

SOUTH AFRICA / JUDGMENT

Jeffrey v Road Accident Fund (2008/5396) [2012] ZAGPJHC 259; 2012 (4) SA 475 (GSJ) (15 February 2012) [2012] ZAGPJHC 259

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mokgoatlheng

CASE / FILE NUMBER

2008/5396

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SOUTH

GAUTENG HIGH COURT, JOHANNESBURG

REPORTABLE

CASE NO: 2008/5396

DATE:

15/02/2012

In

the matter between:

MOREO

JACOB JEFFREY.....Plaintiff

and

THE

ROAD ACCIDENT FUND.....Defendant

JUDGMENT

MOKGOATLHENG J

(1)The plaintiff has sued the defendant for compensation in respect of damages suffered as a result of bodily injuries sustained in a motor vehicle collision in which he was involved on 25 November 2005 at Extension 5 Rose Park Lenasia

(2) At the commencement of the proceedings, the parties agreed that the merits should be separated from the issue of quantum in terms of Rule 33(4) and such an order was made.

FACTUAL MATRIX

- (3) The plaintiff testified that on 25 November 2005 he was walking in an easterly direction in Rose Park, Lenasia on a footpath, when he became aware of a young person riding a quad motorcycle. The quad motorcycle changed course and travelled straight towards his path at a considerable speed. He tried to avoid the quad motorcycle colliding with him by moving away from its path of travel, but the driver changed direction and collided with him, and as a consequence he sustained a bilateral fracture of the tibia and fibula and abdominal trauma.
- (4) He did not have an opportunity to speak to the driver of the quad motorcycle because he drove away. An ambulance and a police vehicle arrived on the scene and paramedics attended him. None of the persons at the scene gave him the details of the quad motorcycle. He was taken to Baragwanath Hospital and was detained. He was discharged on 26 February 2006. He reported the accident to the

police on 11 May 2006.

5) The plaintiff describes the quad motorcycle which collided with him as having:

- 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.
- (6) On 31 August 2009 he had a consultation with Barry Grobblers the defendant's expert witness, and a mechanical engineer by profession. Both attended the accident scene. He described the quad motorcycle in question and explained to him how the

accident occurred. He cannot remember if the quad motorcycle had any side mirrors or indicators.

BARRY GROBBLER'S EVIDENCE

- (7) Grobblers confirmed that he attended the accident scene with the plaintiff. He consulted the plaintiff who explained to him how the accident occurred. That plaintiff also give him a description of the quad motorcycle which collided with him. Plaintiff stated that the quad motorcycle had four wheels, a headlight in front, and was blue and white in colour, but could not remember if it had side mirrors and indicators. From the information provided he compiled a report which he confirmed under oath.

GROBBLER'S REPORT

- (8) Grobblers confirmed the contents his report and his conclusions. It is critical for the determination of the issue whether the quad motorcycle in question is a motor vehicle pursuant to the provisions of section 1 of The Act to quote Grobblers' opinion, reasons, and conclusions in full. The salient features of the report which have relevance to the issue in question reproduced verbatim are the following:

"3.1.2 In general, a quad motor cycle is designed

primarily for off-road use hence the large balloon tyres with large spaced tread patterns as well as the high central ground clearance and large wheel- travel suspension system;

The overall length, overall width and overall heights of a quad motorcycle generally conform to regulation 223 of the Road Traffic Act and Regulation 93 of 1996;

The front and rear overhang of a quad generally conform to regulation 226 of the Road Traffic Act and Regulations 93 of 1996 which specifies that the front and rear overhang of the vehicle may not exceed 60% of its wheel base;

The version of the plaintiff that the quad motorcycle was fitted with a front headlamp, conforms in part to regulation 157 of the Road Traffic Act which requires headlamps, rear lights, brake lights, etc. to be fitted to a vehicle. It is not known whether the quad was fitted with rear lights or brake lights;

