J) reasoned that even though the quad motorcycle’s primary design was for “off-road” use its secondary purpose could well be for use on a road and “the quad motorcycle’s use on a road would not be seen by a reasonable person as fanciful, and neither would such reasonable person perceive the driving of it on a road used by pedestrians and other vehicles as extraordinarily hazardous” (482C). He (482G-H) referred to the requirement of indicator lights and rear view mirrors as “superficial non-mechanical adaptations” even though these features are required in terms of the Road Traffic Act and regulations thereto (see 478A-B, 477I-J). In support of his findings Mokgoathheng J (482J-483H) referred to the unreported judgment in *Road Accident Fund v Coleman* (case no A3045/2009) where the vehicle the plaintiff was driving collided with a “quad motorcycle”. The RAF raised a special plea that the vehicle was not a “motor vehicle” as defined in the Act but the appeal court referred to *Chauke (supra)* and held that “a quad motorcycle can be used on a road ... It has the features of a motor vehicle and is a motor vehicle as defined in the Act. It has four wheels, a steering wheel, headlights, brakes, forward and rear gears, is propelled by fuel and can go to speeds of up to 75 kilometres an hour”. The court in *Coleman* came to the conclusion that the “quad motorcycle” qualified as a “motor vehicle” for purposes of the Act.

Mokgoathheng J went a step further from that of *Coleman* by holding in *Jeffrey* that “a quad motorcycle is a motor vehicle as defined in the Act” (483I) and that the specific features required in terms of the Road Traffic Act do not apply, leading to the logical conclusion that all “quad motorcycles” should be regarded as “motor vehicles” for purposes of the Act, irrespective of any special features.

## 4 Comments

### 4 1 Definition of a Motor Vehicle as Interpreted by the Courts

Olivier JA in the well-known decision of *Chauke v Santam Ltd (supra 183A-D)* pronounced the test to be used to establish whether a vehicle falls within the definition of a motor vehicle as per section 1 of the Act. He applied an “objective, common sense meaning” to the word “designed” (see *Jeffrey v Road Accident Fund (supra 479G-I)*) which:

[c]onveys 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.

Leach J in *Prinsloo v Santam Insurance Ltd* (*supra* 225E-H) agreed with Olivier JA's objective test and held that the "mere fact that a designer of a motor vehicle may well subjectively have intended it to be used on a road cannot mean that the vehicle is in fact one as defined by the Act if, objectively viewed, it is wholly unsuitable or unfit for such purposes". Thus the judge confirmed that the forklift was not a "motor vehicle". In *Mutual and Federal Insurance Co Ltd v Day* 2001 3 SA 775 (SCA) Navsa JA (779E-F) followed Olivier JA in confirming that the particular forklift (Komatsu which had a number of features additional to the Clark model and able to travel at a top speed of 32 kilometres an hour) was not a motor vehicle based on the fact that it "poses a hazard to other road users and steering it in traffic ... should ... be considered extraordinarily difficult and hazardous" (782C-D). There was uncontested evidence led that the Komatsu travelled on public roads to reach destinations to fulfil its primary purpose of lifting and moving goods (779G-H). Navsa JA (780J-781A) also stated that in spite of the Komatsu's primary purpose it "does not mean that it could not have been designed for a secondary purpose such as for use on public roads" thereby falling within the definition of a "motor vehicle". Although there was no reference in the Komatsu's manual for its use on public roads (781B), regulation 436 of the Road Traffic Regulations provided for the use of forklifts on public roads (781E-F). In spite of all these findings the forklift was nevertheless not regarded to be a motor vehicle. The judge acknowledged that this decision would be harsh on a claimant but stated that she was not without remedies and could have chosen to sue others (782D-E).

Marais JA in *Road Accident Fund v Vogel* 2004 5 SA 1 (SCA) 5G-I, viewed Olivier JA's test as having two components and referred to a subjective as well as objective test. He construed Olivier JA's phrase "the ordinary, everyday and general purpose for which the vehicle was conceived and constructed" as the subjective test and the phrase "how the reasonable person would see its ordinary, and not some fanciful, use on a road" as the objective test. Thus in this particular case the forklift (Clark model) which had four wheels, diesel engine, steering wheel, open driver's seat, gear box, hooter, forward and reverse gear, footbrake, and capable of travelling at a maximum speed of 8 kilometres an hour was confirmed not to be a "motor vehicle" designed for use on a road. The vehicle did not have lights, indicators, speedometer or brake lights (183D-H). Thus its use on a road would be "extraordinary and hazardous" (183I-J).

In *Bell v Road Accident Fund* (*supra*) a flatbed transporter designed to transport baggage and cargo (used at airports) was found to be a "motor vehicle" for purposes of the Act. The vehicle in question did not have rear view mirrors, side mirrors or seatbelts but had forward and reverse functions, brakes and could attain a speed of 50 kilometres per hour.

However, Streicher JA in *Road Accident Fund v Van den Berg* (2006 2 SA 250 (SCA) 253B-E) disagreed with this interpretation of Olivier JA's decision and stated that in his view the judge was referring "to the general purpose for which the vehicle, *objectively determined*, was conceived and constructed". In this case a pneumatic tyre roller primarily used to compact road surfaces but also used to travel safely on public roads (253E-F, 255C) was considered a "motor vehicle". This particular vehicle had pneumatic tyres, headlights, rear lights, parking lights, hazard lights, a rotating beacon, a hooter, two side view mirrors, indicators reflectors, footbrakes and a handbrake (252E-G).

