Publiseer 27/86

CONSTANTIA INSURANCE COMPANY LIMITED APPELLANT

and

THELMA HEARNE (born VYVER) RESPONDENT

HEFER JA.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

IN THE MATTER BETWEEN

CONSTANTIA INSURANCE COMPANY LIMITED APPELLANT

and

THELMA HEARNE (born VYVER) RESPONDENT

CORAM: RABIE, CJ, JANSEN, HOEXTER, HEFER, JJA, et NESTADT, AJA.

HEARD : 25 FEBRUARY 1986.

DELIVERED : 25 MARCH 1986.

J U D G M E N T

HEFER, JA :

The respondent issued summons in the Court

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below to recover from the appellant the damages which her two minor daughters allegedly suffered as a result of the death of their father when he fell from a moving vehicle insured by the appellant in terms of the provisions of the Compulsory Motor Vehicle Insurance Act 56 of 1972 ("the Act"). It was alleged in the particulars of claim that the deceased was a workman as defined in the Workmen's Compensation Act, No 30 of 1941, and an employee of the owner of the vehicle when the incident occurred. Appellant's liability was accordingly limited in terms of section 22(2) (a) of the Act. The appellant excepted to the particulars of claim but, in a judgment reported in 1984(4) S A 48 (E C D), SMALBERGER J dismissed the exception. Leave was subsequently granted to the appellant to appeal to this Court.

The allegations in the particulars of claim and the main thrust of the exception are summarised in the judgment and there is no need to repeat them. The issue appears from p 50B-C of the report ,viz "is the liability of an insurer under the Act to the dependants of a deceased workman limited by the provisions of s 22 (2) (a) of the Act to R12 000 in respect of the claim of each dependant, or to an overall amount of R12 000 irrespective of the number of claims by dependants?" .

Although the answer to this question must eventually be provided by section 22(2) (a) itself some of the other provisions of section 22 and of section 21(1) are also relevant. I need not quote the well-known provisions of section 21(1) which are the source of an insurer's liability in terms of the Act. Their effect is that the insurer is obliged to compensate, subject to the provisions of the Act, any person whatsoever (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself, or the death of or any bodily injury to any person, in the circumstances described in the section.

Section 22 contains certain limitations on an insurer's liability. It reads as follows:

"22. (1) The liability of an authorised insurer in connection with any one occurrence to compensate a third party for any loss or damage contemplated in section 21 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 -

(a) was being conveyed in the motor vehicle in question -

(i) for reward; or

(ii) in the course of the business of the owner of that motor vehicle; or

(iii) in the case of an employee of the driver or owner of that motor vehicle, in respect of whom subsection (2) does not apply, in the course of his employment; or

(iv) for the purposes of a lift club where that motor vehicle is a motor car insured in the prescribed manner in terms of this Act for those purposes; or

(b) was in the act of entering or mounting

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the motor vehicle in question for the purpose of being conveyed as referred to in paragraph (a); or

(c) was in the act of alighting from the motor vehicle in question after having been conveyed as referred to in paragraph (a); or

(d) was being conveyed in the motor vehicle in question under circumstances other than the circumstances referred to in paragraph (a) or was in the act of entering or mounting the motor vehicle in question for the purpose of being so conveyed or was in the act of alighting from the motor vehicle in question after having been so conveyed,

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 No. 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 -

(aa) in any case referred to in paragraph (a), (b) or (c), to the sum of twelve thousand rand in respect of any bodily injury to or the death of any one such person;

(bb) in any case referred to in paragraph (d), to the sum of twelve thousand rand in respect of loss of income or of support and the costs of accommodation in a hospital or nursing home, treatment, the rendering of a service and the supplying of goods resulting from the death of or bodily injury to any one such person, excluding the payment of compensation in respect of any other loss or damage,

but exclusive of the cost of recovering the said compensation.

(2) Where the loss or damage contemplated in section 21 is suffered as a result of bodily injury to or the death of an employee of the driver or owner of the motor vehicle and the third party is entitled to compensation under the Workmen's Compensation Act, 1941 (Act No. 30 of 1941), in respect of such injury or death -

(a) the liability of the authorized insurer to that third party shall be limited to the sum representing the difference between the amount which that third party could, but for the provisions of this paragraph, have claimed from the insurer or the amount of twelve thousand rand (whichever is the lesser) and any lesser amount to which that third party is entitled by way of compensation under the said Act; and

(b) ....

