REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 332/04
Reportable

In the matter between:

ROAD ACCIDENT FUND **APPELLANT**

and

MXOLISI RICHARD MTATI
obo ZUKHANYE MTATI **RESPONDENT**

CORAM: MPATI DP, ZULMAN, FARLAM, VAN HEERDEN et JAFTA JJA

HEARD: 17 MAY 2005

DELIVERED: 1 JUNE 2005

SUMMARY: Delict – pregnant woman injured in motor collision – child subsequently born with brain damage resulting from collision – whether child has action against RAF.

JUDGMENT

FARLAM JA

INTRODUCTION

[1] This is an appeal against the dismissal by Froneman J, sitting in the East London Circuit Local Division of the High Court, of a special plea raised by the appellant against a claim brought by the respondent, in his capacity as father and natural guardian of his minor daughter, Zukhanye Mtati, in terms of Article 40 of the Agreement set out in the schedule to the Multilateral Motor Vehicle Accidents Fund Act, 93 of 1989. (References in what follows to 'the Act' are references to Act 93 of 1989.)

PLEADINGS

[2] In his particulars of claim the respondent claimed an amount of R1 365 580 from the appellant, alleging that a collision took place on 20 December 1989 in East London between a motor vehicle, which was being negligently driven at the time by one Dlalo, and the respondent's wife, who was a pedestrian. As a result of the collision it was alleged, the respondent's wife, who was then pregnant with Zukhanye, sustained serious bodily injuries. Zukhanye was born some five and a half months after the collision. It is alleged in the particulars of claim that she has brain damage and is mentally retarded and that this brain damage and mental retardation arose out of the injuries sustained by her mother as a result of the collision.

[3] The appellant's special plea rests on two bases.

[4] The first is what is contended to be the proper construction of Article 40 of the Agreement, which reads as follows:

'The MMF [ie, the Multilateral Motor Vehicle Accidents Fund, the predecessor of the appellant] or its appointed agent, as the case may be, shall subject to the provisions of this Agreement, be obliged to compensate any person whomsoever (in this Agreement called the third party) for any loss or damage which the third party has suffered as a result of –

a) any bodily injury to himself;

b) the death of or any bodily injury to any person,

in either case caused by or arising out of the driving of a motor vehicle by any person whomsoever at any place within the area of jurisdiction of the Members of the MMF, if the injury or death is due to the negligence or other unlawful act of the person who drove the motor vehicle (in this Agreement called the driver) or of the owner of the motor vehicle or his servant in the execution of his duty.'

The appellant contends in its special plea that, as the respondent's minor child was at the time of the collision a foetus *in utero,* she was not, on what is called a 'proper construction' of Article 40, a 'person' entitled to compensation.

[5] The second basis for the special plea is an averment that 'a foetus *in utero* is not in law regarded as a person and in the circumstances the insured driver cannot be said to have owed a duty of care to ZUKHANYE.'

EARLIER DECISION ON ISSUE RAISED IN THIS CASE

[6] Some of the legal issues which arise in this case came before this court for decision in August 1963 when an appeal from the judgment of Hiemstra J in *Pinchin and Another NO v Santam Insurance Co Ltd* 1963 (2) SA 254 (W) was argued. This court was satisfied that Hiemstra J had correctly decided that the plaintiffs in the case before him had not succeeded in proving that the injuries which the mother sustained in the collision which gave rise to that case had caused cerebral palsy from which her child born subsequent to the collision was suffering. It was thus unnecessary for this court to decide whether Hiemstra J was right in holding that a child has an action in our law to recover damages for pre-natal injuries. See *Pinchin and Another NO v Santam Insurance Co Ltd* 1963 (4) SA 666 (A). Hiemstra J's judgment in *Pinchin's* case has been quoted with approval in judgments in Australia (see *Watt v Rama* [1972] VR 353 (FC), a decision of the Supreme Court of Victoria, at 360), and in England (see *Burton v Islington Health Authority; de Martell v Merton and Sutton Health Authority* [1992] 3 All ER 833 (CA) at 840f-g). It has also been discussed in leading textbooks published in Australia (see Fleming *The Law of Torts* 9 ed p 182) and England (see *Charlesworth and Percy on Negligence* 10 ed p 88). Most of the legal review articles in which it has been discussed are listed in what amounts to a monograph on