The all round view of the roadway to the front, rear, right and left of the quad in the photographs appears to conform to regulation 204 of the Road Traffic Act and Regulation 93 of 1996 which requires "a full and clear view of the roadway ahead and to his or her right and left when the vehicle is in use;". It is not known whether the quad motorcycle was fitted with a rear view mirror/s and therefore whether it complies with regulation (e) which requires a rear view mirror to be fitted to the right side and left side of the handle bars of a motor quadracycle;

It is not known whether the quad motorcycle was fitted with red retro-reflectors to the rear as well as white retro-reflectors to the front which is a requirement as specified in regulation 187 and 186 of the Road Traffic Act and Regulations 93 of 1996 respectively;

It is not known whether the quad motorcycle in question was fitted with indicator lights which is a requirement according to regulation 193 of the Road Traffic Act and Regulations 93 of 1996;

Considering the Road Accident Fund definition of a motor vehicle and applying it strictly to the description of the quad in question, it probably makes use of petrol for fuel and therefore conforms to the fuel requirements section of the definition. With regards to the use thereof, a quad 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 can however not 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 in question can be considered to be a motor vehicle as strictly defined in the RAF Act; (my emphasis)

3.2 It is not possible to confirm or reject the version of

the plaintiff based on the information available. The reasons for this conclusion are as follows:

The version of the plaintiff was obtained at the accident scene during the inspection 31 October 2009;

There are no facts on which an expert can rely to confirm or reject the presence of a quad motorcycle at the accident scene on the day as indicated by the plaintiff and also no facts available to confirm or reject the motions of the motor cycle prior to collision and that it collided with the plaintiff. The version of the plaintiff should therefore be evaluated and tested during trial, if necessary”

- (9) Grobblor also testified that “if one looks at a quad motorcycle strictly in terms of the definition provided by the Road Accident Fund Act, its main requirement is it must be propelled by some or other fuel like petrol or diesel or electricity. he does not know what this quad motorcycle was propelled by, but since the plaintiff testified that it sounded like a motorcycle, this is possible if it had a normal sort of an engine propelled by petrol it would conform to the fuel part of the Road Accident Fund Act’s definition”, (my emphasis)
- (10) Grobblor’s further testimony was: “with regard to the use thereof, a quad is generally able to be used on roads, gravel and tarmac, and in general is used on roads in some instance though it is primarily designed to be used in off-road environments, but occasionally quad motorcycle are seen on roads and on farm roads, but their primary design is for an off-road environment. (11) Grobblor also stated that “he can however not be confirm or reject whether the quad motorcycle in question was adapted to be used on a public road, but if a quad which is designed for off-road use is adapted for use on a road, it would have to have flickers, because there is other traffic on a road, whether it is a public road or a farm road, to signal intentions to the other traffic to turn left or right, and the same goes for a rear-view mirror, one would want to look for other traffic”, (my emphasis)
- (12) Grobblor further testified there is a variety of quad motorcycle models which vastly differ from each other. He does not know how the particular one in question looked like, but from what the plaintiff described to him and from plaintiffs testimony in court, he cannot reject the plaintiff’s version that he collided with a quad motorcycle.

THE DEFENDANT’S SUBMISSIONS

- (13) Mr Meyer’s on behalf of the defendant argued that the description the plaintiff gave regarding the quad motorcycle which he collided with, does not identify same as falling within the ambit of a motor vehicle as defined in section 1 of The Act. Consequently, counsel submitted the plaintiff has not discharged the onus to show that the quad motorcycle in question falls within the-purview of section 1 of The Act.
- (14) Counsel further argued in the alternative that in order for the quad motorcycle in question to conform to section 1 of The Act, the plaintiff was obliged to prove that same had been adapted for propulsion on the road. Counsel submitted that there was no evidence to prove that the quad motorcycle described had been so adapted.

