160/95

LL

Case No 322/1994

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

LEE ANN TOUYZ Appellant

and

GREATER JOHANNESBURG TRANSITIONAL METROPOLITAN COUNCIL Respondent

COURT: VAN HEERDEN, VIVIER, F H GROSSKOPF, MARAIS JJA and VAN COLLER AJA

HEARD: 17 NOVEMBER 1995

DELIVERED: 30 NOVEMBER 1995

JUDGMENT

VAN HEERDEN JA:

During May 1990 the appellant ("the plaintiff") sustained bodily injuries as a result of being struck by a bus whilst she was standing on a pavement in Johannesburg. The bus was the property of the Johannesburg City Council ("the defendant") against whom the plaintiff later instituted an action for damages in the Witwatersrand Local Division. This action, which was founded *inter alia* upon the allegation that the collision had been caused by the negligence of the driver of the bus, was brought by virtue of the provisions of Articles 12(b) and 40 of the Schedule to the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 ("the Act"). In so far as material for present purposes, the latter Article prescribes that the MMF (the Multilateral Motor Vehicle Accidents Fund) shall be obliged to compensate a third party for any loss or damage suffered by him as a result of bodily injury to himself caused by the driving of a motor vehicle, if the injury is due to the negligence of the driver. In terms of Article 12(b), however, the MMF may not use

its monies to defray expenses incurred in respect of claims for compensation contemplated in Article 40 arising out of the driving of motor vehicles, which are the property of the defendant, as long as the latter has made provision on prescribed conditions for the payment of compensation in terms of Article 40. (It became common cause that such provision had been made.)

In its plea the defendant *inter alia* denied that the driver of the bus had been causally negligent, and at a pre-trial conference the parties agreed that the issue of negligence should be tried separately from the issue of *quantum* of damages. At the commencement of the trial the court *a quo* gave effect to this agreement. The appellant was then called as a witness. Her evidence *prima facie* established that the collision had been caused by the negligence of the driver of the bus. However, during the course of cross-examination the defendant sought, and was granted, leave to file a special plea. It read as follows:

"1. The Plaintiff claims in terms of the provisions of Act No 93 of 1989 ('the Act') as read with the Regulations thereto.

2. In terms of the provisions of Article 48(f)(ii) of the agreement which forms the Schedule of the Act, the Defendant shall not be obliged to compensate any person for loss or damage if such person refuses or fails to furnish it with copies of all statements and documents relating to the accident that gave rise to the claim concerned, within a reasonable period after having come into possession thereof.

3. The Plaintiff and two witnesses made statements to an assessor and/or private investigator and/or person to the Defendant unknown in approximately March of 1992 and such statements have been in possession of the Plaintiff and/or her duly appointed representative from approximately March of 1992.

4. The Plaintiff has failed to furnish the Defendant with copies of such statements within a reasonable period after having come into possession thereof and the Plaintiff only furnished the Defendant with copies thereof on the 20th of January 1994.

5. In terms of the provisions of Article 63 of the above Agreement, no claim shall be enforceable by legal proceedings commenced by a summons served on the Defendant before all requirements as set out in Article

48(f) have been complied with.

6. The Plaintiff issued her summons in about June 1993.

7. The Plaintiff during or about March 1992, alternatively prior to the issue of the summons had in her possession alternatively in the possession of her representatives, statements by herself and two witnesses which statements were furnished to the representative of the Defendant only on the 20th of January 1994.

7. In the premises, the Defendant is not liable to compensate the Plaintiff as claimed or at all, alternatively the Plaintiff's claim is not enforceable by the present legal proceedings."

The factual averments in the special plea were admitted by the plaintiff. Counsel then proceeded to debate two questions, viz whether Articles 48(f) and 63 of the Schedule enure for the benefit of the defendant - as distinguished from the MMF and an appointed agent - and, if so, whether plaintiff had failed, as alleged in the special plea, to furnish the defendant with copies of the statements in question within a reasonable time. The trial court found for the defendant on both issues

and in consequence dismissed the plaintiff's claim with costs. Subsequently it granted the plaintiff leave to appeal to this court.