the legal issues arising for decision in this case, published as a footnote (footnote 15 on pp 33 to 38, presumably the longest footnote in South African legal history) in *Boberg's Law of Persons and the Family* 2 ed. In an earlier footnote (footnote 12 at pp 32-33) it is pointed out that the problem arising for consideration in this case is an international one and reference is made to 'the vast literature on this vexing subject'. Two contributions are singled out for particular mention, the article by Sir Percy Winfield 'The Unborn Child' published in (1942) 8 *Cambridge LJ* 76 and the dissertation by David A Gordon SC 'The Unborn Plaintiff' published in (1965) 12 *J of Forensic Medicine* 111 and 152, (1966) 13 *J of Forensic Medicine* 23 (an abridged version of this dissertation, published in (1965) 63 *Mich L Rev* 579, was cited in *Watt v Rama supra* at 358). To the extensive list of writings on the topic listed in the second edition of Boberg I wish merely to add references to articles by PA Lovell and RH Griffith-Jones (1974) 90 *LQR* 531 and Professor Peter F Cane (1977) 51 *Australian LJ* 704; the doctoral dissertations by PC Smit *Die Posisie van die Ongeborene in die Suid Afrikaanse Reg met Besondere Aandag aan die Nasciturus-Leerstuk* (1976, University of the Orange Free State) and PJJ Olivier *Legal Fictions: an Analysis and Evaluation* (1973, University of Leiden) pp 119-123 and 153-4; the translated

materials collected and annotated by Sir Basil Markesinis in *A Comparative Introduction to the German Law of Torts* 3 ed pp 39-40 and 130-142, and the annotation on 'Liability for Pre-Natal Injuries' published in 40 *ALR* 3ed pp 1222 *et seq.*

[7] In concluding that a child has an action for injuries sustained while a foetus, Hiemstra J applied the so-called *nasciturus* fiction derived from Roman law to the effect that an unborn child, if subsequently born alive, is considered as already in existence whenever its own advantage is concerned (see, eg, Digest 1.5.7), holding that this rule not only applied to questions of succession and status but could also be extended to the law of delict. In coming to this conclusion he strongly relied inter alia on *Montreal Tramways Co v Léveillé* (1933) 4 DLR 337 (SCC), a decision of the Supreme Court of Canada in an appeal from Quebec, and the article by Sir Percy Winfield to which I have already referred.

[8] The ratio of his judgment on the point presently at issue appears at 260 A-C, as follows:

'I hold that a child does have an action to recover damages for pre-natal injuries. This rule is based on the rule of the Roman law, received into our law, that an unborn child, if subsequently born alive, is deemed to have all the rights of a born child, whenever this is to its advantage. There is apparently no reason to limit this rule to the law of property and to exclude it from the law of

delict.'

[9] The *Pinchin* case was an action brought under s 11 of the Motor Vehicle Insurance Act 29 of 1942 which, as far as was material, provided that a registered insurance company (such as the defendant in that case) had to compensate

'any person whatsoever (in this section called the third party) for any loss or damage which the third party has suffered as a result of

a) any bodily injury to himself;

b) the death of or any bodily injury to any person,

in either case caused by or arising out of the driving of the insured vehicle …'

(As can be seen this section was *in pari materia* with Article 40 of the MMF Agreement.)

[10] Having pointed out (at 256A) that the word 'person' was not defined, Hiemstra J said that it had therefore to bear 'its ordinary common law meaning'. He continued:

'Whether the *foetus* is a "person" or not, seems to me to be irrelevant if the legal fiction applies that it is to be regarded as if it is already born whenever this should be to its advantage.'

