



**IN THE SUPREME COURT OF SWAZILAND**

**HELD AT MBABANE**

**JUDGMENT**

Civil Appeal Case No.29/2014

**In the matter between**

**MOTOR VEHICLE ACCIDENT FUND**

**Appellant**

**And**

**MHAWU GWEBU**

**Respondent**

**Neutral citation:** *Motor Vehicle Accident Fund vs Mhawu Gwebu*  
(29/2014) [2014] SZSC 61 (3 December 2014)

**Coram:** RAMODIBEDI CJ, LEVINSOHN JA and DR  
ODOKI JA

**Heard:** 13 NOVEMBER 2014

**Delivered:** 3 DECEMBER 2014

*Summary: Application proceedings instituted to compel MVA Fund to accept claim and directing it to settle same. Such proceedings inimical to clear provisions of MVA Act - appeal allowed application dismissed.*

## JUDGMENT

### LEVINSOHN JA

1. For ease of reference and for convenience I shall refer to the parties to this appeal by their respective designations in the court a quo.
2. On 9<sup>th</sup> September 2008, over 6 years ago, the Applicant launched proceedings by way of motion in which he cited the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and sought the following relief:
  1. *“That the usual forms and service relating to the institution of proceedings be dispensed with and that this matter be heard as one of urgency.*
  2. *That the applicant’s non-compliance with the Applicant (sic) Rules relating to the above-named forms and service be condoned.*

3. *Declaring the accident in which the applicant was injured on 27<sup>th</sup> June 2007 at Maphalaleni to be one contemplated by Section 10(1) of the Motor Vehicle Accidents Act 13/1991.*
  4. *Interdicting the 1<sup>st</sup> Respondent from rejecting the Applicant's claim lodged pursuant to the provisions of the Motor Vehicle Accidents Act 13/1991.*
  5. *Directing the 1<sup>st</sup> Respondent to consider the merits of, and settle the Applicant's claim referred to in prayer 4 above.*
  6. *Directing the Respondents to pay the costs hereof at attorney and client scale.*
  7. *Further and or alternative relief."*
3. I proceed to summarise in brief outline the salient features in the case made out in the Applicant's founding affidavit.

4. The Applicant testifies that on 27<sup>th</sup> June 2007 at about 16h40 hours he was seriously injured in a motor vehicle accident which took place on a public road at Maphalaleni in the district of Hhlohho. At the time he was assisting one Albert Mdluli who was driving a tractor pulling a trailer loaded with bricks. It appears that these vehicles stopped. The Applicant assisted the driver to unhitch the trailer from the tractor. The Applicant describes how in this process while removing the bar joining tractor and trailer, the driver of the tractor sped forward ejecting the trailer violently with the result that the trailer skidded and fell on his left foot injuring him seriously.
  
5. The Applicant avers that the accident was caused solely by the negligence of the tractor driver. Furthermore, that this accident is one that arises from the driving of motor vehicle and thus falls within the purview of the Motor Vehicle Accidents Act no. 13 of 1991 (“the Act”).
  
6. On 21<sup>st</sup> November 2007 the Applicant’s attorneys lodged the statutory claim form ‘A’ with the 1<sup>st</sup> Respondent.

Annexed to this was an affidavit deposed to by the Applicant describing the circumstances surrounding the accident.

7. The Applicant also lodged the police report described as “Mbabane Incident Report OB 968/06”. This report under the hand of Sergeant Fakudze stated:

*“..... Mhawu Gwebu.....reported that while he was removing a jack from a tractor which was jacked the jack slipped and the wheel of the tractor fell onto his feet.”*

8. On 15 January 2008 the 1<sup>st</sup> Respondent notified the Applicant’s attorneys that on a perusal of the police report it appears that the accident was not one that arose from the driving of a motor vehicle as contemplated by the Act.
9. What followed thereafter was correspondence emanating from the Applicant’s attorneys attempting to persuade the 1<sup>st</sup> Respondent, that the information contained in the original police report was incorrect and provided a distorted picture of what had occurred.

