VONNISSE

CLAIMS FOR EMOTIONAL SHOCK ARISING OUT OF THE DEATH OF A PASSENGER WHO IS SUBJECT TO SECTION 18(1) OF THE ROAD ACCIDENT FUND ACT 56 OF 1996

***Swartbooi v Road Accident Fund* 2013 1 SA 30 (WCHC)**

1 Introduction

The decision of *Swartbooi v Road Accident Fund* dealt with a claim by a secondary victim (that is, a person who was not directly involved in the motor vehicle accident) for emotional shock. The legal question was whether a secondary victim's claim for emotional shock should be limited by the application of section 18(1) of the Road Accident Fund Act 56 of 1996 (hereafter referred to as the "Act prior to the amendments") or not (31H). Section 17 of the Act prior to the amendments provides for liability of the Road Accident Fund (hereafter referred to as the "RAF"), subject to the Act, to compensate any person "for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from" the unlawful and negligent driving of a motor vehicle within the Republic of South Africa. The two most important provisions to which liability of the RAF is made subservient are section 18(1) (dealing with limitation of liability, see the wording in para 3.3.2(a) below) and section 19(a) (dealing with exclusion of liability – which will not be our focus in this discussion).

In order to fully understand the impact of this decision it is necessary to start this discussion by briefly defining emotional shock and stating its requirements, especially in light of other case law on emotional shock since the landmark decision of *Bester v Commercial Union Versekeringsmaatskappy* 1973 1 SA 769 (A). This is followed by a discussion of the facts and findings of the decision in *Swartbooi*. In the discussion the purpose and interpretation of section 18(1), and in particular how this impacts on claims by secondary victims of emotional shock, are analysed in detail. The application of the requirements for emotional shock by the court *in casu* are investigated by specifically referring to the requirement of reasonable foreseeability. Lastly, the constitutionality of the future of these types of claims against the RAF are commented on in the conclusion.

2 Emotional shock

2 1 Definition

Emotional shock, also identified as "psychological lesion" or "psychiatric injury", has been described as a "sudden, painful emotion or fright resulting from the realisation or perception of an unwelcome or disturbing event which involves an unpleasant mental condition such as fear, anxiety or grief" (Potgieter "Emotional shock" 9 *LAWSA* (2005) para 2; see also Klopper *Third party compensation*

(2012) 96 100–101; *Bester* 779H; *Masiba v Constantia Insurance Co* 1982 4 SA 333 (C) 342B–D; *Barnard v Santam Bpk* 1999 1 SA 202 (SCA) 208–209; *Road Accident Fund v Sauls* 2002 2 SA 55 (SCA) 61I–J; *Swartbooi* 34I; *Mokone v Sahara Computers (Pty) Ltd* 2010 31 *ILJ* 2827 (GNP) 2835; Burchell "An encouraging prognosis for claims for damages for negligently inflicted psychological harm" 1999 *SALJ* 697–698 703; Potgieter, Steynberg and Floyd *Visser and Potgieter's Law of damages* (2012) 110 508–509; Neethling and Potgieter *Delict* (2010) 285; Neethling "Deliktuele aanspreeklikheid weens die veroorsaking van psigiese letsels" 2000 *TSAR* 1). For purposes of this discussion the unwelcome or disturbing event causing the emotional shock or psychological lesion would be a motor vehicle accident leading to serious injuries and death.

It is trite law since the decision of *Bester* (779A–C 782B–C) that "bodily injury" encompasses psychological injuries caused by emotional shock (*Swartbooi* 33A–B; Neethling and Potgieter 286; Klopper 96 as well as the cases referred to in fn 512; Burchell 1999 *SALJ* 698; Neethling 2000 *TSAR* 2–4). Consequently a claim for emotional shock arising from bodily injury (in the sense of injury to the nervous and brain system – *Bester* 779B) would form part of a possible claim against the RAF in terms of section 17. Such a claim against the RAF based on emotional shock would be included under the commonly known category of general damages.

