S.-S.33967—1968-69—1,000.

J. 219.

In the Supreme Court of South Africa.
In die Hooggeregshof van Suid-Afrika.

(Appellate ~~Provincial~~ Division.)
(Provinsiale Afdeling.)

Appeal in Civil Case.
Appèl in Siviele Saak.

WILLIAM MARAS *Appellant,*

versus

SUSANNA MARGARETHA MARAS *Respondent*

Appellant's Attorney F.S.Webber & Son
Prokureur vir Appellant

Respondent's Attorney
Prokureur vir Respondent Kriel & Close

Appellant's Advocate H. Snitcher Q.C.
Advokaat vir Appellant S B Krige

Respondent's Advocate
Advokaat vir Respondent J J Fagan

Set down for hearing on
Op die rol geplaas vir verhoor op Monday 28th September, 1970.

Coram: van Blerk A.C.J, Rumpff, Wessels, Jansen J.J.A.
et Muller A.J.A.

1,3,5,7,10

CPD

9.45 am — 11.00 am
11.15 am — 12.30 pm

C a V.

Order on 20-11-70. per Jansen J.A.: appeal is dismissed with Costs. Order as per written Judgment thereof.

REGISTRAR.
20.11.1970

Bills Taxed.—Kosterekenings Getakseer.

Date. Datum.	Amount. Bedrag.	Initials. Paraaf.

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

WILLIAM MARAS ..... APPELLANT
(Defendant a quo)

AND

SUSANNA MARGARETHA MARAS ..... RESPONDENT
(Plaintiff a quo)

Coram: Van Blerk, A.C.J., Rumpff, Wessels, Jansen, JJ.A., et Muller, A.J.A.

Heard: 28th September, 1970 Delivered: 20th November, 1970.

JUDGMENT

JANSEN, J.A.:-

The appellant and the respondent met each other early in 1967. They were then both attending the Summer School at the University of Cape Town. He was a bachelor of 51; she, a woman of 25. They fell in love, and after a short engagement were married on the 15th August 1967. Their first and only child, a boy, was born on the 22nd of June 1968. By that time, however, serious rifts had

appeared ..... /2

appeared within the lute, culminating in a firm of attorneys, acting on behalf of the respondent, informing the appellant, by letter dated 2nd August 1968, that the respondent proposed instituting an action for restitution of conjugal rights and, failing compliance therewith, a decree of divorce, custody of the minor child and maintenance for herself and the child. This action, however, did not materialize as shortly thereafter the parties were again reconciled, in the sense of agreeing to an earnest endeavour to eliminate causes of friction. But this was not to succeed permanently. On the 28th March 1969 the respondent left the common home, taking the child with her, and on the 3rd of April 1969 she issued a combined summons claiming relief similar to that adumbrated in the letter of the 2nd August 1968, but with an additional alternative claim for a judicial separation. The alleged conduct by the appellant, relied upon as constituting a constructive desertion or, alternatively, grounds for a judicial separation, was the following:-

"(i) Defendant persistently finds fault with Plaintiff, bickers and argues with her,

criticizes ..... /3

criticizes her, humiliates her and makes hurtful and deprecatory remarks regarding her capabilities as housewife and cook;

(ii) Defendant abuses Plaintiff and has on occasions assaulted Plaintiff by striking her in the face and pushing her around;

(iii) Defendant constantly criticizes Plaintiff over her handling of money and keeps her short;

(iv) Defendant fails to treat Plaintiff as a wife, to discuss matters with her and to take her out;

(v) Defendant sulks at length and refuses to talk to Plaintiff for days on end when displeased with her;

(vi) Defendant has frequently told Plaintiff that he wishes her to leave."

Save for admitting "occasional arguments and differences of opinion, not uncommon among recently married couples" "and slapping respondent once in the face, immediately after the respondent had slapped his face, during an argument on the 24th March 1969, the appellant in his plea, denied all these allegations and stated that he was "anxious to receive" the respondent "and to resume cohabitation with her as soon as possible."

The matter was heard in the Cape of ~~Good Hope Provincial Division. The Court found the~~ respondent's allegations in the main to have been established

and ..... /4

and granted a decree of judicial separation with the ancillary relief claimed - it being common cause at the end of the trial that the respondent had failed to prove an intent by the appellant to terminate the marriage. The present appeal is against this order.

The respondent's case rested on the evidence of herself, of her father (Mr. Bruwer), and Dr. Louw, a psychiatrist, who had treated her from the 5th of January 1968 to the 10th of April 1968. Opposed to this, and in many material respects acutely at variance with it, as adumbrated by the pleadings, was only the evidence of the appellant himself. These conflicts the Court a quo resolved against the appellant:-

> "On the issue of credibility I have no doubt whatever that the truth lies with Plaintiff, her father and Dr. Louw. The demeanour of all these impressed me ....."
>
> "On the other hand Defendant's demeanour was far from impressive. He was evasive and shifty under cross-examination..... Defendant's evidence in certain respects is obviously untrue."