THE APPLICABLE LAW

(15) Section 1 of The Act provides; “Motor vehicle means any vehicle designed or adapted for propulsion or haulage on a road by means of fuel, gas or electricity and includes a trailer, a caravan, an agricultural or any other implement designed or adapted to be drawn by such motor vehicle”

(16) Olivier JA in *Chauke v Santam Ltd* [1996] ZASCA 120; 1997 (1) SA 178 (AD)

enunciated that the test to show that a vehicle falls within the above definition was to be applied as follows:

‘The correct approach....is to take [the definition] 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 in tender

for use on a road but because it had been adapted for such use.’

(17) In *Road Accident Fund v Vogel* 2004 (5) SA 250 (SCA),

“the SCA clarified the apparent conflict between the ‘subjective test posed (the purpose for which the vehicle was conceived and constructed) and the ‘objective test’ (the reasonable person’s perception of the vehicle) in Chauke’s case (supra) by stating that (while the legislature has not entirely ignored the subjective test of the designer, it is not perse

conclusive and the item’s objective suitability for use in the manner contemplated by section 1 is to be the ultimate touchstone’

(my emphasis)

(18) Lewis JA correctly opined in *Road Accident Fund v Mbendera and Others* 2004 (4) ALL SA 25 (SCA): “The central principle discussed in *Chauke* was whether the court must have regard to the designer’s intention, or the objective suitability for driving on a road, in determining whether a vehicle falls within the ambit of The Act The court, adopted a mixed formulation: the purpose for which the vehicle was conceived and constructed, on the one hand, and suitability for

use on a road, as perceived by the ordinary,

reasonable person on the other The nature of the road
was not in contention”

(19) Olivier JA in Chauke’s case defined a road as “A line of communication, especially prepared track between places for use by pedestrians and vehicles” In Road Accident Fund v Mbendera and Others (supra); it was held that “road” as defined in The Act should not be narrowly interpreted to mean a “public road”. Lewis JA correctly reasoned that The Act applied throughout the Republic of South Africa and not just to vehicles used on public roads, in my view a foot path on a public park fall within this definition.

THE EVALUATION OF EVIDENCE

(20) The plaintiff was an honest and credible witness. He did not embellish his evidence nor did he add any new features regarding the description of the quad motorcycle which collided with him. The plaintiff’s testimony adhered to his claimant affidavit and police statement. The essence of the plaintiff’s evidence that he collide with a quad motorcycle was not challenged and stands uncontroverted.

(21) Under cross-examination it was put to the plaintiff that the information he furnished to Barry Grobblers regarding the quad

motorcycle and the vehicle he described in court, was

not enough to conclusively establish that he collided with a motor vehicle as defined in section 1 of The Act.

(22) It is illogical and unreasonable to expect the plaintiff to individually and exhaustively, describe each and every mechanical

detail and automotive part of the quad motorcycle which collided with him, in an instantaneous moment, to minute detailed specifications.

(23) A court is not going to burden a plaintiff with a level of proof that is impossible to discharge. Although the onus of proof does not shift, 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. Such a burden of proof would be unjust unfair and iniquitous to discharge. The law only requires prove on a balance of probabilities, no more no less.

(24) In my view the plaintiff has established a prima facie case that he collided with a quad motorcycle, there is no evidence tendered in rebuttal of the prima facie case by the defendant. There is nothing to gainsay the plaintiff’s version.

(25) Grobblers in essence testified that a quad motorcycle is designed primarily for off-road use because of its balloon tyres with spaced tread patterns, as well as its high central ground clearance and large wheel-travel suspension system. Grobblers further testified that if a quad motorcycle is fully fitted with all the requisite mechanical and automotive parts as required

by the Road Traffic Act and Regulations 93 of 1996, and is adapted to be used on the road by providing it “in addition with indicators lights as well as rear view mirrors it can be considered to be a motor vehicle as strictly defined in the Road Accident Act”.