2 2 Requirements

Generally the courts have awarded compensation for emotional shock sustained in instances where (a) the shock caused serious emotional or psychological conditions (wrongfulness); (b) the shock was reasonably foreseeable (legal causation); and (c) the reasonable person in the position of the wrongdoer could foresee the detrimental consequences of the emotional shock (negligence) (see Neethling and Potgieter 286–289).

In *Bester*, a decision of the then Appellate Division, it was held that physical injury or personal danger was no longer a requirement to succeed with a claim based on emotional shock (777H 779C). This opened the door to plaintiffs such as the mothers in *Masiba* and *Swartbooi* to institute a claim based on the suffering of emotional shock even though they were not in close proximity to the scene of the motor vehicle accident. In both of the above-mentioned cases, the mothers heard of the death of their sons telephonically. In order to limit liability in such instances where the secondary victim was not in personal danger or in close proximity to the scene of the accident, the court in *Bester* (779H) required that the psychiatric injury should have been foreseen by the reasonable person who should find himself in the place of the wrongdoer and the emotional shock should be significant and have a substantial effect on the health of the plaintiff.

These requirements have been applied in all cases on emotional shock since *Bester* and it is now regarded as trite law (*Masiba v Constantia Insurance Co* 1982 4 SA 333 (C) 342B 343C–F; *Clinton-Parker* 54D–F 59F–G 69A–D; *Majiet v Santam Ltd* [1997] 4 All SA 555 (C) 568G–J; *Sauls* 60C–61A; *Swartbooi* 34G–H; Klopper 96 101). Burchell 1999 *SALJ* 699, however, feels that the aim to limit liability in these cases by requiring that the psychological harm should have been substantial, could also have been achieved by merely applying the defence of *de minimis non curat lex* (see also Neethling and Potgieter 287), as well as the judicious use of the limits implicit in the general criterion of

unlawfulness and legal causation. It is usually the requirement of reasonable foreseeability, whether applied as part of negligence or legal causation, that will receive the most attention in case law on these matters (see para 3.3.3 below).

3 Swartbooi v RAF

3 1 Facts

The plaintiff's son (hereafter the "deceased") was involved in a single motor vehicle accident on 24 September 2006. This date is important (prior to 1 August 2008) because it means that the RAF Act prior to the amendments is applicable to all claims arising from this accident. He was a passenger for reward in a taxi which sustained a burst tyre. As a result of the burst tyre, the driver of the taxi lost control of the vehicle and it veered off the road and capsized. The deceased sustained fatal injuries which led to his death. The plaintiff was informed telephonically about her son's accident and death and this caused her to suffer from emotional shock. The plaintiff subsequently sued the RAF for compensation as a result of the emotional shock she suffered (31C–H). The RAF acknowledged that the plaintiff had a claim and the dispute between the parties lay only in whether or not the plaintiff's claim would be limited in terms of section 18(1) of the Act prior to the amendments (31H–J).

3 2 Findings

The plaintiff's legal representative argued that the plaintiff's claim should not be limited in terms of section 18(1) and further that her claim was based on section 17 (see 31I). The plaintiff's legal representative agreed that section 18(1) relates to the assessment of liability of the RAF "on whether to compensate third parties for losses resulting from . . . the death of a person who was conveyed in an insured motor vehicle" but submitted that it was not applicable *in casu* (32I). Mantame AJ found in favour of the plaintiff's submissions that the plaintiff did indeed sustain emotional shock and reasoned that she was not a dependant of the deceased nor was she herself a passenger. Therefore her claim against the RAF was not subject to any limitation (in terms of s 18(1)) and the liability of the RAF was based only on section 17 of the Act prior to the amendments (35F–36A).

3 3 Discussion

3 3 1 Liability of the RAF in instances where a vehicle sustains a burst tyre

In the reported case, it is not mentioned how the negligence of the taxi driver was determined. It is trite law that in order for the RAF to be held liable, the wrongdoer driver must be delictually liable, and negligence on the part of the driver is therefore required (in terms of s 17 of the Act). All that is mentioned in the reported case is that the taxi was driven at approximately 120km/h when the tyre burst (31F) and that the RAF acknowledged that the plaintiff had a claim. The dispute between the parties lay only in whether or not the plaintiff's claim would be limited in terms of section 18(1) of the Act prior to the amendments (31H–J).