In..... /4 a

In challenging to some degree, this unqualified acceptance of the evidence of the respondent and her father, Mr. Snitcher, on behalf of the appellant, contended that Mr. Bruwer endeavoured to conceal to some extent his contemporaneous knowledge of the difficulties between the parties and to minimise his own contribution thereto, and that it emerges from the respondent's own evidence that she was prone to exaggerate, lacked candour on occasion and was untruthful in a few instances. It was suggested that the appellant's genuine desire and hope that the parties should resume cohabitation, had precluded a too vigorous an attack upon the respondent's credibility at the trial. However, a careful reading of the record, with all the criticisms in mind, would indicate that there are only two issues in respect of which the respondent could, perhaps, be seriously faulted. The first relates to her income prior to her marriage. In cross-examination she conceded that she had once told the appellant that she earned considerably more

than ..... /4 b

than was actually the case, and she explained that she had done so "because I telephoned the University to find out what I had received and they gave me the wrong information." This presupposes that she did not then know how much she had earned, and she had some difficulty in explaining her ignorance. No doubt the fact that she was not dependent on her salary (as will appear later), which was paid into a savings account, and that deductions were made for income tax purposes, had some bearing on the matter. The Court a quo was of the view that she "may well have inflated her income" but that she "may not have been aware of her precise salary." The second respect in which the respondent may perhaps be faulted relates to a visit that a Father Pietersen paid to the parties. It was suggested to the respondent in cross-examination that on an occasion (the date not being specified, but apparently while the parties were living in a house in Orchard Street) she had feigned unconsciousness to avoid seeing Father Pietersen

and ..... /5

and quite unnecessarily so frightened the appellant that he called in a doctor. The respondent first replied that the appellant had hit her, but then changed this to say that he had pushed her, so that she fell and fainted. The toning down of her allegation is, however, quite consistent with only a momentary lapse into exaggeration, quickly rectified, and hardly to be considered as a significant disclosure of general untruthfulness. The allegation that she had fainted, is, however, somewhat puzzling as this incident was never part of the respondent's case nor was it pursued further in cross-examination. Bearing in mind that otherwise consistent excellence of the respondent as a witness, it would nevertheless be impossible to find that the Court a quo erred in its assessment of her general credibility. As to Mr. Bruwer, the criticism directed at him may well not be completely without foundation, but his apparent inability to remember certain matters and apparent ignorance of others is certainly not inconsistent

with ..... /5a

with bona fides.

On the whole it is clear that the strong findings on credibility by the Court a quo must be accepted and that in consequence the history of this unfortunate marriage must in the main be derived from the respondent and her witnesses.

Initially, the marriage was relatively happy. The parties resided in a flat in Grosvernor Square, Rondebosch, where all their meals were provided by the restaurant. The sum of the respondent's duties as housewife was apparently to make the early morning tea (a chore soon taken over by the appellant) and run the household on an allowance of R350 per month. Out of this she had to provide for the rental of

approximately .. /6

approximately R280 (inclusive of meals) per month, expenses in regard to laundry, wines, chemist supplies etc., and her personal requirements (including clothes). She was able to continue as a junior lecturer at the Stellenbosch University and her studies for a doctorate in the classics. She saw her parents almost every weekend - they visited her and often had lunch with the parties in Grosvernor Square, or the latter visited them at their flat in Paarl.

In about October 1967, the respondent discovered that she was pregnant. She suffered from resulting nausea: "I could not eat or drink; I could eat literally almost nothing - ..... That whole business fell through about tea making and getting up early". She could, obviously, not continue lecturing and was forced to resign. The nausea continued until approximately the end of December 1967 and later occasionally recurred. During this period the appellant -

"was very kind. When Dr. Claassen the gynaecologist, advised us that it would be a good thing for me to get away from the confinement

of the ..... /7

of the flat and the aloneness of the flat he agreed kindly that I could go to my parents".

The latter regularly spent the month of December in a house at Hermanus, and, as so often before her marriage, the respondent joined them there on the 1st of December. She remained there until about the 27th.

When his commitments in Cape Town allowed, the appellant went to Hermanus and he actually stayed over for Christmas.

The respondent's return to Grosvernor Square at the end of December heralded a period of stress, which was to tax the marriage to breaking point and culminated in the issue of summons by the respondent in August. The parties had some time before decided to take a house with the idea, inter alia, of enabling the respondent to gain some experience of actual housekeeping. During the respondent's absence the appellant had located a suitable house, in Orchard Street, Newlands. The appellant obtained a leave and the parties moved there on the 6th of January 1968.

The respondent was now for the first time burdened with all

the ..... /8

the responsibilities, anxieties and chores attendant upon the running of a house, with a swimming pool, as opposed to a flat, with meals provided. Likewise, the appellant was for the first time (apparently) to be made fully aware of the expenses involved in maintaining the standard of living to which they were accustomed in the sphere of such altered circumstances.

Physically, the respondent was then much better than she had been during the previous months but a degree of tension and depression that had manifested itself earlier, had become much worse. Dr. Claassens, her gynaecologist, referred her to a psychiatrist, Dr. J.C. Louw, who saw her for the first time on the 5th of January 1968 (viz. the day before the parties moved into the house in Orchard Street). According to Dr. Louw:-

> "when I first saw her, and for the majority of interviews following that, her mood was one of being despondent, depressed, there were numerous times when she cried in my presence".

Treatment by Dr. Louw, which involved inter alia the prescription of a tranquilizer and later an anti-depressant,

was to ..... /9

was to continue until terminated by the appellant (under circumstances to be mentioned later) at the beginning of April.

The respondent's mental state upon her return from Hermanus, despite her spending almost the whole of December with her parents, must no doubt largely be attributed to her pregnancy and her perhaps unconscious fear of the inexorable approach of the ordeal of childbirth. She obviously needed sympathy and tact - which the appellant, apparently as a result of a lack of sensitivity and understanding, was incapable of proffering. This, understandably, led to a sense of grievance on the part of the respondent. A lack of rapport, however, seems to have been inevitable in view of the difference between the parties in age, background, temperament, habits and opinions.