He accordingly held that the plaintiff's minor son had an action under s 11 of Act 29 of 1942.

JUDGMENT IN COURT *A QUO*

[11] In his judgment in the court *a quo* Froneman J accepted that the *Pinchin* decision was correct and that, as he put it:

‘ … the Act and the common law must therefore be approached in the context of the qualified principle set out above, namely to regard, when appropriate, a *foetus* as a person when upon birth it is to his or her advantage. The real and difficult question is to determine when the circumstances are appropriate and when they are not.’

[12] The learned judge held that it was appropriate to apply the *nasciturus* rule in this case. Among the factors which led him to this conclusion was the fact that Act 93 of 1989 was

‘… social legislation aimed at the widest possible protection and compensation against loss and damages for the negligent driving of a motor vehicle (compare *SA Eagle Insurance Co Ltd v Pretorius* 1998 (2) 656 (SCA), 659I-660D). To a large extent it represents … an embodiment of the common law actions relating to damages for bodily injury and loss of support caused by or arising from the negligent driving of a motor vehicle *(Evins v Shield Insurance Co Ltd* [1980 (2) SA 814 (A)], 841E).’

[13] He held that a duty of care could be owed to a foetus and that there was no substance in the argument raised on behalf of the present appellant that a finding on this point in favour of the respondent would, to use the familiar cliché, ‘open the flood gates of litigation’.

[14] Earlier in his judgment the learned judge dealt with a

submission advanced by counsel for the appellant, who took as his starting point what was called the 'ordinary grammatical meaning' of the word 'person', *viz* 'a human being' as distinguished, amongst other things, from a stillborn child, an unborn child or a foetus. For this submission counsel had relied on the decision of this court in *Van Heerden and Another v Joubert NO and Others* 1994 (4) SA 793 (A) in which it was held that the meaning of the word 'person' as used in the Inquests Act 58 of 1959 does not include a stillborn baby, with the result that an inquest into the death of a stillborn baby cannot be held under the provisions of the Act.

[15] Froneman J rejected this submission, saying that the 'indeterminacy of meaning is increasingly recognized in our law (compare, for example, the remarks of Kentridge AJ in *S v Zuma and Others* 1995 (2) SA 642 (CC), paras 17-18), and was also implicitly recognized by FH Grosskopf JA in *Van Heerden's case,* above. In that case he starts his whole discussion of the proper meaning of the word "person" by saying that the jurisdictional issue in dispute in *Van Heerden* "depends on the meaning of the word 'person' in the *context* (my emphasis) of the Act [the Inquests Act 58 of 1959]". Context is thus all *(Jaga v Donges NO and Another* 1950 (4) SA 653 (A), 662; *Aetna Insurance Co v Minister of Justice* 1960 (3) SA 273 (A), 284). It logically precedes, or, perhaps more accurately, determines, the question whether the meaning of a word is unambiguous or not.'

SUBMISSIONS ON BEHALF OF THE APPELLANT

[16] Before us counsel for the appellant submitted that, in dismissing the special plea, the court *a quo* erred in interpreting the Act in its context, in the process paying insufficient regard to what counsel called the 'ordinary grammatical meaning' of the word 'person' as well as accepted interpretations of the word 'person' in the context of other statutes. In this regard counsel referred to *Van Heerden's* case, *supra,* at 796-798, *Christian Lawyers Association of South Africa v The Minister of Health and Others* 1998 (4) SA 1113 (T) at 1117F-1118F, *Christian League of Southern Africa v Rall* 1981 (2) SA 821 (O) at 929 *et seq* and *Friedman v Glicksman* 1996 (1) SA 1134 (W) at 1140G.