As a point of interest it can be mentioned that in instances where a vehicle sustains a burst tyre, a driver could (depending on the circumstances) rely on the doctrine of "sudden emergency" which excludes negligence and in turn liability of the RAF. The requirements for sudden emergency are (a) a situation of imminent peril or danger; (b) the wrongdoer must not have caused the perilous situation by his own negligence or imprudence; and (c) the wrongdoer must not

have acted in a grossly unreasonable manner (Neethling and Potgieter 149–150; Klopper 88–90; Klopper *The law of collisions in South Africa* (2003) 108–112; see also *Rautenbach v De Bruin* 1971 1 SA 603 (A) where the brakes of the vehicle had failed and *Rex v Moolman* 1935 EDL 443 where a defective steering mechanism excluded negligence; but see *Arthur v Bezuidenhout and Mieny* 1962 2 SA 566 (A) where a broken steering shaft resulted in a finding of negligence and *South British Insurance Co Ltd v Mkhize* 1965 1 SA 206 (A) where a burst tyre resulted in a finding of negligence). If indeed the driver in *Swartbooi* was faced with a "sudden emergency" as a result of the burst tyre (and with no fault on his part), it may be argued that the court on the face of it held the RAF liable on a no-fault basis. This would then clearly have been a wrong decision. However, from the given facts in the reported case such an assumption cannot be made and we therefore proceed from the premise that the negligence on the part of the driver in *Swartbooi* was established and acknowledged by both parties.

3 3 2 Section 18(1) of the Act prior to the amendments

(a) Purpose

Section 18(1) states that

> "[t]he *liability* of . . . [the *RAF*] *to compensate a third party for any loss or damage contemplated in section 17* which is the *result of* any bodily injury to or *the death of any person who*, at the time of the occurrence . . . *was being conveyed in* or on the *motor vehicle* concerned, *shall*, in connection with any one occurrence, *be limited* . . .
>
> (a) *to* the sum of *R25 000 in respect of* any bodily injury or *death of any one such* person who at the time of the occurrence which caused that injury or death was being conveyed in or on the motor vehicle concerned –
>
> (i) for reward" (our italics).

Section 18(1) of the Act prior to the amendments applies to certain classes of passengers conveyed in a motor vehicle where either their driver was solely negligent or the passenger was involved in a single motor vehicle accident (Klopper 214). It was clearly the intention of the legislature to limit the liability of the RAF in respect of claims relating to the injury or death of certain classes of passengers (see *Santam Insurance Ltd v Taylor* 1985 1 SA 514 (A)). This is also evident from the fact that the predecessors to the Act prior to the amendments had similar provisions *in pari materia* to that of section 18(1) of the Act prior to the amendments. The provisions *in pari materia* differ *inter alia* in respect of the classes of passengers, the type of damages recoverable and the amount recoverable (eg a single claim relating to a passenger conveyed for reward involved in a single motor vehicle accident was limited to R8 000 in terms of s 11(1)(ii) of the Motor Vehicle Insurance Act of 1942 and R12 000 in terms of s 22(1) of the Compulsory Motor Vehicle Insurance Act 56 of 1972).

(b) Interpretation

It is apparent from the wording of section 18(1) prior to the amendments, that what is limited is the RAF's liability (to a maximum of R25 000) to compensate a third party (see *Constantia Insurance Co Ltd v Hearne* 1986 3 SA 60 (A) 67). Therefore the balance of the claim could still be recovered from the wrongdoer in terms of common law (see *Rose's Car Hire (Pty) Ltd v Grant* 1948 2 SA 466 (A); *Da Silva v Coutinho* 1971 3 SA 123 (A); Klopper 215).