A bachelor of 51 when he met the respondent, the appellant may well have been described as a self-made man of the world. He was born in Poland and received a polytechnic education, directed at mechanical engineering. When Poland fell in World War II he made his way to France and was

there ..... /10

there trained as a pilot. When France in turn was overrun, he made his way to England. Ultimately, after the war, in 1948, he came to this country, acquired a small garage and then, financially, went from strength to strength, branching out into the property and hire purchase discount spheres. At the time he met the respondent he was a man of considerable wealth. He was of the Roman Catholic faith and despite his sojourn in this country spoke no Afrikaans. One would have thought that he had very little in common with the respondent. She came from an Afrikaans, Dutch Reformed home with strong academic leanings. Her father, a former headmaster of an Afrikaans school, was head of the Training College at Paarl; she herself had obtained her M.A. degree at Stellenbosch in 1964, with Latin as her major subject, and had been appointed a junior lecturer whilst continuing her studies for a doctorate. She was an only child, very attached to her father, confessing to have had no serious romantic involvement before meeting the appellant. She had obviously led a sheltered life.

At the ..... /11

At the time she met the appellant she, it is true, had her own set of rooms in Stellenbosch and her own motor car, but despite her earning R186.50 per month her father was paying her rent and still supplying her with pocket money. Her salary went, apparently intact, into a savings account, which at the time of her marriage stood at about R3,000.00. She regularly went to her parents at Paarl during weekends and often spent holidays with them.

The parties were undoubtedly set in their ways. The appellant was painfully neat and an early riser; the respondent was neither. Their views on the proper role of a wife differed substantially. He envisaged a woman devoting herself exclusively to her husband and home, a wife sharing breakfast with him before he left for his office, a wife always there to answer when he telephoned and to welcome him home on his return in the afternoon. The respondent, however, did not envisage marriage and motherhood as being an obstacle to the continuation of her studies and taking part in the proceedings of the Classical Association, or as affecting her relationship with her parents.

She ..... /12

She thought that "you could be a good housewife and be a good mother and have a further interest as well". The appellant did not share her enthusiasm for gramaphone records and books, and was to prove reluctant to spend money on them. It is true that the appellant did make an effort to acquaint himself with the respondent's chosen field of study but this was to prove unsuccessful, in the sense that the appellant was soon te feel, rightly or wrongly, that the respondent was rather patronizing in regard to his efforts. The appellant's interest (apart from his business) centred on his home. At the time of his marriage he had a plot at Constantia and during the first half of 1968 he took the initial steps towards building their future home there, having plans drawn, etc. He was happy to spend his week-ends working on the site, tending the trees he had planted and making improvements. The respondent did not find this activity "very entertaining" and preferred not to accompany him. In spite of continued, regular visits by her parents over the weekends, the appellant's absences were soon to cause her to believe that she was being neglected by the

appellant. ..... /13

appellant. Money was also a subject of potential hazard to the marriage. The appellant did not mind spending large sums upon what he considered to be investments and having a resale value, but he preached economy in respect of the housekeeping. Thus he gave the respondent an engagement ring said to be worth R4,000.00 and was later to offer to buy her a fur coat for R900.00; he was to build a house valued on completion at R100,000.00 (including the land), to purchase antiques valued at between R5,000.00 and R7,000.00, Persian carpets for R5,000.00, and paintings valued at R10,000.00 - but he was reluctant to increase the respondent's allowance by R50.00 per month when they moved into the house in Orchard Street. The respondent was to resent what she considered to be this "stinginess" of the appellant in respect of the housekeeping and herself, particularly when he was meanwhile, for example, buying, well in advance, the expensive Persian carpets.

The aforegoing does not profess to be an exhaustive catalogue of the elements of initial incompatability, which were to be exposed after the parties

moved to Orchard Street, but it will at least serve to illustrate the great need then for considerable adjustment and adaptation by the parties if the marriage was to succeed. The inherent difficulties were no doubt not such that they could not have been overcome by understanding, patience and tact. These qualities were, however, sadly lacking. The appellant was an emotional and excitable person, often acting impulsively and explosively. In certain respects he lacked sensitivity and understanding. He was intolerant of what he considered the respondent's failings and believed he could "make" her a good housewife. He made moral issues of being neat and getting up early, and was inflexible in his approach to housekeeping expenses. On the other hand, the respondent was a spirited woman not prepared to be dominated or to adapt herself to any marked degree to her husband's ideas. No doubt her physical and mental state during the first half of 1968 aggravated the position, as also the presence of her parents who came to visit her on most weekends. They were a potential source of annoyance to the appellant as a result

of the ..... /15

she mentioned to the appellant that the rental of R200 left a balance of only R150 and that she doubted whether, with the additional expense of a maid and the upkeep of the swimming-pool, that would suffice. In her own words:-

> "And he was surprised, he was very surprised. He almost immediately got excited and said other people were living on half of that amount with twice as many expenses, and it should be quite enough."

She begged him for an additional R50, in the end being reduced to tears, and he then, eventually, said "it was all right." The additional amount was, however, only to be paid as from the beginning of April. As the appellant had himself paid the January rent for the Orchard Street house, the only rent the respondent was to pay for January was R54 for 6 days at Grosvernor Square, leaving a balance of R146 at her disposal. Spreading this sum over the period January - March she thereafter, in effect, worked on the basis of an allowance of R400 per month. The appellant had apparently not fully realized this, for on the 3rd of April a casual remark by the respondent brought it to his attention with catastrophic result:-

"I said ..... /17

> "I said to my husband that I had seen a copper thing that morning that I would Like to buy for the house, and he said: Buy it. And I said no, I can't, I have overshot my allowance somewhat last month.
> Did you say that in a serious vein or a jocular vein? ..... No, it was quite in a playful vein. I did not think for a moment it was going to cause anything. And he was immediately furious. He stormed out of the room, and did not say a word. And I ran after him and I said: What is the matter now? What on earth is the matter? And he said: How can you spend more? You only get R350."

She reminded him that he had "promised" in January to increase her allowance by R50. He at first denied this and then said:-

> "I have changed my mind. You don't need any more, you can live on less than that. I will teach you to be a thrifty housewife."