(Prior to the hearing of the appeal the defendant was substituted as a party by the present respondent in its capacity as the deemed successor-in-law to the defendant.)

Before us counsel for the plaintiff again submitted that Articles 48(f) and 63(b) of the Schedule do not apply to a claim brought against the defendant under the Act. The kernel of this submission was that there is no mention of the defendant - again as distinguished from the MMF and an appointed agent - in those Articles.

Article 48(f) reads as follows:

> "The MMF or an appointed agent, as the case may be, shall not be obliged to compensate any person in terms of Chapter XII [which includes Article 40] for any loss or damage -
>
> .....
>
> (f) if the claimant concerned refuses or fails-
>
> (i) to submit to the MMF or the appointed agent, together with his claim form, as prescribed by the

Board, or within a reasonable period thereafter and if he is in a position to do so, an affidavit in which particulars of the accident that gave rise to the claim concerned are fully set out; or

(ii) to furnish the MMF or the appointed agent with copies of all statements and documents relating to the accident that gave rise to the claim concerned, within a reasonable period after having come into possession thereof."

And Article 63(b) provides:

"No claim shall be enforceable by legal proceedings commenced by a summons served on the MMF or an appointed agent-

.....

(b) before all requirements as set out in Article 48(f) have been complied with ...."

(For the purposes of this appeal Article 48(f), as it now reads, does not differ in a material respect from its wording prior to its amendment by Proclamations 102 of 1991 and 62 of 1993.)

In terms of Article 1 of the Schedule an "appointed agent" is an agent appointed by the MMF under Article 13. The defendant was not

so appointed and there is hence no express reference to the defendant in Articles 48 and 63. Nor is the defendant mentioned expressly in Articles 40, 42, 43, 44, 45, 46, 47, 47A, 47B, 52 and 62 of the Schedule which in terms have reference only to the MMF or an appointed agent. Indeed, apart from Article 12(b), the defendant is named in only two Articles of the Schedule. The first is Article 54 which provides:

> "The appointed agent or the MMF or the owner mentioned in Article 12(b) shall within a reasonable period after the third party has complied with the provisions of Article 48(f)(i), furnish the third party or his agent with a copy of the information and statements which the said owner or driver furnished in terms of Article 53, as well as all statements which were or are obtained from witnesses to the accident."

The second is Article 65 which stipulates that the provisions of Article 64 are also applicable where the owner referred to in Article 12(b) (i e the defendant) has paid compensation in terms of Chapter XII (Articles 40 to 45) for loss or damage caused by the negligence or other unlawful act of somebody else. Article 64 in turn provides that the MMF

or an appointed agent who has paid compensation under chapter XII may under certain circumstances exercise a right of recourse.

The trial court held, however, that unless the Schedule to the Act "is interpreted, in general, to equate the defendant with an appointed agent, absurdities arise which could not have been contemplated by the legislature", and that hence Articles 48(f) and 63(b) should be construed so as to include the defendant.

There is no provision in the Act or the Schedule which in so many words casts an obligation upon the defendant to compensate a third party for loss or damage suffered as a result of *inter alia* bodily injury caused by or arising from the negligent driving of a motor vehicle belonging to the defendant. Yet it can hardly be doubted that such an obligation is implicitly created by the provisions of Article 40, read with Article 12(b), of the Schedule. In relation to its motor vehicles the defendant therefore incurs the liability which, but for the provisions of

Article 12(b), would have rested upon the MMF or its appointed agent under Article 40. In general it would consequently be anomalous if other Articles of the Schedule which create rights and obligations for the MMF and an appointed agent in regard to claims preferred under Article 40 do not likewise apply to similar claims brought against the defendant.

It is, however, not necessary to go as far as the trial court. I say so because in my view there are sufficiently clear indications that references in at least Articles 48 and 63 to the MMF or an appointed agent impliedly include the defendant.