A passenger (subject to s 18(1)) who was personally injured in a motor vehicle accident may be entitled to claim up to a maximum of R25 000 from the RAF (see *Du Plessis v Road Accident Fund* 2001 4 SA 1140 (N) where the court held that the passenger who was injured was entitled to claim up to R 25 000 from the RAF and so was the father of the passenger, who was also considered a third party, and entitled to claim up to R25 000 from the RAF). In cases where the third party suffers loss as a result of injury to a passenger (subject to s 18(1)), such third party may also be entitled to claim up to a maximum of R25 000 from the RAF (see *Du Plessis* and *Taylor*). In *Taylor* the court held that the father and natural guardian of a minor who was a passenger subject to section 22(1) of the Compulsory Motor Vehicle Insurance Act 56 of 1972 (*in pari materia* to s 18(1) of the Act prior to the amendments) was entitled to claim a limited amount of R12 000.

In instances where a passenger subject to section 18(1) dies, a third party may also be entitled to claim a maximum of R25 000 from the RAF (see the following cases which dealt with limitation provisions *in pari materia* to s 18(1) prior to the amendments: *Jensen v Williams Hunt and Clymer Ltd* 1959 4 SA 583 (O); *Du Plooy v SA Onderlinge Brand en Algemene Versekeringsmaatskappy* 1975 1 SA 791 (O); and *Hearne*).

(c) Application of section 18(1) by the court

According to the facts, the plaintiff was notified of her son's death telephonically. She was not as referred to by the plaintiff's representative "an innocent bystander who suffered from emotional shock" (33A). The plaintiff's legal representative predominantly relied on *Barnard* where the mother was informed of her son's involvement in an accident and death resulting in her suffering emotional shock (33D). The mother in that case was indeed successful in her claim for compensation for emotional shock. The defendant's legal representative, however, correctly argued that *Barnard* and *Sauls* did not deal with the applicability of section 18(1) of the Act prior to the amendments (see 34A) or any provision *in pari materia* in terms of any preceding legislation which may have been applicable at the time. In *Sauls* the plaintiff was a pedestrian and in *Barnard* the claimant's son was not a passenger involved in a single motor vehicle accident, nor was his driver solely negligent. The defendant's legal representative therefore correctly reasoned that the plaintiff's claim was subject to section 18(1)(a). He further correctly submitted that *in casu*, or in a dependency claim, or where a parent or guardian has incurred expenses resulting in the death of a dependent minor (who was a passenger as contemplated in s 18(1)), all of these claims should be limited to R25 000 (33E–F, see *Du Plessis*; *Taylor*; *Jensen*; *Du Plooy*; and *Hearne* referred to in para 3 3 2*(b)* above).

Mantame AJ stated that the two sections are "independent and capable of being interpreted separately . . . [and] even if one were to employ the ordinary grammatical meaning of the two sections, each one of them is independent of the other" (34C–D 35C). As mentioned, section 17 provides for liability of the RAF (subject to the Act) and section 18 is one of the provisions to which liability of the RAF is made subservient. Section 18 limits the claims of certain passengers and the deceased fell within one of the passengers listed in section 18(1), namely, a passenger for reward. If one looks at the wording of section 18, both sections 17 and 18 are mentioned in one breath. Section 18 at the outset clearly

states that the liability of the RAF in compensating a third party "for any loss or damage contemplated in section 17 which is the result of . . . the death of any person" who at the time of the accident was being conveyed, would be subject to a limited claim of R25 000. Mantame AJ stated that, in his view, section 18(1) was set to operate in a situation where the claim is for *compensation of third parties for losses resulting from* bodily injuries or *the death of a person* who was conveyed" (our emphasis) as a passenger and that the plaintiff is not a third party subject to section 18 but a person who suffered emotional shock as a result of the negligent driving of a motor vehicle (34E–F). He clearly disassociated the two sections, misinterpreted the provisions and came to an incorrect conclusion (see para 3 3 2(b) above).