An amended police report was procured by the Applicant's attorney. This was consistent with the Applicant's version of the accident. It was delivered to the 1<sup>st</sup> Respondent on 10<sup>th</sup> July 2008. On 18<sup>th</sup> July 2008 the 1<sup>st</sup> Respondent repudiated the Applicant's claim noting –

*“Accordingly, in the circumstances and from the police report itself, we really find it difficult to attribute any negligence/and or unlawful act on the owner of the truck in question and this really appears to be nothing less than an unfortunate incident of a jack slipping and your client being injured in the process. We very much doubt your client's version in the subsequent affidavit of occurrence lodged with the Fund.”*

10. In a reply dated 20<sup>th</sup> August 2008 the Applicant's attorneys countered the above contentions arguing that no reliance could be placed on the first police report. It was also argued that there was nothing to gainsay the Applicant's version in his affidavit.

The attorneys gave notice that they intended to launch proceedings by way of notice of motion “to decide this disputed aspect”.

11. The 1<sup>st</sup> Respondent opposed the application and delivered an answering affidavit contending essentially that the relief sought was not competent. For the purposes of this appeal I find it unnecessary to traverse the allegations made therein.
12. The learned judge in the court a quo made the following order:-

*“(a) It is hereby declared that the accident in which the Applicant was injured on the 27<sup>th</sup> June 2007 at Maphalaleni is one contemplated by Section 10(1) of the Motor Vehicle Accident Act 13/1991.*

*(b) The 1<sup>st</sup> Respondent is directed to consider the merits of the Applicant’s claim and finalise it within 30 days of this order.*

(c) *The 1<sup>st</sup> Respondent is directed to pay costs of suit on the ordinary scale.”*

13. The 1<sup>st</sup> Respondent appeals against the above order .It challenges the court a quo’s findings on 10 grounds which are listed in its notice of appeal. These essentially call into question whether the orders made by the court a quo were competent.
14. Now in order to properly evaluate the correctness or otherwise of the 1<sup>st</sup> Respondent’s submissions the first port of call must inevitably be the Act and I turn now to consider this legislation.
15. The MVA Fund, a body corporate established in terms of Section 3(1) of the Act, is empowered to investigate or settle claims referred to in Section 10 arising from the driving of a motor vehicle or commence, conduct, defend or abandon legal proceedings in connection with such claims.

(Section 4(a) Section 10(1) provides that the MVA Fund be utilised for the purpose of compensating an injured person (referred to as 'the third party') for loss and damage suffered by such person which arises from the driving of a motor vehicle. Section 12(1)a provides that the MVA fund shall not compensate any third party for any loss and damage for which neither the owner of the motor vehicle concerned would have been liable if Section 13 had not been enacted. The latter section precludes the third party from claiming loss or damage from either the owner or driver of the motor vehicle.

16. The above section highlights the important feature of the legislation namely, that the MVA Fund is a surrogate litigant. It stands in the place of a normal common law defendant in a delictual case.
  
17. Section 16 under the heading of "Procedure", deals with the manner in which claims for compensation are to be submitted. Subsection (2) and (3) are of importance, they read as follows:

*“(2) No such claim shall be enforceable by legal proceedings commenced by a summons served on the MVA Fund-*

*(a) Before the expiration of a period of 90 days as from the date on which the claim was sent by registered post or delivered by hand to the MVA Fund.*

*(b) Before all the prescribed requirements of the MVA Fund have been complied with.*

*Provided that if the MVA Fund repudiates in writing liability for the claim before the expiration of the ninety days, the claimant may at any time after such repudiation serve summons on the MVA Fund.*

*“(3) An action to enforce such a claim may be brought in any court of competent jurisdiction in Swaziland within whose area of jurisdiction the occurrence which caused the injury or death took place.”*

18. This brief review of some of the salient features of the Act indicates that the legislature acting in the public interest created a statutory body to compensate those members of the public who suffer bodily injury in motor accidents. Dependents of those who are fatally injured in motor accidents also qualify to receive compensation.
19. The legislative scheme demonstrates that there are two distinct phases in a claimant's pursuit of compensation. Firstly there is the delivery of the claim form to the MVA Fund and secondly litigation, which follows in the event of the Fund repudiating the claim. As a surrogate defendant by definition, the Fund has no knowledge of any of the circumstances surrounding the claim. The first phase is therefore designed to provide the Fund with information necessary to investigate the said circumstances and to consider the claim.
20. In the instant case the applicant duly submitted his claim form. The Fund initially, and with justification, did not accept the claim.