Later that evening he was still furious and told the respondent inter alia that he would sleep better if she did not sleep in his room. As a result the respondent spent the night in another room and locked herself in. The next morning:-

> "He created a scene in the presence of the servant, which was most humiliating. He shouted that it was my duty to come and make breakfast for him. And I was very

scared, ... /18

> scared, I was in a very bad nervous condition at the time. And he did not make it any better after that. When he insisted that I come out of the room, and When I would not, he collected all the keys from all over the house trying to get in, and I was getting more and more upset. It was certainly unexpected and uncalled for, and, as I say, it was a very embarrassing scene, that I had to face the servant afterwards. Were you in fear? ..... Yes, I was."

Meanwhile the respondent was undergoing treatment by Dr. Louw. He had suggested, during January, that he would like to see the appellant as he felt that the relationship between the parties contributed to the respondent's mental condition. According to Dr. Louw the appellant, however, "felt that he had nothing to do with her problem and could not see why I wanted to see him in this regard." On the 27th of March the appellant telephoned Dr. Louw to enquire why the respondent showed no improvement, Dr. Louw then again said that he would like to see the appellant, as he thought the "disagreement" between the parties affected the respondent, but the appellant "seemed to feel that he had no contribution to the problem; it seemed to be beyond his comprehension that anything he might do could affect her illness." Dr. Louw

then ..... /19

then became angry and terminated the conversation. The appellant's reaction was to forbid further treatment by Dr. Louw. The respondent, however, saw Dr. Louw again on two more occasions, the last being on the 10th of April 1968. Dr. Claassens was informed of the appellant's attitude and he telephoned the respondent's father, an old acquaintance, and told him about it. The Sunday thereafter (presumably the 7th of April) the respondent's parents visited the respondent at the house in Orchard Street. During the absence of the appellant, who was working on the plot in Constantia, the respondent told them of the strained relations with her husband.

Thereafter the respondent's mother came to stay with the parties. It is not clear when she actually arrived, but she had been there for some days, apparently, when another serious quarrel occurred between the parties. This was on Friday night the 19th of April, and it arose from the respondent's intention to attend a meeting of the Classical Association Committee the next day. In the course of the quarrel the appellant said inter alia:-

"Why do ..... /20

> "Why do you keep on going to these things? You are a housewife now ..... I'll make you forget all your Latin and Greek ..... I'll make a proper housewife out of you. I'll teach you to do things the proper way ..... Give me back my rings. We are no longer married."

The next day, Saturday the 20th of April 1968, the appellant telephoned the respondent's father at Paarl and told him abruptly and laconically: "My marriage to your daughter is a failure." No doubt because of his then awareness of the matrimonial troubles, Mr. Bruwer immediately jumped to the conclusion that the marriage was breaking up. All that he said was "I will come immediately," which he did. Mr. Bruwer concedes that he was indignant and hurt and under emotional strain. That afternoon he managed to see the appellant alone and told him inter alia:-

> "When the first time you struck your wife it must have been the lowest moment in your life ..... If a man prevents his wife from getting medical care that has been prescribed or advised for her, then it is a terrible thing to take onto your conscience."

The appellant kept himself under control and reassured

Mr. Bruwer ..... /21

Mr. Bruwer that he was not deserting the respondent.

Mr. Bruwer did not, so it seems, realize the appellant's resentment and remained there until the following afternoon (Sunday). He returned to Paarl but Mrs. Bruwer remained. That night the appellant said to the respondent:-

> "Your father must stop interfering in this marriage. You will tell him not to set foot in this home unless I invite him."

She replied that she was not prepared to carry a message like that to her father. The next day (Monday April 22) the appellant telephoned Mr. Bruwer and abruptly said "I want you not to come to my house again." As to Mrs. Bruwer, reference may be made to the following passage from the respondent's evidence-in-chief:-

> "And then, what happened as regards your mother? ..... Well, two days after my father had been forbidden the premises, he told me that my mother was to leave. Actually, he asked me: 'Hasn't your father come to fetch your mother today?' So, I said no, I was genuinely surprised, I said 'I mean, you know it was the advice of the doctor that it would be a good thing for me to have my mother here at

this ..... /22

this stage.' But he insisted that she must leave; the next morning just before he left, he again stood in the door and he said: 'Your mother must leave this house today" - 'that is my last word." And when he returned that night she was still there, he refused to come to dinner and he sulked the whole evening and after we had gone to bed there was a terrific outburst again and he said: "Your mother must get out of this house, she is driving me crazy. I will get a heart attack. I will have her fetched by the Police, I will have her evicted, I will get an order from the Supreme Court." And then he rushed down the passage and he went to sit in the lounge, for some time. Well, anyway, the next morning he quite calmly pointed out to me that a Court order would be an exceedingly unpleasant thing, because of unpleasant publicity and that, moreover, my father would have to pay, it would be about R400 or R500 and that he would not like that very much."

Mr. Bruwer fetched his wife on Thursday the 25th of April. They did not again visit their daughter at her home until after the 1st of June, when the appellant having relented, suggested that the respondent should phone her parents and ask whether she and the appellant could have Sunday dinner with them at their home in Paarl the next day. This was arranged and, in consequence, the breach between the appellant and his parents-in-law was, at least superficially, restored.

It will have been noted that in his conversation with the appellant on the 20th of April, Mr. Bruwer raised two matters: firstly, the appellant striking his wife and, secondly, preventing her from getting medical care. As to the first, it is not at all clear to what he was referring. His own evidence in this regard is far from satisfactory, nor did the respondent in her evidence-in-chief, complain of such an incident. Whatever incident Mr. Bruwer had in mind may in fact have been so trivial that the respondent had forgotten about it at the time of the trial as a ground for complaint. On the other hand it could relate to the so-called Father Pietersen incident, but this is no more than speculation.

