HIGH COURT
(BISHO)

CASE No. 65/2001

In the matter between:

JONGISILE FONJANA Plaintiff

and

MULTILATERAL MOTOR VEHICLE ACCIDENT FUND First Defendant

ROAD ACCIDENT FUND Second Defendant

JUDGMENT

EBRAHIM J:

Introduction

1. On 2 September 1996 at approximately 22h00 and on the Stuttterheim - King William's Town road, in the district of Zwelitsha, a motor vehicle bearing the registration FRC 573 T, driven by one P F Mopanga, was involved in an accident when it left the road and overturned. The plaintiff was a passenger in the motor vehicle at the time of the accident and sustained various injuries. In consequence thereof the plaintiff suffered damages and instituted action against the first defendant, alternatively the second defendant, for compensation in the sum of R780 841,00.

2. As the defendants have conceded liability the only issue is that of quantum. In this regard the parties have requested that a specific issue only be decided at this stage and that the remaining issues relating to quantum stand over for determination at a later stage.

3. The parties have, by agreement, moved that the Court decide the following issue at this stage:

> 'Whether the plaintiff is exempted from the limitations imposed on a passenger by Article 46 of the Agreement referred to in Section 1 of Act No. 93 of 1989. In this regard the parties have agreed that the plaintiff was at all material times a member of the South African National Defence Force.'

4. Counsel for the plaintiff, Mr Notshe, informed the Court that he would not tender any evidence in relation to this issue. He would, however, address argument to the Court regarding the interpretation that should be placed on the relevant provisions contained in Article 46 of the Agreement. Counsel for the defendants, Mr Bloem, while somewhat surprised by this turn of events, similarly conveyed that he would confine himself to addressing argument to the Court.

The legislative historical background

5. In the Compulsory Motor Vehicle Insurance Act 56 of 1972 ('the CMVI Act of 1972') the exception is set out in s 22(1) in the following terms:

> 'The liability of an authorised insurer shall be limited, except where the person concerned was conveyed in or was in the act of entering or mounting or alighting from the motor vehicle in question while proceeding on authorized leave or returning to his base from such leave during any period in which he rendered military service or underwent military training in terms of the Defence Act, 1957 (Act 44 of 1957), or while dressed in a uniform of the South African Defence Force

during such period, or under circumstances where the owner or driver of the motor vehicle believed upon reasonable grounds that he was a person rendering such service or undergoing such training and dressed in such a uniform.....'

6. The CMVI Act of 1972 was, however, repealed and replaced by the Motor Vehicle Accident Act 84 of 1986 ('the MVA Act of 1986') and the exception amended. The requirement that the person had to be on authorised leave at the time was no longer applicable but it was still necessary that he be dressed in a Defence Force uniform . The relevant portion of s 9(1) of the MVA Act of 1986 reads:

'9(1) The liability of the MVA Fund ....., shall be limited except where the person concerned was conveyed in or on the motor vehicle concerned during a period in which he rendered military service or underwent military training in terms of the Defence Act, 1957 (Act 44 of 1957), and while dressed in a uniform of the South African Defence Force.....'

7. The MVA Act of 1986 was, in turn, replaced by the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 ('the MMVA Fund Act of 1989'). Once more the exception was amended resulting in the requirement that the person be dressed in a Defence Force uniform being dispensed with.

8. Section 2 of the MMVA Fund Act of 1989 gives recognition to an Agreement establishing a Multilateral Motor Vehicle Accidents Fund and ascribes to it the force of law. Article 46 of the Agreement stipulates:

'The liability of the MMF or its appointed agent, as the case may be, to compensate a third party for any loss or damage contemplated in Chapter XII which is the result of any bodily injury to or the death of any person who, at the time of the occurrence which caused that injury or death, was being conveyed in or on the motor vehicle concerned, shall, in connection with any one occurrence be limited exclusive of the cost of recovering the said compensation, except where the person concerned was conveyed in or on a motor vehicle other than a motor vehicle owned by the

Defence Force having jurisdiction in the same area of jurisdiction of a Member during a period in which he rendered military service or underwent military training in terms of defence legislation applicable within the area of jurisdiction of a Member, but subject to the provisions of Article 47 -

(f) 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 cause that injury or death was being conveyed in the motor vehicle in question.....'

(Underlining added)

The submissions by counsel regarding the exception in Article 46 of the Agreement

9. Mr Notshe chronicled the amendments preceding the exception framed in Article 46. The position prior to the amendment of Article 46 in 1991 was that in order for the exception to come into effect the person had to be rendering military service or undergoing military training and be proceeding on, or returning to his base from, authorised leave and be dressed in a uniform of the Defence Force. The amendment dispensed with the requirements relating to authorised leave and the wearing of a uniform.