(26) Grobblers also testified that quad motorcycles do often travel on roads. In this regard, the evidence of Grobblers an expert mechanical engineer with expertise in vehicle design is uncontroverted and conclusive and deserves critical consideration, more especially because Grobblers as an expert witness, his primary obligation although testifying in support of the defendant’s case is to assist the court to arrive at a just and fair decision.

(27) In Chauke’s case it was held that just because a vehicle can be used on a road does not mean that it was “designed”

for propulsion thereon. Further that the mere fact that a vehicle is capable of being driven on a road is not perse sufficient to bring it within the definition of section 1 of The Act Applying this ratio to the present matter, it follows 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 section 1 of The Act.

(28) The decisive question is, is a quad motorcycle’s general use on a road contemplated as one of its uses by its design and conception. Approaching the matter in this fashion at the end of the case, a court is obliged to ask itself whether on a balance of probabilities it has been proved that any reasonable person perceiving a quad motorcycle on a road would be inclined to believe that one of its uses would be on a road. In my view Grobblers’s expert opinion evidence in this regard is sufficient to provide such objective criterion.

(29) Grobblers expert testimony is that quad motorcycles do often travel on road. In this regard, the evidence of Grobblers an expert mechanical engineer with expertise in vehicle design is conclusive and deserves critical consideration, more especially because Grobblers as an expert witness, his primary obligation although testifying in support of the defendant’s case, is to assist the court to arrive at a just and informed decision regarding the issue whether a quad motorcycle is a motor vehicle in terms of The Act

(29) It is quite patent that Grobblers is a technically skilled expert witness in respect of the definitive design characteristics of a quad motorcycle. Grobblers’s evidence that a quad motorcycle’s primary design and purpose is for use off-road, does not necessarily mean that it could not have been designed for a secondary purpose such as for use on a road thereby enabling the quad motorcycle to fall within the purview of the definition of section 1 of The Act with the relevant adaptation as he conceded.

(30)The fact that the plaintiff could not conclusively testify as to whether, the quad motorcycle was fitted with a rear view

mirror, reflectors, indicators, front and rear retro-flickers is not decisive in determining that it was not adapted for use on a road and in my view is not determinative of whether the quad motorcycle's primary design and conception is solely and exclusively for use on a road only.

(31) Grobblers expert opinion is that although the quad motorcycle's is primarily designed for off-road use, if it is adapted by equipping it with indicators and rear view mirrors it can qualify to be classified as a motor vehicle adapted for propulsion on the road in terms of section 1 of the Act. Distilled Grobblers opinion is that a 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.

(32) The plaintiff testified that the quad motorcycle emitted a sound like a motorcycle and drove towards his path of travel at

considerable speed. Grobblers conceded that considering the definition in The Act and applying it to the quad motorcycle in

question, it probably makes use of petrol to

fuel an engine which according to him is the main definitive feature required for a vehicle to conform to section 1 of The Act (my

emphasis)

(33) The plaintiffs coherent description of the quad motorcycle he collided with coincides with Grobblers evidence regarding the fact that a prototype quad motorcycles has an engine which is propelled by fuel, a steering mechanism, a front head light, four wheels with tread patterns, and sufficient ground clearance. In my view these definitive characteristic features substantially fit the main distinguishing mechanical description of a prototype quad motorcycle as alluded to by Grobblers in order for it to conform to the definition of a motor vehicle In terms of section 1 of The Act

(34) The various features referred to by Grobblers which distinguish a prototype quad motorcycle in its original design and conception,

show that its design is suitable for propulsion off-road and on a road without any major mechanical adaptation, because according to Grobblers, the adaption relates to the provision of indicator lights as well as

rear view mirrors, which objectively viewed are superficial non mechanical adaptations, (my emphasis)

(35) The overriding consideration should be the purpose of the quad motorcycle, and its suitability for travelling on a road. The

uncontroverted fact according to Grobblers is that a quad motorcycle with minor adaptations is suitable for use on a road.