The ..... /24

The second matter raised by Mr. Bruwer on the 20th of April, viz., preventing the respondent from receiving medical care, was clearly a reference to the appellant's stopping the respondent from continuing treatment by Dr. Louw. At about this time the appellant, however, arranged that she should consult Dr. Cooper, also a psychiatrist. Whether this was as a result of Mr. Bruwer's intervention is not clear, but be that as it may, Dr. Cooper treated the respondent during April and thereafter.

During ..... /25

During the appellant's vehement reaction to the continued presence of his mother-in-law after the 22nd of April, he also at some stage told the respondent, apparently because she was not prepared to persuade her mother to leave, the following:-

> "You are being disloyal to me. I will punish you. You will not get R400 next month."

The appellant in fact carried out his threat and only deposited R350 to the respondent's account on the 1st of May. The respondent upon discovering this decided not to pay the rent for May and on the 2nd of May typed a letter addressed to "Dear W." and signed "Yours Sincerely, Suretha" setting out in detail that R425 per month had been required to run the household from January to April inclusive, and ending upon the following note:-

> "As there was on 1/5/68 deposited into my account R350 (less ± R45 overdraft from April) = R305, it will be clear that, since R225 on average is needed for food, personal requirements and sundries the R200 could unfortunately not be paid from this amount this month."

That evening she handed this letter to the appellant. He appeared to read it and then tossed it on the floor saying,

"You ..... /26

"You stupid little girl." As to what followed a few days later, the most charitable construction to be placed upon the appellant's conduct is that he did not realize that the respondent actually intended not to pay the rent, and that it came as a/ shock to him when the landlord telephoned him to enquire why it had not been paid. The appellant was extremely angry and said "all sorts of nasty things" to the respondent:-

> "Well, he said he could have me fetched, he would call the Police and have a criminal charge laid against me and that it was his money and not my money to do with what I like, I must pay what he ordered me to pay, I must remember that I had nothing when he married me.
> Did he refer to your background in very strong terms? ..... Yes, he did.
> Do tell the Court - I know it is not pleasant? ..... Well, he said I lived in a semi-slum when I married him; that I had earned a miserable salary and that I had only three dresses when I married him and that now I had a wardrobe full, all for his money, and that he would tell the landlord that he had provided the money and that if I don't pay it I will be sued."

Elsewhere in her evidence the respondent also gave this version of what the appellant said:-

"Do you ..... /27

> "Do you realise that it is my money, it is not yours to spend as you like? Do you realise that you are stealing R200 from me, and that I can have you fetched by the Police? I could put up with so much and no more of your parents; then I had to threaten you with Court and the same would happen to you; and I won't sleep tonight, you can sleep in another bedroom, I sleep better if you are not there."

(It should perhaps be mentioned that this passage appears in the context of what was said when the respondent gave the appellant the letter a few days before, but upon analysis of the record it is clear enough that it relates to the appellant's reaction upon hearing from the landlord. Counsel for the appellant has suggested that this was to attempt to mislead the Court, but it is, in my view, more consistent with bona fide momentary confusion). The respondent, having thus been ordered out of their bedroom, or so she understood the appellant, then moved to the spare room. She was not again to share a bedroom with the appellant before December of that year.

A period of extreme tension now followed. There were numerous quarrels and recriminations, inter alia about the respondent's parents who were then still forbidden the house. The ..... /28

The respondent told the appellant that she could not "go on on this inimical footing with my parents." The appellant "wound himself up terribly" and said:-

> "Then why do you not go back to Paarl? ..... I'll make you go back to Paarl, I'll make it so unbearable for you here that you will have to go back to Paarl. ..... There is an unnatural relationship between you and your father - homosexual or something, all this kissing. Why do you not go and live with him?"

On another occasion he told her:-

> "I am the boss of this house, not you and your father."

He denied that he had ever promised (as in fact he had done) that if the child was a girl she would be christened in the Dutch Reformed church. He would agree that they should take another house in Claremont and then, after a quarrel, would announce:-

> "we are no longer going into the new house, you don't deserve anything but a single room, to live in a single room."

However, some improvement in the situation came about towards the end of May, when, as mentioned above, the appellant took the initiative in restoring, superficially at least, relations

with his ..... /29

with his wife's parents.

Their child was born on the 22nd of June 1968. On the 1st of July the appellant effected a transfer of their menage to the home in Claremont (referred to in the evidence as Dr. Moolman's house). The respondent was then still in the nursing home, but her parents assisted the appellant in moving their possessions.

Upon her return home (i.e. to the new home in Claremont), the respondent and the infant were settled in a separate room. She was accompanied by a nurse who remained for a time to assist her. This arrangement was in accordance with a previous discussion between the parties, when the respondent had suggested that as the maid would be going on leave and the appellant would not be having his meals at home while she (the respondent) was in the nursing home, she would probably be able to contribute something from her allowance towards payment of a nurse.

A week after returning home, the respondent took ill and was in bed "running a temperature of about 106 occasionally." She,

it would ..... /30

it would appear, did not then in fact have enough from her allowance to pay the nurse. As the appellant was at that stage avoiding the respondent and not coming to her room, the result of some quarrel that had again occurred, she wrote him a note asking him to settle the nurse's account. The result was, in the respondent's own words:-

> "And that brought him in, on the Monday morning before he went to office, and he said to me: 'I demand to know what you did with the money I gave you last month and since you came out of the Hospital. You will pay Sister Erasmus. That is my last word.' And then he went out; and I tried to settle matters with Sister as best I could, and I was ill in bed but I feverishly set out to working out lists, accounting for each separate item. And after he had received it, he said to me: 'I can't take your word for this. I will want to see the chits in future', which I proceeded to do during the next 5 or 6 months; every month I handed him a typed list, accounting for every item, accompanied by every chit."