In this regard Article 54 is of primary importance. It will be recalled that Article 48(f)(i) relates to a refusal or failure to submit to the MMF or an appointed agent a prescribed affidavit. No mention is made of the defendant. Yet, Article 54 enjoins the appointed agent or the MMF *or the defendant* to furnish the third party or his agent with specified information and statements, including statements obtained from witnesses

to the accident, within a reasonable time after the third party has complied with the provisions of Article 48(f)(i). Now, when a claim is preferred against the defendant under Article 40 no purpose would be served if the required affidavit were to be submitted to the MMF. (Clearly, the MMF would not appoint an agent in such a case.) Indeed, the MMF would not at all be concerned with such a claim. In consequence, only the defendant would have an interest in the receipt of the prescribed affidavit. And its own obligation under Article 54 can obviously arise only if the affidavit has been submitted to it (as distinguished from the MMF or an appointed agent). It seems clear, then, that Article 48(f)(i) by necessary implication includes the defendant.

The above obligation of the MMF or an appointed agent or the defendant to furnish the prescribed information and statements is in a real sense reciprocal to the indirect obligation imposed upon a claimant by Article 48(f)(ii). Clearly, however, when a claim is preferred against the

defendant by virtue of the provisions of the Schedule it will only be it which will be concerned with compliance with that indirect obligation. Hence, and again as a matter of necessary implication, Article 48(f)(ii) also includes the defendant.

Reference may also be made to Article 48(e) in terms of which the MMF or an appointed agent shall not be obliged to compensate any person for any loss or damage

> "(e) suffered as a result of bodily injury to any person who-
>
> (i) unreasonably refuses or fails to subject himself, at the request of the MMF or the appointed agent and at the cost of the MMF or that agent, to any medical examination or examinations by medical practitioners designated by the MMF or the said agent;
>
> (ii) refuses or fails to furnish the MMF or the appointed agent, at its or his request and cost, with copies of all medical reports in his possession that relate to the relevant claim for compensation; or
>
> (iii) refuses or fails to allow the MMF or the appointed agent at its or his request to inspect all records relating to himself that are in the possession of any hospital or his medical practitioner...."

The purpose of these provisions is clear. They indirectly compel a claimant to co-operate in providing the MMF or an appointed agent with information relating to the *quantum* of his damages, either for the purpose of making an offer of settlement or preparing a defence to the claim. It is hardly necessary to say, however, that when a claim is preferred against the defendant under the Schedule it has a like interest in obtaining such information.

It is unnecessary to deal with paragraphs (a) to (d) of Article 48. It suffices to say that those provisions do not give rise to any anomalies should Article 48 be construed as impliedly including the defendant. There is, however, a further general consideration which should be borne in mind. Article 48 excludes in a number of instances the liability imposed by Article 40. Now, as has been pointed out, in relation to its motor vehicles the defendant steps into the shoes of the MMF or an appointed agent and incurs the liability created by Article 40. It would

therefore be highly anomalous should the provisions relating to the exclusion of liability enure for the benefit of the MMF or an appointed agent but not, in applicable cases, for that of the defendant.

I therefore hold that Article 48 impliedly includes the defendant. Mainly because of the reference in Article 63(b) to Article 48(f) this interpretation leads to the inevitable conclusion that Article 63(b) should be likewise construed.

I turn to the question whether the appellant failed to comply with the provisions of Article 48(f)(ii). On appeal counsel for the appellant submitted that the court *a quo* wrongly found that the statements in question were not furnished to the defendant within a reasonable time after the plaintiff or her representative had come into possession thereof. I shall, however, assume in favour of the defendant that that finding is unassailable, and proceed to consider counsel's main contention, viz, that mere inaction does not constitute a failure within the ambit of Article

48(f).

In *Union and South-West Africa Insurance Co Ltd v Fantiso* 1981 (3) SA 293 (A) this court was called upon to consider the meaning of the word "fails" in *s 23(c)(ii)* of the Compulsory Motor Vehicle Insurance Act 56 of 1972 ("the 1972 Act"). The respondent in that matter instituted an action for damages against the appellant, alleging that he had sustained bodily injuries when knocked down by a car insured by the appellant in terms of the 1972 Act, and that the accident had been caused by the negligence of the driver of the car. The appellant's amended plea contained a paragraph 8 which in effect constituted a special plea. In this paragraph the appellant disclaimed liability by reason of the respondent's alleged failure to comply with the provisions of s 23(c)(ii) of the 1972 Act. The appellant averred, *inter alia*, that by letter dated 29 November 1979 its attorneys had requested the respondent's attorneys to furnish the former with copies of a medical report by one Dr Warren which was then

in their possession; that when replying on 3 December the plaintiff's attorneys did not annex copies of that report but in essence merely stated that the information obtained from Dr Warren did not affect the issue of quantum of damages; that a copy of the report was handed to the appellant's attorneys only on 13 August 1980, i e, five days before the date of set down of the trial, and that:

> "(g) Plaintiff's failure to attach a copy of the said medical report to its reply to defendant's request as aforesaid, alternatively its unreasonable delay in handing a copy of the said report to defendant, amounts in the premises to a refusal or failure to furnish defendant at its request with a copy of such report in terms of the said section".

The factual allegations in the special plea were apparently admitted by the respondent but although Dr Warren's report contained information relevant to the merits of the matter, the plea was dismissed by the court of first instance. On appeal to this court that decision was confirmed.

In so far as material s 23(c)(ii) of the 1972 Act provided:

> "An authorized insurer shall not be obliged to compensate any person ... for any loss or damage-
>
> .....
>
> (c) suffered as a result of bodily injury to any person who-
>
> .....
>
> (ii) refuses or fails to furnish the authorized insurer at his request ... with copies of all medical reports in his possession, relating to the relevant claim for compensation...."

On appeal Rumpff CJ emphasised that the general object of the 1972 Act was to afford third parties the widest possible protection against loss sustained through the negligent or unlawful driving of a motor vehicle. (See also *Constantia Insurance Co Ltd v Hearne* 1986 (3) SA 60 (A) 67 I-J.) As regards the meaning of the words "refuses" and "fails" in s 23(c)(ii) the Chief Justice said (at p 301 B-D):

> "The word 'refuses' implies a specific verbal or written refusal. Having regard to the context of the Act and of s 23 itself, the word 'fails' in (c)(ii) implies more than the mere omission to furnish copies of reports. To hold otherwise would create an injustice which the Legislature could not have intended. In view of the severity of the penalty, a final loss of claim, one has to consider the failure to furnish copies of reports in a restrictive manner, restrictive in the sense that a court will not deprive the

plaintiff of his right to claim compensation unless he can be said to have obstructed the insurer from getting the information which he is entitled to. As the object of the section is to allow the insurer to get information, forfeiture of plaintiff's claim will only be allowed, in my view, if the information is wilfully withheld after a request is made or if the request is deliberately ignored."

Turning to the facts of the appeal Rumpff CJ went on to say (at p 301 G-H):

"The letter dated 3 December 1979 was not a refusal in express terms. Although it may have been evasive as to the full contents of Dr Warren's report, I do not think that plaintiff's attorneys deliberately tried to hoodwink the defendant's attorneys. It is quite possible that they were *bona fide* in their statement in the letter that they considered that the report did not affect the question of damages as such, and that the failure at the time to provide a copy of the report itself was due to inadvertence."

Counsel for the respondent in the present matter pointed out, as did the court *a quo*, that unlike s 23(c)(ii) of the 1972 Act, Article 48(f) of the Schedule does not require a request for the furnishing of a document. That distinction, however, has no bearing on the question

whether the word "fails" in Article 48(f) should be given the same meaning as that accorded by the Chief Justice to the identical word in s 23(c)(ii). It is true that in the judgment of Rumpff CJ there are references to a request, but this was entirely due to the fact that in the absence of a request there could not have been a refusal or failure within the ambit of s 23(c)(ii). Hence the requirement of a request played no part in the construction placed upon the word "fails". It is indeed clearly implicit in the reasoning of the Chief Justice that since the word was of uncertain meaning it had to be interpreted in favour of third parties. It was for this reason that he equated the word with deliberate inaction; i e, a failure to act in the appreciation that action is or may be required.

The object of the present Act is manifestly the same as that of the 1972 Act, and in the context in which it appears in Article 48(f) "fails" remains a word of uncertain meaning. It therefore appears to me that the construction of "fails" in *Fantiso* governs the meaning of the

same word in Article 48(f).