Mantame AJ further stated that by enacting section 18 "the legislature could not, and did not, intend to limit the claim and thereby alter the common-law position" (35E–F). This statement is incorrect on two grounds. Firstly, there were historic reasons for limiting the claims of certain passengers (see Suzman *et al Compulsory motor vehicle insurance in South Africa* (1982) 190ff). Secondly, the plaintiff's common law position is not altered; it is only her claim against the RAF that is limited. In *Mvumvu v Minister of Transport* 2011 2 SA 473 (CC), section 18(1) of the Act prior to the amendments was eventually found unfair by the Constitutional Court. *Swartbooi*, however, was decided before the decision of *Mvumvu*, as well as the enactment of The Road Accident Fund (Transitional Provisions) Act 15 of 2012 (hereafter referred to as the "Transitional Act") and the applicability of the Road Accident Fund Amendment Act 19 of 2005 (hereafter referred to as the "RAF Amendment Act") which removed the R25 000 limitation. Even though the RAF Amendment Act removed the limitation in regard to certain passenger claims, it put other limitations in place and specifically excluded the liability of the RAF in cases where secondary victims suffer emotional shock.

3 3 3 Application or non-application of requirements for emotional shock

As was pointed out in para 2 2 above, the courts are clear on the requirements set for succeeding with a claim based on emotional shock. It is in particular required that the emotional shock suffered by the plaintiff should be of a serious nature and must have been reasonably foreseeable by the wrongdoer. In *Swartbooi* the court referred (35J–36A) to the medico-legal report compiled by the psychiatrist to come to the decision that the consequences of the emotional shock was of such a serious nature that the loss suffered could be recovered. In principle we cannot fault this part of the court's conclusion. On the other hand, the other important requirement of reasonable foreseeability of the harm suffered was in our opinion not investigated in sufficient detail by the court. Furthermore, we are of the opinion that the court incorrectly linked the question of legal causation with whether section 18(1) should apply to the test of reasonable foreseeability.

Mantame AJ mentioned (34I–35B) the role of the relationship between the primary and secondary victims of the accident and that it will not be the prime consideration when deciding whether the emotional shock suffered by the secondary victim should have been reasonably foreseeable by the wrongdoer. Surprisingly, he then linked this to the question of whether the claim in this case should be limited. Mantame AJ stated that "[i]n determining *such limitations* [our emphasis] the court will take such relationship into consideration, but it

remains a question of legal policy, reasonableness, fairness and justice, in which reasonable foreseeability should also be a guide" (34I). He then listed a few cases in which different types of relationships were relevant, but never applied the principles from those cases to the case at hand. In the very next paragraph he discussed the relatedness of section 18(1) and section 17(1) and came to the conclusion that "the legislature could not, and did not, intend to limit the claim and thereby alter the common-law position" (35F). In the next sentence he stated that according to the law of delict, loss is recoverable if it was reasonably foreseeable. From these quoted statements the conclusion can be drawn that Mantame AJ decided not to limit the plaintiff's claim in terms of section 18(1) because the loss suffered by her was severe in nature and should have been reasonably foreseeable by the wrongdoer. This conclusion can furthermore be justified by the following statement made by him (36C–D): "In my opinion, given the plaintiff's personal circumstances and what she has gone through, it would be *unreasonable* to cap the damages. The imposition of a cap would be demonstrably *unnecessary, unjustifiable and unreasonable* in the circumstances" (our emphasis).

The legal question of whether her claim against the RAF should have been limited depended on the interpretation of section 18(1) of the RAF Act, not reasonableness or other criteria related to legal causation. Mantame AJ confused the questions in respect of determining liability and the effect of section 18(1). The value judgement on whether it is reasonable, fair and just to hold a defendant liable forms part of the flexible approach to determine legal causation (see *S v Mokgheti* 1990 1 SA 32 (A) and *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A)) and therefore relates to liability.

4 Conclusion

As mentioned, *Swartbooi* was decided before the application of the RAF Amendment Act, as the accident *in casu* occurred before 1 August 2008. If the provisions of the RAF Amendment Act were applicable, the plaintiff's claim against the RAF would have been specifically excluded (see s 19(g)). The plaintiff would, however, have been entitled to claim her damages for emotional shock from the wrongdoer in terms of common law.