In the end the respondent somehow did pay the Sister herself.

During July there was no improvement in the situation. Even the baby was to become a bone of contention. Overly concerned over the baby, the appellant

was apt ..... /31

was apt to criticise violently the respondent's care and handling of the infant. Matters soon came to a head:-

> "My husband called me to his room one evening and said very solemnly: 'Suretha, we are getting nowhere. If you are not prepared to obey me, we will have to get a divorce.' He was quite calm. Things had really been going from bad to worse, an untenable situation and I agreed with him. I said: 'Yes, I think that is the only solution'. The next morning, before he left for office, he called me from the baby's room again and he said: 'Is your decision of last night final?' I said 'Yes'. And he said: 'I'll be waiting for word from your attorney then'. I think that was his expression."

The result was the attorney's letter of the 2nd of August, mentioned at the outset of this judgment.

It would seem that the respondent's mother was staying with the parties at the time, but be that as it may, the appellant asked an aunt of the respondent, with whom he apparently got on reasonably well, to intervene on his behalf. He even consulted a marriage counsellor. Despite his previous attitude he apparently did not really want a divorce. It was then agreed by the parties that they would try again to make the marriage work. The

respondent .... /32

respondent drew up a list of guiding principles which the appellant accepted. This document, dated the 5th of August 1968, is to some extent a reflection of the many difficulties that had gone before, not all of which have been detailed above. It reads as follows:-

"1) We go to Dr. Cooper when necessary to discuss our problems together.

2) Try to talk to me, also about your problems when you come home at night.

3) Do not talk in an excited way if you can help it - expecially not where someone else can hear it. I'll try to do the same.

4) Do not leave me alone for weekends on end; take me and the baby out, please!

5) Let us agree that whenever one of us goes out with one car the key of the other car is left on the table in the foyer in case it is needed.

6) Try not to interfere with my personal habits, unless they positively irritate you or infringe on your personal liberty. (heater, wine glass etc!) I undertake to try and do the same.

7) I see to the household and the cooking generally to the best of my ability in return for the house you provide and the money you provide it with. Neither of us is doing the other a favour. Try not to create tension by withholding this money from me.

8) Try not to make negative comments about my housekeeping and cooking unless absolutely necessary (e.g. don't complain about the stew - I do not make it to irritate you; for the sake of variety and economy.)

9) What I do with my sparetime is my concern -

reading, ... /33-

reading, studying, sewing ..... Accept (try) that my interests are in the main not the ordinary feminine ones.

10) I am free to see my parents here, and go to see them, with the baby when I like - I'll be reasonable! try not to say something nasty about them to me, it hurts and I am inclined to sting back.

11) If anything bothers you, SPEAK UP! (within 2 hours)."

Two days later, on the 7th of August, the respondent wrote an emotional reply to the attorney's letter of the 2nd of August:-

"I am in receipt of your letter of 2 inst. and note the contents thereof.
The contents are nonsensical and nothing short of impertinence or gross discourtesy on your part towards happy married people. You are out to create hostility because you live out of hostility.
Keep away!"

That very morning, before leaving for his office, the appellant had also written a peculiar note to the respondent:-

"My dear Suretha,
It was a great shock to me to see it this morning at 2.00 a.m. your extremely bad behaviour towards our son and me. I have seen several times before similar occurrences but this one was the most violent. You told me that the son has only 4 vests you could not change his wet clothing, that I did not give

you ..... /34

> you enough money. I warn you very solemnly and ask very kindly to treat our son with motherly tenderness he deserves.
> Notwithstanding that you have apologised for your (near [illegible]) behaviour twice and I accepted your apologies I wish to make it clear that I shall not hesitate to take such a step in order to protect our son as I may be advised.
> Love."

It is clear that there could have been no real justification for this effusion or its tone. It must no doubt to some extent be attributed to the appellant's lack of sensitivity and understanding as apparent from the following extract from his cross-examination:-

> "Now, surely Mr. Maras, could you expect your wife to accept such a letter from you? ..... It wasn't a letter, it was a note which I just wrote in a hurry before leaving for office, and I do not see much wrong with that letter. I could have found different words or more tender words ...."

In the spirit of the agreement to try again, relations were somewhat better for some months. The respondent refrained from informing her parents of any disagreements between her and the appellant. The appellant assisted the respondent to the extent of looking after the baby during the early morning, before leaving for the office,

so as to ..... /35

so as to enable the respondent to get some sleep after feeding the baby. Occasionally, however, there were incidents relating to the respondent's untidiness and handling of the infant. "The old ghost, the money problem was still there all the time," despite the appellant now paying the rent of R180 himself, and giving the respondent R200 per month, in two equal cash payments, for the housekeeping and herself, in addition to paying the telephone account, the electricity account in excess of R10, and the respondent's motor car expenses (but not including petrol). The respondent found this not to be enough and was forced to cut down on her personal expenses, spending a total of only about R18 to R20 for this purpose during the rest of the year.