[17] It was further contended that in extending the common law, as counsel submitted the court *a quo* had done, by finding that the word 'person' in the Act included a foetus *in utero,* it had failed to consider the effect of such extension on the law of delict in general. In this regard counsel repeated the 'floodgates' argument which had not impressed the court *a quo.* In elaborating this submission counsel referred to the Congenital Disabilities (Civil Liability) Act 1976 of the United Kingdom, which was based on the recommendations of the English Law Commission published in its *Report on Injuries to Unborn Children* Law Com. No. 60, Cmnd

5709 (1974). He contended that the UK Act takes due account of what he called 'the potential difficulties and inequities that could result from an uncontrolled right to claim damages sustained *in utero'.* In particular, he pointed out, the UK Act, in s 1(1), provides that a child born disabled as a result of an occurrence before his or her birth which affected either parent's ability to have a normal healthy child, or affected the mother during her pregnancy, or affected her or the child in the course of his or her birth, so that the child is born with disabilities which would not otherwise have been present, will have an action against a person answerable in respect of the occurrence *other than the child's own mother.* Section 2 of the UK Act provides that, in certain circumstances, there will also be an action against the child's mother if the child's disabilities arose from injuries sustained through, eg, the negligent driving of a motor vehicle by the mother. (The reason for this exception is that in such a case a statutory third party insurer will be liable to satisfy any judgment the child may succeed in obtaining against the mother, so that the exception is more apparent than real.)

[18] Counsel contended that the courts should accordingly leave the extension of the common law to provide a remedy for children who sustain pre-natal injuries to the legislature which, in framing a

suitable remedy, will be able in a way the courts cannot, to qualify the remedy provided so that, for example, it will not lead to a situation where children are able to sue their own mothers in respect of injuries they sustained while still in the womb.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

[19] In arguing that the order made by the court *a quo* could not be faulted, counsel for the respondent submitted that Froneman J was correct in following the judgment in the *Pinchin* case and applying the *nasciturus* rule to the facts of this case. In the alternative he submitted that the appellant's argument contained implied propositions that compensation is only payable in terms of Article 40 in circumstances where the negligent driving (to confine the argument to the facts of this case) and the injuries suffered by Zukhanye occurred at the same time, and that she could not be compensated in this case for the injuries she sustained because she was not a person at the time when the negligent driving took place and when her mother sustained the injuries which led in turn to Zukhanye's injuries. According to counsel, these propositions were unsound and contrary to principle.

[20] In this regard counsel relied on views expressed by the late Professor WA Joubert who, in a note on the *Pinchin* case published in (1963) 26 THR-HR 295, expressed the view that the

solution to the legal problems in the *Pinchin* case was to be found in the ordinary principles of liability for delict, without having to have recourse to an artificial extension of the *nasciturus* rule. Joubert stated that the minor's claim was based on the damage he or she had suffered not as a *foetus* but as a living born person, as *persona iuris.* The fact that the act that caused the damage, in this case the negligent driving of the vehicle which collided with the child's mother, had happened before the birth was irrelevant. To illustrate his point he gave several examples, including the following: a person is injured by the explosion of a timebomb placed in a room before he was born. Obviously he would have a claim even though he was not born when the act which caused the damage took place. In support of his views he referred to a decision of the Federal Supreme Court in West Germany, reported in *Neue Juristische Wochenschrift* 1953, I 418. In this case, an English translation of which (by Kurt Lipstein) is given in Markesinis *op cit* 130-133, the plaintiff child, who was born with congenital syphilis, sued the hospital at which her mother had, before the plaintiff was conceived, received a blood transfusion as a result of which she contracted syphilis. The plaintiff's claim against the hospital was based on s 823 I of the BGB, which provides as follows:

'A person who, wilfully or negligently, unlawfully injures the life, body, health, freedom, property or other right of another is bound to compensate him for any damage arising therefrom.' (The translation is taken from Von Mehren and Gordley *The Civil Law System* 2ed p 557.)