(c) the authorized insurer shall not be liable under the said Act for the amount of the compensation to which any such third party is entitled thereunder,

without, however, any liability of the authorized insurer to pay costs awarded against it in any legal proceedings being affected by anything in this subsection contained."

A preliminary examination of section 22 reveals that two distinct and unrelated situations are provided for in subsections (1) and (2) respectively. Subsection (1) deals with cases in which a passenger in the insured vehicle is injured or killed. (I shall refer in this judgment to the persons listed in subsection (1) (a) to (d) collectively as passengers despite the provisions of paragraphs (b) and (c)). Subsection (2) deals with cases where an employee of the driver or owner of the insured vehicle is injured or killed and the third party is entitled to compensation in terms of the Workmen's Compensation Act as a result of such injury or death, i e where the employee in question was a workman, as defined in that Act, at the relevant time. Separate provision is made in subsections (1) (aa) and (2) (a) for a limitation of the insurer's liability to third parties in both types of cases. A workman may, of course, be injured or killed while being conveyed as a passenger in the insured vehicle and to that extent subsections (1) and (2) overlap. But in

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such cases it is obviously the limitation in subsection (2) (a) which applies.

The interpretation of subsection (2) (a), read by itself, presents no problem. Its words are perfectly plain and appellant's counsel rightly conceded that *prima facie* its correct interpretation is that, in cases where there are several third parties, the limitation of the insurer's liability applies to each of them separately. He argued, however, that the *prima facie* meaning of subsection (2) (a) must yield to indications of a different intention elsewhere in section 22; that subsection (1) (aa), correctly construed, contains a limitation of an insurer's total liability to all third parties; that it is unlikely that the legislature's intention was to provide for a different type of limitation in subsection (2) (a); and that subsection (2) (a) must accordingly be interpreted in the same way as subsection (1) (aa).

The correctness of the submission depends primarily on the interpretation of subsection (1) (aa). If the correct interpretation of that subsection is not the one for which appellant contends, the whole argument founders. It also founders if that interpretation is found to be correct, but the submission relating to the effect of subsection (1) (aa) on the interpretation of subsection (2) (a) is rejected. One may dispose of the appeal by assuming the correctness of the interpretation of subsection (1) (aa) for which appellant contends, and by dealing merely with the second leg of the argument. The temptation to do so is strong for it will certainly be the easiest way to follow. But the interpretation of subsection (1) (aa) is important and I have decided to approach the matter from that end. In discussing subsection (1) (aa) I shall refer to the type of limitation favouring the appellant (i e a limitation of an insurer's total liability to all third parties) as a collective limitation, and to the type of limitation which favours the respondent (i e a limitation of an insurer's liability to each individual third party) as an individual limitation.

The pith of the relevant part of subsection (1) (aa) is that -

> "The liability of an authorized insurer -----
> to compensate a third party-----------------
> shall be limited ---------------------------
> to the sum of R12 000-----------------------
> in respect of any bodily injury to or the
> death of any one such person."

Appellant's counsel argued that the words "in respect of any bodily injury to or the death of any one such person" indicate the respect in which the insurer's liability is limited. The limitation, so the argument went, was intended to operate, not in respect of third parties, but in respect of the persons injured or killed.

This entails that its extent depends on the number of persons injured or killed, and not on the number of third parties. The number of third parties is irrelevant; all that is required in order to determine the maximum extent of the insurer's liability in any particular case, is to determine the number of persons injured or killed; in the case of one such person, the maximum liability is R12 000 and it remains R12 000 irrespective of the number of third parties involved.

The problem which I have with this approach is that it does not give effect to all the words of the provision. It overlooks the fact that subsection (1)(aa) speaks of an insurer's liability to compensate a third party and limits that liability in the defined respect. The words "to compensate a third party" cannot be regarded as mere verbiage. They are obviously descriptive of the liability and they cannot be ignored. The only question is : what do they mean?

In the words of section 21(1) a third party means "any person whatsoever" (who has suffered a loss recoverable in terms of the Act). Now,"any person whatsoever" may mean a number of things depending on the use to which it is desired to be put. In section 21(1) e g it may mean "every person whatsoever", or "each person whatsoever", or "all persons whatsoever". Any one of these expressions may be substituted equally fittingly for the one actually used without doing violence to the wording and without affecting the application of section 21(1) at all; it really makes no difference which expression one prefers to use. In subsection (1)(aa), however, the position is obviously entirely different. There, the same degree of flexibility could not have been intended for it is inconceivable that the legislature could have intended anything but a specific and precise meaning to be attached to its description of the liability which it was limiting. It must accordingly be assumed that a specific and precise meaning was intended to be attached to the words "to compensate a third party".