This conclusion is to some extent borne out by Article 48(e)(ii) which has been quoted above. It provides for the forfeiture of a claim relating to bodily injury if the person concerned "refuses or fails to furnish the MMF or the appointed agent, at its or his request and cost" with copies of certain medical reports. Counsel for the respondent rightly felt constrained to concede that on an application of the *Fantiso* construction the word "fails" in Article 48(e)(ii) means "deliberately fails". That being so, it is in my view unlikely that the legislature intended the same word to bear a different meaning in Article 48(f).

It follows that a mere omission cannot constitute a failure within the meaning of Article 48(f), and that for the purposes of Article 48(f)(ii) there must be a deliberate withholding of a statement or a document before it can be said that the claimant failed to furnish the same. That, I perceive, was also the view held by Van Rensburg AJP in his

unreported judgment in *Goliath v Fedgen Insurance Company Limited* (case 92/92 ECD). See also the unreported judgment of Goldblatt J in *Zeem v Mutual and Federal Insurance Company Limited* (case 34809/91 WLD).

On the assumption that Article 48(f) does not penalise mere inaction counsel for the respondent advanced an alternative submission. It was this. Since the plaintiff attracted the overall *onus* of proving that the defendant was liable to compensate her under the Schedule, she had to show that she was not non-suited by virtue of *inter alia* the provisions of Article 48(f)(ii). That Article does not, however, create a limitation on the general liability imposed by Article 40. What it does, is to provide for the termination of a claim which has already arisen by virtue of Article 40. The position *in casu* is therefore analogous to that obtaining in a case where a seller claims payment of the purchase price and the purchaser pleads that the seller's rights came to an end because of a

cancellation of the sale for one reason or another. Clearly, in the postulated case the purchaser bears the *onus* of proving such termination.

A further alternative submission was that in view of the plaintiff's omission to furnish the defendant with copies of the statements in question for a period of nearly two years after having come into possession thereof, and in the absence of an explanation for her inaction, the most plausible inference to be drawn from the omission is that it was deliberate. There might have been merit in this submission were it the defendant's case that copies of the statements had been deliberately withheld. However, in paragraph 4 of the special plea no more was averred than that the plaintiff had failed to furnish the defendant with such copies. I am not unmindful of the fact that when an averment in a pleading is couched in the same language as that of a statutory provision, it may be legitimate to conclude that the pleader assigned to the words in question their statutory meaning. In the present case, however, such

conclusion cannot properly be drawn. I say so because of the cumulative effect of two factors. Firstly, it is as plausible that the draftsman of the special plea was under the impression that Article 48(f) penalises mere inaction, and that the averment under consideration was therefore intended to relate solely to such inaction. Secondly, when counsel who appeared for the defendant at the trial informed the court *a quo* that the facts set out in the special plea were common cause, he clearly intimated that the averment indeed related to a mere omission. He said:

> "We are agreed that the facts set out in the special plea are common cause. In other words that the statement of the plaintiff and the two witnesses were in her possession or that of her representatives from approximately March 1992 and as far as paragraph 4 is concerned, that she failed to furnish such copies until 20 January 1994...."

Counsel for the respondent rightly refrained from suggesting that it was agreed that the plaintiff had deliberately withheld copies of the statements from the defendant. Hence, the relevant fact "set out in the

special plea" which was common cause, was a mere omission on the part of the plaintiff. In the result the court *a quo* was not called upon to decide whether the plaintiff had deliberately failed to furnish copies of the statements to the defendant.

It was common cause that the appeal had to succeed should it be found that the word "fails" in Article 48(f) means "deliberately fails", and that the defendant was precluded from relying on a deliberate failure on the part of the plaintiff. In this regard I should mention that counsel for the respondent did not contend that the special plea should in any event have been upheld because of the provisions of Article 63(b) of the Schedule.

The appeal is allowed with costs, including the costs of two counsel, and the following is substituted for the order of the court *a quo*.

"The defendant's special plea is dismissed with costs."

H J O VAN HEERDEN JA

VIVIER JA

F H GROSSKOPF JA CONCUR

VAN COLLER AJA