

SOUTH AFRICA / JUDGMENT

Road Accident Fund v Van Den Berg (19/2005) [2005] ZASCA 104; 2006 (2) SA 250 (SCA) (16 November 2005) [2005] ZASCA 104

COURT
Supreme Court of Appeal

BEFORE
Scott, Streicher, Ponnann

CASE / FILE NUMBER
19/05

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THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable

CASE NO: 19/05

In the matter between :ROAD ACCIDENT FUND Appellant and ERIKA VAN DEN BERG Respondent

Before: SCOTT, STREICHER & PONNAN JJA

Heard: 3 NOVEMBER 2005 Delivered: 16 NOVEMBER 2005

Summary: Road Accident Fund Act 56 of 1996 - meaning of 'motor vehicle' – 'designed ... for propulsion ... on a road' to be determined objectively – general use being made of vehicle a relevant consideration – Hamm GRW 18 pneumatic tyre roller found to be a motor vehicle as defined

J U D G M E N T

STREICHER JA

STREICHER JA:[1] Does a Hamm GRW 18 pneumatic tyre roller ('a PTR') qualify as a 'motor vehicle' as defined in s 1 of the Road Accident Fund Act 56 of 1996 ('the Act'). That is the question to be decided in this appeal.[2] The respondent instituted action in the High Court, Johannesburg ('the court a quo') against the Road Accident Fund, the appellant, for the payment of damages suffered by her and her two minor sons when her husband and the father of her minor children died as a result of injuries suffered by him when he was involved in a collision with a PTR. The appellant, in a special plea, alleged that a PTR does not fall within the definition of a motor vehicle in s 1 of the Act and claimed that the respondent's claim should be dismissed for that reason. The court a quo, having ruled that this issue should be determined first, held that a PTR does fall within the definition but granted leave to the appellant to appeal to this court.[3] The definition of 'motor vehicle' in s 1 of the Act reads as follows: "motor vehicle" means 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'.[4] The PTR is depicted below.[image edited out by SAFLII]The vehicle is approximately 2 meters wide, 4,7 meters long and 3,3 meters high. Its basic weight is 13,8 tons but it may carry ballast of up to 28 tons. It is fitted with a three speed gearbox, pneumatic tyres, headlights, rear lights, parking lights, hazard lights, a rotating beacon, a hooter, two side view mirrors, direction indicators and reflectors. It has a footbrake similar to those found in trucks, a hand brake and an emergency handbrake. It is powered by a four cylinder turbo diesel engine commonly used in trucks and has power steering. It has a facility to reduce the pressure in its tyres.[5] It is common cause that the PTR was designed for propulsion by means of fuel. What is in dispute is whether it was so designed for propulsion on a road. In *Road Accident Fund v Mbendera* [2004] 4 All SA 25 (SCA) para [11] to [13] it was held that 'road' in the definition should not be interpreted to be a public road as was held in *Mutual and Federal Insurance Co Ltd v Day* 2001