The hospital contended that s 823 I of the BGB did not apply 'because at the time when the act causing damage occurred, the plaintiff had not even been conceived'.

The Federal Supreme Court rejected this argument, saying (*op cit* 133):

'It is not possible … to agree with the appellant who argues that s 823 I presupposes the existence of a physical person and that it cannot therefore be applied to injuries affecting those who were not yet conceived when the tort was committed, since in such a case "another person" in the meaning of s 823 I BGB does not exist … [T]he plaintiff was conceived in the body of the mother who suffered from syphilis and developed in it as a human being affected by syphilis by absorbing the illness. This would not have happened without the tortious act or omission of the defendant; in short without it she would not have become a person suffering from syphilis.

The object of the argument is thus not damage to a foetus or to an unborn child, but the damage which the plaintiff has suffered by the fact that she was born a sick person affected by syphilis. As stated before, her damage is connected by a link of adequate causation with the infection with syphilis of her mother by the defendant. This damage was suffered by the plaintiff when she was born and constituted an injury to her health. Thus the conditions of

s 823 I BGB exist for allowing the claim.'

[21] Joubert pointed out that similar problems arise in our law as regards the dependants' action where, eg, a man is killed by the negligent act of another at a time when his wife is pregnant. Her child will have a claim for loss of support when he or she is born. In this case also, he said, referring to the leading case of *Chisholm v East Rand Proprietary Mines Ltd* 1909 TH 297, the *nasciturus* rule had unnecessarily been invoked.

DISCUSSION

[22] The first question to be decided is whether Zukhanye has a claim under Article 40 against the appellant for the damages flowing from the disabilities from which she is suffering.

[23] I do not think it is possible to decide this question separately from the question as to whether in our law she has an action for ante-natal injuries. That this must be so flows from the fact that the remedy created by Article 40 is the counterpart of and indeed the substitute for the common law actions relating to damages for bodily injury and loss of support caused by or arising from the negligent driving of motor vehicles. Parliament could never have intended Zukhanye, if the common law grants a child an action for ante-natal injuries, to have to sue the driver of the vehicle which collided with her mother.

[24] The next point to be made is that it would be intolerable if our law did not grant such an action. On this part of the case I can do no better than to quote what was said by Lamont J in the *Montreal Tramways* case *supra* at 345, *viz:*

'If a child after birth has no right of action for pre-natal injuries, we have a wrong inflicted for which there is no remedy, for, although the father may be entitled to compensation for the loss he has incurred and the mother for what she has suffered, yet there is a residuum of injury for which compensation cannot be had save at the suit of the child. If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor. To my mind it is but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother.'

[25] The *Montreal Tramways* case was very influential in causing American courts, which had previously denied an action for pre-natal injuries, to change their stance on the matter. It was, for example, cited with approval in *Bonbrest v Kotz* 65 F Supp 138 (DDC 1946), the first case in which it was held in the United States (after a long line of cases from all over the United States, starting with *Dietrich v Northampton* (1884) 138 Mass 14, 52 Am Rep 242, a judgment of Oliver Wendell Holmes J, going the other way) that

there was an action, at least as far as concerned a claim for injuries to a viable unborn child, brought by the child after its birth. This led to what Prosser (*Law of Torts* 4 ed p 368) called 'the most spectacular abrupt reversal of a well-settled rule in the whole history of the law of torts'. (Indeed some American courts go further and even allow damages to be recovered by the estate of a stillborn child.)

[26] The passage I have quoted from Lamont J's judgment in the *Montreal Tramways* case was also cited by Hiemstra J in *Pinchin supra* at 257A-B, by Gillard J in *Watt v Rama supra* at 363-4 and by Dillon LJ in *Burton's* case at 839b-d.

[27] The more difficult question is whether we should allow such an action by using the *nasciturus* rule or by using what Professor Joubert called the ordinary principles of the law of delict.