Klopper 134 correctly predicts that it is doubtful whether the exclusion of claims of secondary victims of emotional shock (s 19(g)) will remain constitutional mainly because it "arbitrarily discriminates between victims who sustain psychological deficits arising from their injuries and other persons who suffer the same injury albeit that the mechanism of the injury may differ". Ironically this is exactly the opposite to the outcome of the decision in *Swartbooi*, in which the court actually favoured secondary victims of emotional shock to primary victims of physical injury by allowing the former to have an unlimited claim.

Furthermore, the Road Accident Benefit Scheme Bill of 2013 was published in *Government Gazette* 30138 of 8 February 2013. This Bill, if implemented, will totally exclude claims for general damages and claims for emotional shock suffered by victims will no longer be actionable in third party matters. If history determines the future, the Law Society of South Africa or another concerned organisation will most probably challenge the constitutionality of some of the provisions of the Road Accident Benefit Scheme and the uncertainty regarding the position of road accident victims will start all over again. Even if this does

not happen, the controversy over the application of the requirements for emotional shock as a head of damage will continue in other types of damage-causing events, such as wrongful arrest or medical malpractice.

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ONTEIENING VAN ONBENUTTE OU-ORDE REGTE: HET IETS NIETS GEWORD?

***Agri South Africa v Minister of Minerals and Energy* 2013 4 SA 1 (KH)**

1 Inleiding

By die inwerkingtrede van die Wet op die Ontwikkeling van Mineraal- en Petroleumhulpbronne, 28 van 2002 (hierna "MPRDA" na aanleiding van die Engelse titel van die wet naamlik, die "Mineral and Petroleum Resources Development Act") het sogenaamde onbenutte ou-orde regte ("unused old order rights") vir 'n tydperk van 'n jaar bly voortbestaan (item 8(1) van die oorgangsmaatreëls in Bylae II tot die MPRDA (hierna "oorgangsmaatreëls")). Onbenutte ou-orde regte was hoofsaaklik mineraalregte, prospekteerregte en mynregte ten aansien van grond waarop geen prospektering of mynbou onmiddellik voor die inwerkingrede van die MPRDA plaasgevind het nie (vgl die definisie van "unused old order right" in item 1 van die oorgangsmaatreëls). Die houers van sodanige regte was uitsluitlik geregtig om binne 'n tydperk van 'n jaar vir prospekteer- of mynregte ingevolgde die MPRDA aansoek te doen (item 8(2)). By die versuim om aldus aansoek te doen, is die onbenutte ou-orde regte beëindig (item 8(4)). Die oorgangsmaatreëls maak vir die betaling van vergoedingsgeld deur die staat voorsiening, indien 'n persoon kan bewys dat sy eiendom kragtens die bepalings van die MPRDA onteien is (item 12(1)). Dit is aanvaar dat houers van onbenutte ou-orde regte wat nie vir nuwe regte aansoek gedoen het nie, onteien is en derhalwe op vergoeding geregtig is (Badenhorst, Mostert en Dendy "Mining and Minerals" 18 *LAWSA* (2007) par 68; sien ook Badenhorst en Mostert "Revisiting the transitional arrangements of the Mineral and Petroleum Resources Development Act 28 of 2002 and the Constitutional property clause: An analysis in two parts " 2004 *Stell LR* 22 44–45).

Die feite in hierdie dispuut was kortliks soos volg: Voor die inwerkingtrede van die MPRDA was Sebenza Mining (Pty) Ltd (hierna "Sebenza") die geregistreerde houer van steenkoolregte ten aansien van twee eiendomme wat in Mpumalanga geleë is. Tydens die oorgangstydperk het die maatskappy nie, soos geregtig, vir prospekteer- of mynregte ten aansien van steenkool aansoek gedoen nie. Die maatskappy, wat op daardie stadium in likwidasie verkeer het, kon nie vir nuwe regte aansoek doen nie omrede nuut verkreë regte ingevolge artikel 56(d) van die MPRDA outomaties vanweë likwidasie beëindig sou word. 'n Vergoedingseis is, derhalwe, kragtens item 12(1) van die oorgangsmaatreëls ingedien waarin aangevoer is dat die maatskappy se steenkoolregte deur die MPRDA onteien is. Die eis is deur die Departement van Mineralehulpbronne