At the end of November things "went terribly wrong again" because the respondent "was again R6 over (her) allowance." Also when, in December, respondent told the appellant that she really didn't have enough money for clothes, as he could see for himself from the chits relating to the housekeeping, he simply asked her why she did not buy some for herself, as she had plenty of money (a

reference ..... /36

reference to her savings account). He even suggested that the chits were false. Nevertheless, at the beginning of December the parties again started sharing a bedroom, as the respondent thought it time for the baby to sleep in his own room. However, the question of getting up early again caused trouble. The appellant had apparently resumed urging the respondent to get up early, viz. at 7 a.m., and because she did not, became furious. About this time, according to the respondent:-

> "..... there was really a very ugly scene as a result of this. He was on the point of leaving for office and he said: 'If you don't get up at 7 o'clock tomorrow you will see what will happen to you'. I tried to keep him back, I clutched him by his arm and (this is in the door of the baby's room) he walked me across the room - he pushed me across the room and he pushed me down on the bed and he started slapping my face. Well, I am afraid, instead of just letting him go I still grabbed his arm and I also got hold of his tie and that made him furious and he grabbed my thumb and he twisted it so that it cracked and we thought it had broken, and, I mean, it was all over a trivial ..... ."

The parties spent 4 or 5 days over Christmas (1968) with the respondent's parents at Hermanus,

but it ...../37

but it would seem not without some unpleasantness beforehand. As an instance of the appellant's inclination "to use situations to punish" her, the respondent says:-

> "For instance, about this Hermanus holiday that I have just mentioned; suppose we were to leave on the 18th of December, then a week before that there would be a row and he would say to me: 'Your behaviour is such that I cannot go with you to Hermanus, you had better tell your parents that we are not coming'. Which put me really into an intolerable situation, because I could not let my parents know without telling them that there had been a row, and then we would have the whole circle starting again about my parents interfering and so on."

The new residence being built in Constantia was now nearing completion and at the end of January 1969 the parties moved back, temporarily, to Grosvernor Square. On the 14th of March they were able to take occupation of their new house.

This was clearly not a joyful event. Relations were still far from cordial, as a few instances may illustrate. In January, having again consulted a marriage counsellor, the appellant had offered to pay for expensive

items ..... /38

items of clothing should the respondent ask for them. Her real complaint, the insufficiency of her allowance for her ordinary needs, could, however, not be removed by the prospect of occasional expensive gifts upon application. The temporary move back to Grosvernor Square, where there was no housekeeping relating to meals etc., served to emphasize this. Asked in cross-examination how much the appellant then gave her, the respondent replied:-

> "Well, actually he was under the impression that I needed no money at all seeing that there was no housekeeping and he kept saying: But you have got money left over from January, because we left on the 27th of January, surely you have got a lot of money left? And then I occasionally got R5 here and R10 there and so on. That was while we were in Grosvernor Square."

In February the respondent told the appellant that she thought it would be irresponsible to have another child, as to try and bring up a child "in so much unhappiness would be unfair to the child." Even the allowance to be made to the respondent in the new house, viz. R300 in view of inter alia the employment of additional servants, was only determined after discussion with the marriage

counsellor ..... /38 a

counsellor. The very house itself was the result of planning which had occassioned dispute. It can be inferred that the preceding months of unhappiness had robbed the respondent of enthusiasm for the new home.

At the time the parties took occupation of the house, circumstances were still chaotic. In some respects the house was as yet unfinished and carpenters, tilers and glaziers were still on the site. The respondent felt that it might be wise if they went away for a couple of days and suggested this to the appellant:-

> "I said to him: 'Don't you think it would be better if we go away for a few days' and he said 'If you go to Pa, you do not come back'.
> Was he upset that you were going to leave the very moment you moved into the house, just when he needed you most? He was angry at that? .....
> Well, he was obviously angry if he said that."

The appellant, one morning, was most unpleasant to the respondent, in front of her aunt and the servant, about having no brown bread to eat. At some stage (whether

before ..... /38 b

before or immediately after the quarrel about the cupboard, to be discussed presently, is not clear) the respondent again consulted the marriage counsellor, who advised "that it would be a good thing to be apart for a few days, to let things calm down." The appellant agreed that she could go to her parents for a few days but would not allow her to take the child. In any event the culminating crisis was precipitated by the arrival of a sewing cupboard, or "working-top" with doors, that was to be built into the

family ..... /39

family room. The respondent had, in collaboration with the architect, designed it herself. The appellant thought it took up too much room and said that the doors should be taken off; the respondent insisted that the doors remain. In effect, the respondent wanted the working-top with doors or not at all; the appellant wanted it without doors or not at all. In the quarrel that followed the appellant insinuated that the respondent had wasted R450 of his money and had conspired with the architect behind his back. At some stage the respondent retaliated by saying more or less the following: "If that is your attitude, here is your ring; sell it to pay for the cupboard." That evening (probably the 21st of March), the matter was raised again. In the respondent's own words:-

> "I tried to explain to my husband that even if it was a little bigger and not exactly as he had perhaps expected that it would be, it seemed that we had spent so much on it, it would surely be wiser to keep it, and also I do need a place to sew, so that he may as well have it. But he did not react at all, he did not say yes or no or anything. And I went on explaining, and I suppose that is what my husband calls nagging, and in the end I got very excited and I said to him: I can't help it if you are so stupid that you cannot

understand an architect's plan. And that just set him off and he started slapping me. He got more and more furious as it went on. Where was the baby at that stage? ..... I had the baby on my arm, and he tried to grab the baby from me."

In another passage the respondent says:-

"This was a very bad argument and we both got excited and in the end he started slapping my face and saying all sorts of terrible things and .....
Will you tell his Lordship the type of language that he used towards you? Don't say he said terrible things - I want you to repeat some of them..... Well, during this argument he said to me: 'You are dirt! This time I will divorce you; I will hit you so much that the police will have to come here.' And the end of the story was that he - I had the baby on my arm during all this time, this whole argument - and he tried to grab the child from me - I was terrified by that time, I rushed out and called to the maid to take the baby and he came after me; he was not dressed, he was in his underwear and he rushed after me and he took the baby from the servant, although she protested; she said: 'He is crying too much master, please leave him'; he took the child and started walking up and down in the courtyard with him, but I thought this was a sort of - really a debasing sort of thing - situation in front of the servant. I have to work with her afterwards."