In *Berry v SPE Security Patrol Experts* (*supra*) Goodey AJ found a six-seat golf cart "shuttle" carrying passengers to and fro in a parking lot of the hospital to be a "motor vehicle" for purposes of the Act. The brochure relating to the vehicle stated that the "shuttle" was ideal for use in a resort, hotel, park or shopping mall (523A). The vehicle was petrol driven, had a steering wheel, lights, hooter, parking brakes, forward and reverse gears but no side mirrors or rear mirrors (524E). The judge (529I-H) stated that if he confined himself strictly to the brochure pertaining to the vehicle in that "it has not been *designed* or *adapted* for use by and at hospitals in their parking lots, let alone for *public roads*" then he would not consider it a "motor vehicle". Goodey AJ argued (530B-D) that these types of vehicles are commonly used in increasing numbers and he therefore came to the conclusion that "[c]ommon sense and the reality of the situation call for these 'shuttles' to be classified as 'motor vehicles'". His opinion was further based on the belief that a claimant would otherwise be left without recourse against the RAF.

Only one other case (apart from the unreported *Coleman* case referred to in the *Jeffrey* case – see below in 4 2) could be found in which a quad motorcycle was involved in an accident leading to a claim against the RAF, *Ferreira v Road Accident Fund* [2010] ZAGPJHC 166. This was also a hit-and-run case, but the RAF agreed on liability which means that no mention was made in the report on whether the specific features of the quad motorcycle was in dispute or not.

#### **4 2 Unique Circumstances in Hit-and-run Cases that Could Justify Relaxing the Requirements**

Mokgoathheng J (in *Jeffrey supra*) held that the plaintiff's submission that he collided with a "quad motorcycle" was uncontested and even though the burden of proof is upon the plaintiff to prove that he was injured by a motor vehicle, it will be illogical and unreasonable to expect the plaintiff to remember and be able to describe mechanical details of the motorcycle which collided with him in an instantaneous moment (480F-H). Mokgoathheng J (480H-J) continued to hold that a "court is not going to burden a plaintiff with a level of proof that is impossible to discharge ... [and] should not place an unfair onerous burden of proof on a plaintiff regarding technical details relating to a vehicle whose existence is not disputed".

It can be said that there is logic in his argument, but the consequences of such a line of thought is that one should then never expect of a plaintiff in a hit-and-run accident to remember the details of the vehicle that collided with him or her. This will mean that if there is no rebuttal in the evidence produced by the plaintiff, no matter the detail of it, the plaintiff will be relieved of proving that the collision was caused by a “motor vehicle” as technically required by the Act. This surely could not have been the intention of the legislature, otherwise it would have used language clearly indicating such an intention.

The legislature clearly and unequivocally distinguished between identified claims and hit-and-run claims by providing for different prescription periods and specific requirements relating to submission of hit-and-run claims. If the legislature wanted to do the same with the burden of proof in respect of whether the vehicle causing the accident can be regarded as a “motor vehicle”, it could have done so in clear language in the Act or the regulations thereto, but chose not to do so. It is therefore stated that the unique circumstances surrounding a hit-and-run case should not be regarded by the courts as a justification to relax the requirements clearly set out in the Act and in the Road Traffic Act.

## 5 Conclusion

Recently the courts have been liberal with regard to the interpretation of a “motor vehicle” (as seen above) and the concept of a “road” which now in essence refers to any road in South Africa whether tarred or gravel, public or private. Even though the courts have subjectively referred to what the vehicle was designed for (as per the manufacturer’s guidelines) they have religiously relied on the objective approach based on whether the particular “motor vehicle” was designed for use on a road. However, it is ironic that a “road” refers to any road whether it is a footpath in a park or a parking lot, yet strictly speaking if a road is regarded as any road within the Republic, the question of whether a “motor vehicle” is designed for use on a road becomes irrelevant as any or all vehicles could then qualify as “motor vehicles”, because all vehicles are designed to move somewhere.

Klopper (62) correctly submits that

[d]espite the judgments handed down by the SCA, it is difficult to derive clear objective principles from these judgments and it remains unpredictable when a vehicle will be deemed to be a ‘motor vehicle’ in terms of the Act. A feature of these judgements is that there is no concerted attempt to fully interpret the word ‘road’ [which] ... seems to be the key problem of identifying vehicles in terms of the Act.

According to him (62 fn 260) the golf cart shuttle is not a motor vehicle as defined by section 1 of the Act and in the same breath it is submitted that the “quad motorcycle” in *Jeffrey* should also not have been considered a motor vehicle.

Even though the object of the Act is to provide wider protection to road users, the liability of the RAF should be limited at some point and the clear unambiguous words of the Act did exactly that, until the courts interpreted the words too liberally to presumably widen the liability of the RAF. In light of the courts liberal approach as to what constitutes a “motor vehicle” it will be of no surprise if the two-wheeler “personal transporters” (such as those manufactured by Segway Inc) currently used in shopping malls and parking lots will also be considered a “motor vehicle” in the near future.

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