10. Mr Notshe submitted that a person commenced rendering military service as soon as he became a member of the South African National Defence Force ('SANDF'). It was the person's membership of the Defence Force that was the pertinent factor and not whether he was involved in any other specified conduct in addition to such membership. Even when members were on leave they were still rendering military service. It was not necessary that the person be on active service. It was the intention of the legislature to protect persons who were rendering military service.

11. In regard to military training Mr Notshe submitted that this was not confined

solely to members of the Defence Force. It was his contention that even non-members could undergo such training and hence the legislature has drawn a distinction between a person rendering military service and one undergoing military training.

12. Mr Bloem, on the other hand, submitted that the onus is on the plaintiff to prove that the exception applies in his case. Although the defendants did not dispute that the plaintiff was a member of the SANDF, they denied that the plaintiff was rendering military service at the time that the accident occurred. The plaintiff has to prove what is meant by military service and, furthermore, that he was rendering military service at the time. If the legislature had intended that the exception should apply merely because of a person's membership of the defence force it would have said so. Instead, the legislature has used involved language to indicate that the exception applies to a person 'during a period in which he rendered military service or underwent military training in terms of defence legislation'.

13. Mr Bloem contended that the plaintiff has failed to present evidence which would enable the Court to determine what the phrase 'rendered military service' meant. The plaintiff has also not presented evidence that at the time of the accident he was rendering such service. On the contrary, the plaintiff has admitted in his particulars for trial that he was not on duty over the weekend when the accident occurred and was only due to report for duty on the following Monday. Accordingly, the plaintiff was not rendering military

service at the time of the occurrence.

14. Mr Bloem submitted further that while the Defence Act was relevant in interpreting the provisions of Article 46 cognisance had to be taken of the Constitution of South Africa. In this regard, the right to equality (Section 9 of the Constitution of South Africa Act 108 of 1996) was of particular significance. He submitted that the exception infringed the right to equality as it unfairly discriminated against a co-passenger who was not rendering military service or undergoing military training since such a passenger's claim for compensation against the second defendant would be limited to R25 000,00. Section 9 of the Constitution required that all passengers be treated equally.

15. Finally he submitted that the plaintiff has not discharged the onus which rests on him. There is no basis, therefore, for the Court to hold that the exception is applicable to the plaintiff in this instance.

Is the exception applicable in respect of the plaintiff?

16. At the date of the accident, namely 1 September 1996, the operative Act was the MMVA Fund Act of 1989. The military service referred to in both the CMVI Act of 1972 and the MVA Act of 1986 would have been rendered in terms of Defence Act 44 of 1957 ('the Defence Act'). In the MMVA Fund Act of 1989, however, this provision was amended to take account of defence legislation which was in force in the then TBVC states, namely, Transkei,

Bophuthatswana, Venda and Ciskei. Since their re-incorporation into South Africa on 27 April 1994 the only applicable legislation is once more Defence Act 44 of 1957.

17. The plaintiff elected not to adduce any evidence. Instead the plaintiff was content to rely on the fact, which the defendants admit, that at the time of the occurrence he was a member of the SANDF. The plaintiff avers, however, that he was not on duty at the time and was to report for duty only on the following Monday at 07h30. He states, in addition, that he did not obtain permission to leave the base where he was stationed as he only required such permission during working hours and when he was on duty. Even though it is common cause that he was a member of the SANDF it is unclear what the consequences were of his being off duty at the time and, moreover, absent from the base without permission.

18. The nub of the decision in this case is the interpretation that the Court will place on the phrase 'rendered military service' where it is used in Article 46. It is evident that the plaintiff's case stands or falls on such interpretation.

19. During the course of presenting argument both Mr Notshe and Mr Bloem referred to the case of *Bray v Protea Assurance Co Ltd* 1990 (1) SA 776 (T), although in support of different submissions. Mr Notshe submitted that it was accepted in the Bray case that a member of the South African Defence Force was rendering military service. In my reading of the judgment, however, I do

not find support for this contention. The two issues which that Court addressed were, firstly, whether or not the plaintiff was on authorised leave at the time of the occurrence and, secondly, whether a military track suit could be regarded as being a uniform of the Defence Force. Regrettably the *ratio* in the Bray case is not of assistance in the present case.

20. Mr Bloem, on the other hand, relied on the Bray case in support of his submission that the plaintiff bore the onus of establishing that the exception applied. I return to this issue in due course.