[28] The judges in the Supreme Court of Canada who decided the *Montreal Tramways* case were also divided on the legal principles to be applied so as to allow a child to sue after birth for pre-natal injuries. Lamont J, who delivered his judgment on behalf of himself and Rinfret and Crocket JJ, relied on the *nasciturus* rule. Cannon J held that it was not necessary to consider the rights of the child while in its mother's womb, between the time of conception and birth. His judgment was delivered in French. The

following summary of his reasoning is taken from the judgment delivered by Winneke CJ and Pape J in *Watt v Rama supra* at 357:

'His view was that the cause of action arose when the damage was suffered and not when the wrongful act was committed. Injury was one of the three essential elements of responsibility, and without injury, no action would lie. He thought that in principle the plaintiff's right to compensation came into existence only when she was born with the bodily disability from which she suffered. It was only after birth that she suffered the injury, and it was then that her rights were encroached upon and she commenced to have rights. It could be said that her rights were born together with her; and from birth with her guardian's help she could bring the action and endeavour to show that the injury from which she suffered was caused prior to her birth through the fault of the defendant. He thought it unnecessary to discuss the maxims of the civil law or the application of the Civil Code of Quebec. It was not a question of the right the child had after conception, but of the right to compensation which commenced when she was born.'

[29] This approach commended itself to all three judges in *Watt v Rama,* although Gillard J also, in the alternative, suggested (at 374-7) that the other approach based on the *nasciturus* rule, which for some purposes at least had been received into the law of England, might be adopted. He stated, however (at 377 lines 29-30), that it was not necessary 'to form any concluded opinion' on the point. Cane *(op cit 7*20) found the main line of reasoning in *Watt v Rama* to be 'rather technical' and said that 'its detailed

operation, like the scheme of the [UK] Act presents certain difficulties'. He preferred the alternative reasoning of Gillard J, which involves treating the unborn child as having already been born at the date of its injuries.

[30] Similar views have been expressed by academic commentators in South Africa, notably Professor PQR Boberg, whose views were first set out in a note he wrote on *Pinchin's* case in the 1963 volume of the *Annual Survey of South African Law* at pp 216-219. At 218 he summarised Joubert's comments on the case and continued:

'The difficulty about Joubert's analysis is that it does not explain the process by which the conclusion is reached that the delict has been committed against a living child only after its birth. Delictual liability does not stem from damage alone: it only arises when such damage has been caused by an invasion of legal rights, or wrongful act. The only act to which the injuries presently involved can be traced was one committed before the child's birth. Against whom was it wrongful: the child, the *foetus,* or, if before conception, what? As Joubert denies the relevance of the *nasciturus* rule, he would, presumably, say that the act was wrongful against the child. To equate this situation, as he does, with the example of the time-bomb, is, however, not permissible. When the bomb is placed in the room no damage is suffered and hence no delict is committed. It is only when the bomb explodes that a delict is committed, and by then the child has been born. Thus if the "bomber" were to repent of his deed and remove the bomb before it exploded there would be no liability. On

the other hand, pre-natal injuries are already sustained by the child in the womb while not yet a legal person. No arrangement of circumstances has taken place which only injures him upon his emergence into the world. Thus if a delict has been committed at all, was it not committed against the unborn child who was not at that stage a person?

Possibly Joubert's answer would be that, as legal personality is essential to an invasion of rights, the delict only arises when the rights are created, i.e. on birth. But how does one escape the fact that the actual invasion took place some time before, when there were no rights? It is submitted that the recognition of an action for pre-natal injuries is logically impossible without the conferment of legal rights, and hence legal personality, upon the unborn child, as achieved by the *nasciturus* rule. (See the remarks of Greenberg J in *Stevenson N.O. v Transvaal Provincial Administration,* 1934 TPD 80 at 85).'