(36) In my view even if these adaptations are not effected on a quad motorcycle objectively considered, that omission cannot be decisive regarding the seminal objective question whether a quad motorcycle is capable of being operated on a road.

(37) In the unreported two judge appeal judgment in Road Accident Fund v Coleman case number A3045/2009. The respondent Karren Gripper Coleman sued the appellant, the Road Accident Fund, for payment of damages sustained when the motor vehicle she was driving collided with a quad motorcycle.

(38) The Road Accident Fund in a special plea contended that the quad motorcycle did not fall within the definition of a motor vehicle in terms of section 1 of The Act as it was not designed for propulsion on a road.

(39) In the court-a-quo parties agreed that it was common cause that a quad motorcycle had:

a) four wheels; b) a steering mechanism; c) brakes; d) head lights; e) was propelled by a fuel engine; f) forward and reverse gears; g) a top speed of 75k/m per hour; and h) could and was used on a normal road.

(40) The appeal court in determining whether the quad motorcycle was a motor vehicle or not in terms of The Act, had recourse to the test enunciated in Chauke v Santam

Ltd

[1996] ZASCA 120; 1997 (1) SA 178 (A) and after adopting “a down to earth common sense approach held that “objectively determined, a quad motorcycle can be and is used on a normal (public) road and off 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, head lights, brakes, forward and rear gears, is propelled by fuel and can go to speeds of up to 75 kilometres an hour”.

(41) Mr Meyer argued that Coleman’s case is distinguishable from the present matter in that it was common cause that the vehicle was a quad motorcycle, had headlights, had as its top speed 75 Kilometre per hour, had a steering wheel, brake lights, and reflectors. Further that, there were eight common points that made this a quad motorcycle conform to the prescriptions of The Road Traffic Act.

(42) I demur, objectively viewed there are no substantial material differences between the quad motorcycles in both matters. Their main defining characteristic features are similar namely, a fuel propelled engine, a steering mechanism, a front head light, and forward motion at a considerable speed. In the present matter there is no countervailing evidence that the vehicle plaintiff collided with was a quad motorcycle. In my view Coleman’s case did not place an onerous burden of mechanical or automotive requirements for a person to

conclusively prove whether a quad motorcycle is a vehicle in terms of The Act

(43) The court is enjoined to adopt a common sense approach in determining whether the quad motorcycle is a motor vehicle for the purposes of The Act Applying the test set out in Chauke's case it appears to me to be clear that the quad motorcycle which collided with the plaintiff can be defined as a motor vehicle within the definition of section 1 of The Act.

(44) I accordingly find that a quad motorcycle is a motor vehicle as defined in The Act The plaintiff has on a preponderance of probabilities

shown that the driver of the insured vehicle, the quad motorcycle was the sole cause of the collision in which he sustained bodily

injuries.

THE ORDER

(45)

(i) The quad motorcycle which collided with the plaintiff on 25 November 2005 at Rose Park, Lenasia is a motor vehicle as defined in section 1 of The Act.

ii) The defendant is ordered to pay 100% of the plaintiff's proven damages arising from the accident in which he sustained bodily injuries on the 25 November 2005.

iii) The defendant is ordered to pay the costs of the suit.

Dated at Johannesburg on the 30th January 2012.

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JUDGE OF THE HIGH COURT

DATE OF HEARING: 18th FEBRUARY 2011 DATE OF JUDGMENT: 15th FEBRUARY 2012 ON BEHALF OF THE PLAINTIFF: MR FISHER INSTRUCTED BY: SHYAMA MARAR ATTORNEYS TELEPHONE NUMBER: (011)432-8153/78 ON BEHALF OF DEFENDANT: MR MEYER INSTRUCTED BY: M F JASSAT DHLAMINI INC TELEPHONE NUMBER:

(011) 447-0464

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