Having said that, I have really also said how subsection (1) (aa) is to be interpreted. The only specific meaning which the words in question can have, is the literal one. What is limited, is the insurer's liability to compensate "a third party". And so construed, the limitation is individual, not collective.

This interpretation of subsection (1)(aa) is based, of course, on the use of "a third party" in the singular. There is a suggestion in The Law of Compulsory Motor Vehicle Insurance by Suzman, Gordon and Hodes (3rd ed) at p 264 that that expression is to be read as including the plural, i e that the reference in subsection (1) (aa) to "a third party" must be read as "a third party or third parties", in accordance with the provisions of section 6(b) of the Interpretation Act, 1957. That is precisely what was done in Du Plooy v Suid-Afrikaanse Onderlinge Brand- en Algemene Assuransie Maatskappy Beperk 1975(1) S A 791(0) at p 799 in respect of the forerunner in Act 29 of 1942 of the present subsection (2) (a). But I do not support that view. Section 6 (b) of the interpretation Act provides that, in any Act, words in the singular shall include their plural unless a contrary intention appears. In the case of subsection (1)(aa) a contrary intention does appear. In order to test this one may compare the effect of the provision as it stands with the effect which it would have if section 6(b) were applied. In dealing with the wording of subsection (1)(aa) I indicated that it manifests an intention to impose an individual limitation on an insurer's liability. If "third parties" were to be substituted in subsection (1)(aa) for "a third party" (which, in terms of section 21(1), would then refer to the insurer's liability to "all persons whatsoever"), the construction and effect of the provision would change dramatically for the limitation would then plainly become collective. It would acquire a new meaning contrary to the one which its actual wording conveys. That would also be the result if "a third party or third parties" were to be substituted for "a third party". A contrary intention, therefore, does appear and section 6(b) cannot be applied.

There is, however, another way in which the same conclusion as to the interpretation of subsection (1) (aa) may be reached. In view of the extremely wide provisions of section 21(1), this Court has repeatedly held that the general object of the Act is "to afford third parties the widest possible protection against loss sustained through the negligent or unlawful driving of a motor vehicle" (per RUMPFF CJ in <u>Union and South West Africa Insurance Co Ltd</u> <u>v Fantiso</u> 1981(3) S A

293 (A D) at p 300). That being the case, this Court has also pronounced that words of uncertain meaning appearing in provisions of the Act in which an insurer's liability is limited, must be interpreted in favour of third parties and against insurers. (A A Mutual Insurance Association Ltd v Biddulph and Another 1976(1) S A 725 (A D) at p 738; Van Blerk v African Guarantee and Indemnity Co Ltd 1964(1) S A 336 (A D) at p 341; Ngubetole v Administrator,Cape and Another 1975(3) S A S A 1 (A D) at p 8). Assuming then that the wording of subsection (1)(aa) is not sufficiently clear to justify the interpretation which I have given it, that interpretation is at least a possible one. It is the

one which favours third parties and it is the one which is to be accepted in preference to the one for which the appellant contends.

Two further matters remain. The first relates to the words "in respect of any bodily injury to or the death of any one such person" in subsection (1) (aa). To these words effect must obviously also be given. Since several passengers in the insured vehicle may be injured or killed in the same incident, thus rendering the insurer liable in respect of the injury or death of each of them, the section provides that the limitation shall operate accordingly. This is not merely stating the obvious, for cases may occur where the same third party is affected by the injury or death of several passengers. In a single incident a woman may e g be injured, and her husband on whom she was dependent, killed and both parents from whom a minor had received maintenance, may be killed in the same incident. Had the insurer's liability not been limited in respect of the injury or death of each passenger the third party would not have been entitled to recover more than R12 000 from the insurer. By giving effect to the words of subsection (1) (aa) as a whole the position, as I see it, is accordingly that an insurer is liable to each third party in respect of injury to or the death of each passenger for a maximum amount of R12 000.