[31] Part of the answer to this contention was, in my view, given by Phillips J in the court *a quo* in *de Martell v Merton and Sutton Health Authority* [1992] 3 All ER 820 (QBD) when he said (at 832a-b):

'In law and in logic no damage can have been caused to the plaintiff before the plaintiff existed. The damage was suffered by the plaintiff at the moment that, in law, the plaintiff achieved personality and inherited the damaged body for which the defendants (on the assumed facts) were responsible. The events prior to birth were mere links in the chain of causation between the defendants' assumed lack of skill and care and the consequential damage to the plaintiff.'

[32] Furthermore I do not find Boberg's criticism of Joubert's time-

bomb example particularly helpful. What if the bomb had gone off, leaving a dangerous crater into which two people subsequently fell? Each person would have an action only when he or she fell and suffered damage, not before.[1]

[33] The *nasciturus* rule provides no solution to cases such as the German case of the mother who was negligently infected with syphilis before she conceived her child, who was subsequently born with congenital syphilis. Such a case also, in my view, cries out for a remedy and a theory which denies one should not be accepted. [2]

[34] Furthermore the application of the *nasciturus* rule led to what was clearly, in my view, an unjust result in *Stevenson NO v Transvaal Provincial Administration, supra*. In that case a man was killed in consequence of what was alleged to be the negligence of the Provincial Administration. More than six months after his death the mother of his children, wishing to institute proceedings on behalf of her children for loss of support, applied, *inter alia,* for condonation of her failure to institute the proceedings in the prescribed period. It was held that, as action had not been commenced within the period laid down in s 5 of the Roads

1 See also in this regard the useful discussion of the views of Professors Joubert and Boberg by Craig Lind 'Wrongful-Birth and Wrongful-Life Actions' (1992) 109 *SALJ* 428 at 440-443.
2 See also Lind *op cit* 442-443.

Amendment Ordinance 10 of 1931 (Transvaal), the application had to fail, even in respect of a child born after his father's death and within the relevant period. Greenberg J, with whom Tindall AJP and De Wet J concurred, said (at 85):

'The question when the cause of action matured depends firstly on the nature of the claim. In *Union Government v Lee* (1927, A.D. at 222) it was held that in a case of this kind the compensation claimable is due to third parties who do not derive their rights through the deceased or from his estate, but from the fact that they have been injured by the death of the deceased and that the defendant is the person responsible for such death. I think it follows that these rights can only accrue in favour of an entity who is a person either in fact or by a fiction of law at the time when the act of the defendant complained of is committed. According to Maasdorp's *Institutes of Cape Law,* vol 1 p. 1 and the authorities there cited, an unborn infant, provided it is afterwards actually born, is sometimes by a legal fiction regarded as already born, in so far as such presumption will be for its benefit. Mr *Maisels* sought to use this proviso in support of his case and contended that it would not be for the benefit of the minor concerned if it were presumed to have been born on the date of conception, i.e., before the death of the deceased, and that the fiction should not be invoked. But it appears to me that it is only by the aid of the fiction that this minor has a cause of action at all. If at the date of respondent's negligence the minor was in existence neither as a living *foetus* that by a fiction can be looked on as a person nor as a living person, then there is no entity or *persona* in whose favour respondent could have incurred obligations at that time. The appellant would therefore have claimed damages in respect

of this minor as well, immediately upon the death of the deceased. It may be that if the child was still-born or if the *foetus* miscarried, no claim in respect of this minor may have arisen. But on the date of its birth the claim for future maintenance based on its expectation of life would have lain and there seems no difference in principle between such a claim and a claim in respect of an unborn but living *foetus.* In the former case there is the possibility that the living child may not live another day, in the latter that a like fate may befall a living *foetus.* I think therefore that this point also fails and that the appeal must be dismissed with costs.'