21. Neither the MMVA Fund Act of 1989, nor the preceding legislation, nor even the Defence Act, provides a definition of either military service or military training. Mr Notshe or Mr Bloem were not able to refer the Court to any authorities which could assist in ascertaining the meaning to be ascribed to either of these phrases. What is evident, nevertheless, is that the MMVA Fund Act of 1989 specifies that the military service be rendered, or the military training be undergone, in terms of the Defence Act. In my view, therefore, in seeking an answer to the interpretation to be placed on the relevant provisions, regard must be had to what constitutes military service and, if necessary military training, in the context in which these phrases are employed in the Defence Act.

22. Despite the absence of a definition in the Defence Act the phrase 'military service' is used in a particular context in the Defence Act. This is to be found

in the definition which is provided for another phrase, namely 'service in defence of the Republic'. The definition for this latter phrase appears together with the definition for 'operations in defence of the Republic'. These definitions are the following:

'Service in the defence of the Republic' means military service and 'operations in defence of the Republic' means military operations -

(a) in time of war; or

(b) in connection with the discharge of the obligations of the Republic arising from any agreement between the Republic and any other state; or

(c) for the prevention or suspension of any armed conflict outside the republic which, in the opinion of the State President, is or may be a threat to the security of the Republic.'

23. Aside from the reference to military service in the aforesaid definition I have not found any indication that the phrase appears in any other context in the Defence Act. The definition provided in the Defence Act for the phrase 'service in the defence of the Republic' points to military service being service of a limited duration which is rendered in extraordinary and specifically defined circumstances. I do not consider the addition of the word 'military' to the word 'service' to be fortuitous or inconsequential. It is clearly descriptive of the nature of the service the person is rendering in the Defence Force in the same manner that the phrase 'military operations' describes the nature of the operations, in the aforementioned definitions.

24. It is evident that the legislature must have been cognisant of the provisions of the Defence Act since it prescribed that the military service or the military training had to be in terms of the aforesaid Act. Similarly, the legislature must have been cognisant of the circumstances in which a person rendered military

service or underwent military training on the basis of the person's membership of the Defence Force. If the purpose was to make the exception available to every member of the Defence Force irrespective of the type of service such person was rendering it would have been a simple matter for the legislature to have said so. Instead, the legislature has used the specific wording that the exception would be applicable 'during a period in which the person rendered military service or underwent military training'. In my view, the use of such specific phraseology indicates that the legislature intended that it was not the person's membership of the Defence Force that was the determining factor, but rather whether the person was rendering military service or undergoing military training at the time.

25. In the circumstances I am of the opinion that the interpretation which is to be given to the phrase 'military service', in the context in which it is used in the MMVA Fund Act of 1989, is that it refers to service which a member of the Defence Force renders in the specific circumstances described in the definition for the phrase 'service in defence of the Republic'. I am also of the view that the fact that a person is a member of the Defence Force does not on its own entitle the conclusion to be drawn that such person is rendering military service, as Mr Notshe has sought to argue.

26. Since the plaintiff's case is that he was rendering military service at the time of the occurrence the question as to whether he was undergoing military training is obviously not relevant. Accordingly, I have not deemed it necessary

to determine what the phrase 'military training' means in the context in which it is used in the MMVA Fund Act of 1989.

27. In view of the conclusion that I have reached there is also no necessity for me to determine the constitutional issue relating to the applicability of the right to equality. Accordingly, I shall not express any opinion in this regard.

28. As correctly submitted by Mr Bloem, the onus to show that the exception is applicable rests on the plaintiff. See *Bray v Protea Assurance Co Ltd* (supra). Since the plaintiff has not adduced any evidence to establish that at the time of the occurrence he was rendering military service, as I have defined it above, he has failed to discharge, on a balance of probabilities, the onus which he bears. It follows that I cannot find in favour of the plaintiff.

29. In the circumstances I hold that the provisions of the exception in Article 46 do not apply in respect of the plaintiff's claim. Consequently, the limit on the liability of the Multilateral Motor Vehicle Accidents Fund, as prescribed in Article 46, is applicable.

Costs

30. In regard to costs there is no reason why costs should not follow the result. Accordingly, the defendants are entitled to an order for costs in their favour.

Order

31. In the result there is an order in the following terms:

(a) The plaintiff is not exempted from the limitations imposed on a passenger by Article 46 of the Agreement referred to in section 1 of Act No. 93 of 1989; and

(b) The costs of both the first and second defendants are to be paid by the plaintiff.

Y EBRAHIM
JUDGE OF THE HIGH COURT (BISHO) **Date: 10 June 2002**

Heard on	:	22 April 2002
Judgment delivered on	:	10 June 2002
Counsel for plaintiff	:	Adv. V Notshe
Attorneys for plaintiff	:	Tini & Partners c/o L R Lesele KING WILLIAM'S TOWN
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