The Applicant's attorneys thereafter embarked on a course designed to amend the contents of the original police report – such to reflect a version of the accident consistent with the Applicant's version thereof. Notwithstanding this the Fund in July 2008 still expressed scepticism in regard to the basis of the claim.

21. It seems to me that the Applicant's attorneys having obtained an amended police report were lulled into a belief that the Applicant's claim, and in particular the circumstances surrounding the accident, were indisputable. They thus embarked on a course to fast-track the applicant's case by proceeding on urgent motion in order to achieve a speedy resolution thereof. The relief sought embraced both a declaratory order and a mandatory interdict. The declaratory relief was aimed at achieving *res judicata* on a truncated issue- one which would normally feature in an ordinary action. The interdict relief was designed to compel the 1<sup>st</sup> Respondent to settle the Applicant's claim.

22. In my view the 1<sup>st</sup> Respondent correctly contends that this procedure was fatally flawed.
  
23. The Applicant's decision to proceed by way of motion is wholly inimical to the clear provisions of the Act. As pointed out above the Act envisages in Section 16(2) that a claim is enforceable **“by legal proceedings commenced by a summons served on the MVA Fund”**. (my emphasis). In the proviso again, the words, “serve summons on the MVA Fund appear. In subsection 16(3)-**“An action to enforce such claim.....”** appears.
  
24. It seems to me to be fairly self-evident that the legislature intended that these legal proceedings be by way of action commenced by the issue of summons. Given the full context of the legislation and particularly the fact that the MVA Fund interposes itself as a surrogate litigant, it was intended that the Fund would be entitled to test any claimant's case by way of cross-examination in an action. The present case serves as a good example of such a need.

The legislature certainly did not envisage that a claimant could in a quasi-administrative context compel the Fund by way of a mandatory interdict to make a decision. Lest it be thought that the legislature may have used the words “action” and “summons” loosely, and that in the context an “application” was included, reference is made to Section 15(3) of the Act where specifically, in a case where a claimant seeks an extension of time to prosecute a claim that has prescribed, **application** procedure is envisaged. Clearly the lawgiver was fully conscious of the distinction between the two procedures.

25. In any event, it seems to me in a case of this nature, involving as it does, an illiquid claim for damages, the traditional approach has always been to proceed by way of action. These cases envisage proof in a trial environment with pleadings and of course, oral evidence properly tested by cross-examination.
26. I agree with counsel for the 1<sup>st</sup> Respondent’s submission that the order made by the court a quo rides rough shod over the above prescribed procedures and it has accorded the Applicant with a

novel remedy not contemplated by the legislature. Counsel poses the pertinent rhetorical question as to what would happen in the event of the claim not being finalised within 30 days due to a failure by the parties to agree the quantum of damages. Would the MVA Fund be in contempt of court?

27. It follows in the premises that the appeal ought to be allowed and the order of the court a quo set aside. Before this court's order is issued, I mention that counsel for the Applicant took the point that the record of the proceedings in the court a quo had not been filed timeously. He also was critical of the fact that page 1 of the judgment had not been included. (This simply contained the formal headings and the judgment commenced on page 2). This is a "*de minimus non curat lex*" situation. The record had in fact been filed timeously. However it omitted the replying affidavit which had been handed in at a late stage. When the first Respondent noticed the omission it took steps to timeously rectify the situation and procure the Registrar's certification of the record. Again, the point taken by counsel is without any substance.

28. The following order is issued:
1. The appeal is allowed with costs, such costs to include senior counsel's certified costs.
  2. The order of the court a quo is set aside and there is substituted therefor the following order:  
"The application is dismissed with costs."

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P. LEVINSOHN  
JUSTICE OF APPEAL

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M.M.RAMODIBEDI  
CHIEF JUSTICE

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DR B.J. ODOKI  
JUSTICE OF APPEAL

For the Appellant

M. Maurice Pillemer SC

For the Respondent

Mr S.K. Dlamini