[35] The conclusion to which the court came cannot in my view be faulted if it is correct, as Greenberg J said, that 'it is only by the aid of the fiction that this minor has a cause of action at all'. I do not, however, think that that statement is correct. On the ordinary principles of the law of delict, unlawfulness and damages must not be conflated. As Cannon J said in *Montreal Tramways,* each is a separate element for delictual liability. No cause of action arose, in my view, until Stevenson's posthumous child was born. The application should accordingly have been granted.

[36] Although it was averred in the special plea that the insured driver did not owe a duty of care to Zukhanye, counsel for the appellant (very correctly, in my view) addressed no submission to us on this point. In our law, for the element of wrongfulness to be present, there has to be a breach of a legal duty (a term to be

preferred to the expression derived from English law ‘duty of care’, the use of which can lead to confusion: see *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 27E)).

[37] The assertion that the driver did not owe Zukhanye a legal duty because she had not yet been born must clearly be rejected in the circumstances. In my opinion the point was well answered by Fraser J of the High Court of Ontario in *Duval v Seguin* (1972) 26 DLR (3d) 418 in a passage cited with approval by Dillon LJ in the *Burton* case at 842c-d, as follows:

‘Ann’s mother [Ann was the child *en ventre sa mère* at the time of the collision] was plainly one of a class within the area of foreseeable risk and one to whom the defendants therefore owed a duty. Was Ann any the less so? I think not. Procreation is normal and necessary for the preservation of the race. If a driver drives on a highway without due care for other users it is foreseeable that some of the other users of the highway will be pregnant women and that a child e*n ventre sa mère* may be injured. Such a child therefore falls well within the area of potential danger which the driver is required to foresee and take reasonable care to avoid.’

[38] Finally I wish to say something about the floodgates argument. It is certainly true that the judgment in *Bonbrest v Kotz supra,* which initiated the reversal in attitude of the American courts on the point, may be said to have opened the floodgates of litigation regarding pre-natal injuries, leading to claims on the part

of the estates of stillborn infants and infants who died shortly after being born (details can be found in the annotation in 40 *ALR* 3d 1222 to which I have referred above) and also to claims by children against their mothers for the infliction of pre-natal injuries (a topic dealt with in an annotation published in 78 *ALR* 4th 1082), a problem which, as we have seen, is addressed in the UK Act.

[39] Problems of that kind are not likely to arise in our law for several reasons. First, the right of a child to sue for pre-natal injuries recognised in this judgment is expressly based on the holding that the right of action only became complete when the child was born alive. Secondly, a claim of a pre-natally injured child who dies shortly after birth lapses unless action has already been instituted and the proceedings have already reached the stage of *litis contestatio* in the case of the *actio injuriarum* and the action for pain and suffering (see *Hoffa v SA Mutual Fire and General Insurance Co Ltd* 1965 (2) SA 944(C) at 950 and 955 and *Potgieter v Sustein (Edms) Bpk* 1990 (2) SA 15 (T) at 21-22). Thirdly, any claim the child may have for loss of expectation of life will be regarded as part of his or her claim for loss of amenities (Corbett *The Quantum of Damages in Bodily and Fatal Injury Cases* Vol 1 4 ed by JJ Gauntlett SC, p 45) and will thus lapse on the child's death and the child will have no claim for loss of income

during the 'lost years': see *Lockhat's Estate v North British & Mercantile Insurance Co Ltd* 1959 (3) SA 295 (A).

[40] As far as a possible claim against a child's mother for pre-natal injuries is concerned, such a claim will only lie if and to the extent that an enforceable legal duty on the part of the mother towards her child is recognised, a matter on which no opinion need be expressed at this stage.

CONCLUSION AND ORDER

[41] In the circumstances, I am satisfied that the special plea was correctly dismissed by the court *a quo* and the appeal must fail.

The following order is made:

The appeal is dismissed with costs, including those occasioned by the employment of two counsel.

……
IG FARLAM
JUDGE OF APPEAL

CONCURRING

MPATI DP
ZULMAN JA
VAN HEERDEN JA
JAFTA JA