(3) SA 775 (SCA) para [13] and [16] and *Road Accident Fund v Vogel* 2004

(5) SA 1 (SCA) para [5], in which the nature of the road referred to was not of critical importance, as was the case in *Mbendera*. [6] The test to determine whether a vehicle was designed for propulsion on a road as required by the definition is an objective one. [1] In *Chauke v Santam Ltd* [1996] ZASCA 120; 1997 (1) SA 178 (A) at 183B-C Olivier JA said: '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.' [7] In *Vogel* [2] Marais JA said that Olivier JA posited both a subjective and an objective test. He added: 'To say that the word "conveys the ordinary, everyday and general purpose for which the vehicle was conceived and constructed" (his 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.'I disagree with this interpretation of the passage referred to. 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 constructed, he was in my view, referring to the general purpose for which the vehicle, objectively determined, was conceived and constructed.[8] It is common cause that the PTR 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.[3] [9] Only one witness, one Harvey, who was called by the respondent, testified at the trial. He is a mechanical engineer who had been involved in the construction industry for approximately 28 years. At present he is employed by a company which markets and sells construction vehicles and equipment including Hamm PTR's. According to his evidence, which is not disputed by the appellant, another general use to which the PTR is put is to travel on public roads from one construction site to another. He mentioned as an example the Maputo Corridor Project which comprised the rehabilitation of pieces of a road 550 kilometre long. For this purpose the project was split into 21 separate contracts. Equipment such as a PTR would have been taken to the construction sites on a trailer but once there it would have travelled on the public road from one point where it was needed to another. In doing so it would have covered distances of up to 10 kilometres at a time. It would have done so on a regular basis, two or three times a week. At times it may have been escorted by a bakkie. On a 60 kilometre road contract the position would, according to Harvey, be no different. Harvey's undisputed evidence was, therefore, that the PTR is generally used to travel on public roads from one construction site to another.[10] Counsel for the appellant submitted that being an objective test one cannot have regard to the fact that the PTR is generally used on a road. However, the purposes for which the PTR is generally used are objectively determinable and is a fact that cannot be ignored when attempting to objectively determine the use for which it had been designed.[11] It is the design of the PTR that makes it possible for the vehicle to be used as aforesaid. It is fitted with all the paraphernalia required to be fitted to a motorcar so as to enable it to be used with safety on a public road, such as headlamps, direction indicators, brake lights and rear view mirrors. These features may of course also be required for its primary purpose of compacting but that is in my view an irrelevant consideration. The third gear, which enables the PTR to travel at a maximum speed of 20 kilometres per hour and the facility to reduce the tyre pressure from 7 bar required for compacting to 2 bar are not required for compacting purposes but for travelling on roads to and from the site where compacting is required. [12] Counsel for the appellant contended that objectively considered the PTR was nevertheless not designed for propulsion on a road because it is inherently dangerous to drive it on a road for the following reasons –

- a) the maximum speed at which it can travel is 20 km per hour;

- b) its tyres are smooth with the result that it may skid; and
- c) its centre of gravity is high as a result of which it may tip over.

In this regard he relied on Chauke at 183B-C and Vogel at 4H. In Chauke, at the place cited, Olivier JA said: 'If the ordinary, reasonable person would perceive that the driving of the vehicle in question on a road and 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.' [13] The judge a quo held that the driving of the PTR on stretches of public road between construction sites cannot be regarded as 'extraordinarily difficult and hazardous unless special precautions or adaptations were effected'. I agree and shall deal with each of the three reasons advanced in turn. [14] I accept that a vehicle travelling at a speed of 20 km per hour may under certain circumstances constitute a greater danger on the road than a vehicle traveling at a higher speed. I do not, however, think that an objective observer would perceive the danger to be of such magnitude that he would conclude that the vehicle was not designed for use on a road. Vehicles do from time to time travel at speeds of 20 km per hour or less and all reasonable drivers of motor vehicles are aware of that fact. The PTR is a large vehicle and should be clearly visible to other users of the road especially if the rotating beacon is used, as it should be, if required by the particular circumstances. [15] It was never suggested to Harvey that the PTR was more likely to skid than an ordinary motor vehicle with treaded tyres and no basis for the submission is to be found in the evidence. Being fitted with 8 wheels there is in my view no reason to believe that the PTR would be prone to skidding. [16] Harvey did testify that it is highlighted in the operator's manual that when 'ballasted' to the full the centre of gravity of the PTR 'is quite high and you have to be careful of the cross slopes' as there is a danger that it may tip over. That is not, however, to say that there is any danger that it would tip over on a public road and there was no suggestion that this has ever occurred. [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. [18] The appeal is dismissed with costs.

____STREICHER JA

SCOTT JA)PONNAN JA) CONCUR

[1] Vogel at para [12]. [2] Para [10]. [3] See Chauke at 182 E-J and Vogel para [8].

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