The other matter concerns the decision in Du Plooy's case (supra) and the question whether a departure from the words in subsection (1) (aa) is justified. In that case the forerunner of the present subsection (2)(a) in Act 29 of 1942 was considered. Proviso (ii) to section 11(1) of Act 29 of 1942 contained provisions which were almost identical to those of subsection (2) (a) relating to injury to or the death of workmen as defined in the Workmen's Compensation Act. The liability was limited to R8 000 in respect of injury to or the death of one workman and to R40 000 in all in respect of injury to or the death of more than one (less the amount of compensation to which the third party was entitled). SMUTS J, as he then was, found that the limitation was an individual one according to the literal meaning of proviso (ii), but departed from that meaning in view <u>inter alia</u> of the anomalous result which would flow from a literal interpretation. The learned judge described the anomaly as follows (at p 799 of the report):

> "Indien 'n werknemer slegs beseer en nie gedood word nie sal dit beteken dat die aanspreeklikheid van die versekeraar beperk sal wees tot R8 000 terwyl as hy sterf en afhanklikes het, die aanspreeklikheid van die versekeraar verhoog word tot R40 000. Hierdie sou 'n benadering wees tot die basis waarop skadevergoeding aan afhanklikes toegeken word wat indruis teen alle bestaande beginsels wat daarop betrekking het. In die geval van 'n gemeenregtelike eis om skadevergoeding deur 'n afhanklike word die skade wat hy gely

het gebaseer op die waarskynlike inkomste wat die oorledene sou verdien het indien hy nie onwettiglik gedood was nie en 'n afhanklike word dan vergoed in die bedrag wat hy kon verwag het om van die oorledene te ontvang het. So 'n bedrag kan nooit meer wees as wat die oorledene sou ontvang het indien hy nie gedood is nie maar wel so erg beseer is dat sy werksvermoë hom totaal ontneem is. Indien die vertolking wat mnr. Kotze betoog aan die artikel geheg moet word,aanvaar word, sal dit beteken dat selfs waar 'n werknemer so erg beseer is dat hy nooit weer kan werk nie die geregistreerde maatskappy aanspreeklik is tot 'n bedrag van hoogstens R8 000 maar waar die werknemer sterf van sy beserings is die versekeraar aanspreeklik teenoor sy afhanklikes tot die bedrag van R40 000."

In considering this so-called anomaly care should be taken not to obliterate the essential difference between the right of an injured person to be compensated for his injuries and for any pecuniary loss suffered as a result thereof, and the right of a dependant to recover his loss of support in case of the death of the person on whom he was dependent. Nor should sight be lost of the fact that in the latter case the dependant's claim is subject to deductions (e g accruals to him from the estate of the deceased), which is not the case when a person is injured. Viewed in this manner the anomaly loses much of its significance. And it becomes even less significant if account is taken of the fact that section 22 is by no means a model of consistency, and that equal treatment of third parties is not one of its redeeming features. Reference was made in Santam Insurance Ltd v Taylor 1985(1) S A 514 (A D) at p 529-530 to what BOTHA JA called "favoured" passengers and "specially favoured" passengers, in order to illustrate the differentiation between various classes of passengers. There is differentiation too between passengers who are workmen and those who are not. And even between workmen there is a startling degree of differentiation. An insurer's liability in respect of injury to or the death of a workman is limited to the extent which subsection (2)(a) prescribes, if the workman is employed by the driver or owner of the insured vehicle; if he is not, the liability is wholly unlimited. Thus, if two craftsmen working side by side on a building site were, in circumstances giving rise to liability, to be in-jured by a truck belonging to the main contractor, and if the one craftsman were to be employed by the main contractor and the other by a subcontractor, the former would be entitled to recover from the insurer no more than R12 000 whilst the other would be entitled to be fully compensated. Departure from the literal meaning of a statutory provision on account of anomalous or un-reasonable results is only justified if the Court is satisfied that such results were not intended (Bhyat v Commissioner for Immigration 1932 A D 125 at p 129). In view of the foregoing I am far from satisfied that

that can be said of the result mentioned by SMUTS J. There is accordingly no reason for departing from the literal interpretation of subsection (1)(aa).

Having interpreted subsection (1)(aa) against the appellant, it is unnecessary to consider the possible effect of that provision on the interpretation of sub - section (2)(a).

The exception was rightly dismissed and the appeal is accordingly dismissed with costs.

J J F HEFER JA.

RABIE,CJ.)
JANSEN,JA.) CONCUR.
HOEXTER,JA.)
NESTADT,AJA.)