The ..... /41

The following Thursday the respondent again consulted the marriage counsellor she had previously seen. The latter telephoned the appellant, asking him to join them, which he did. The marriage counsellor told them that they would make an unhappy home for the child and suggested a separation or a divorce. According to the respondent:-

> "To her question my husband agreed that he was not happy either and he said he would prefer a divorce to a separation, because in the case of a separation one cannot go out with anyone else.
> After you had left the Marriage Counsellor did you and your husband that day later on discuss it again, or did he get back to it? ..... He ignored it completely, he did not mention it again. He hardly spoke, he just kept silent, and eventually I said to him: Well, what about our problem now? And quite curtly he said: Look, this business seems to affect you more than it affects me. You can make your own arrangements."

The following day (Friday the 28th of March) the respondent telephoned the marriage counsellor, received certain advice and then telephoned her father to

fetch ..... /42

fetch her. He came that afternoon, and the respondent returned with him to Paarl, taking the baby with her. The appellant did not realize that the respondent was leaving permanently and was under the impression that she was only going to her parents for a few days. He kissed her good-bye. The respondent did not disabuse him as "I was frightened and I could not face another confrontation about - are we going to have a divorce or not". She afterwards telephoned the appellant and told him that she would not return to him. The summons was issued on the 3rd of April.

The aforegoing narrative of the events giving rise to the summons is primarily that of the respondent and her witnesses. Due regard has, however, been paid to the appellant's version, bearing in mind the findings on credibility by the Court a quo, which have been accepted for the reasons stated above. Consequently, the appellant's evidence has, where in conformity with that of the respondent and her witnesses, been accepted, and where in conflict with the latter, rejected. Instances of appellant's evidence so

rejected ..... /42 a

rejected are: his claim to have slapped the respondent only in retaliation after she had struck him first, the denial that he had ever reacted harshly to the respondent's parents, or ever received a letter regarding the rent from the respondent, or threatened her with the police or told her to leave their bedroom, and, generally, the explanation of certain incidents, largely absolving himself from harsh and unreasonable conduct, whilst imputing the latter to the respondent.

The Court a quo was satisfied that when the respondent left the appellant, she had at that stage "reached the end of her tether," and that "notwithstanding the fact that the parties only lived together for a period of less than two years Plaintiff's decision to leave Defendant was not a decision made on the spur of the moment." The Court found that the "primary cause of the intolerable situation which developed, was the general attitude of Defendant towards Plaintiff" and was "satisfied on the probabailities that Defendant's conduct as set out in

the ..... /43

the particulars was unlawful and that he is to blame for the intolerable conditions which developed."

In the main it was argued on behalf of the appellant that the difficulties between the parties were largely to be attributed to the conduct of the respondent, such conduct flowing inter alia, initially at least, from her mental condition, and generally from her inability to adapt herself to the responsibilities of running a household. It was pointed out that there was almost bound to be some conflict for a while by reason of the difference in their ages, background and education, and the fact that she was an only child exceptionally attached to her parents. The parties, so it was argued, until their reconciliation in August 1968, were passing through a difficult phase, under adverse circumstances which rendered adaptation particularly difficult. That phase, it was urged, had by August largely passed, as demonstrated by the period of comparative peace that reigned until the incident of the cupboard, when the respondent had adopted (so runs the argument) an unreasonable and truculent attitude and conducted herself in a

grossly ..... /44

grossly provocative manner. In general, the submission appeared to be that the actions and reactions of the parties were merely part of the wear and tear in a process of adaptation, and that in the circumstances the appellant's conduct was not "unlawful," in the sense of providing grounds for a judicial separation. It was also argued that, in any event, it was by no means clear on the evidence that cohabitation had actually been rendered, by the conduct of the appellant, intolerable to the respondent at the time she left the appellant, and that there was a good prospect of the marriage succeeding should the respondent return to the appellant.

Undoubtedly, the respondent contributed to the difficulties between the parties. This she frankly admitted under cross-examination:-

> "Do you believe in the old saying: 'It takes 2 to make a quarrel'? ..... Yes, I do.
> Do you think it applied to this marriage? ... Well, I most certainly do as in the notes I said too (?)" (a reference to the guiding principles?)
> "I think it would be quite fair to say it was not all your husband's fault, even on your version? ..... Yes, I think it would.
> I think you sometimes were hurtful to him, as everybody is, from time to time? ..... Well, I assume so.
> Sometimes when he was angry, perhaps he had some reason to be? ..... Yes, probably sometimes."

She ..... /45

She conceded that, on occasion she lost her temper, and that sometimes she would "pick him (the appellant) out" (an example of the latter being an occasion when the appellant forgot to bring home the R100 for her allowance, after they had switched to a cash basis), that as "things progressed and got worse" she, a basically calm person, became more excitable. She appeared to concede that on occasion she had struck the appellant. Asked in cross-examination "Have you ever laid hands on him?" she replied in the affirmative. The matter was not then persued in detail, no doubt because counsel was well content with the answer as given. Not too much can, however, be made from this admission as she denied emphatically that the appellant had only struck her in retaliation. Her admission may very well only relate to the incident in December 1968. The Court a quo thought the respondent not "free from blame on the parental issue" and was of the opinion that if respondent "had been a timid person, the marriage may have succeeded."

Making due allowance for the respondent's contribution to the events, there is, however, little reason

to differ ..... /46

to differ from the finding of the Court a quo that "the primary cause of the intolerable situation which developed, was the general attitude" of the appellant towards the respondent. The reasonable tone of the document drawn by the respondent in August 1968, setting out guiding principles for the future, is some measure of her approach. When he married the respondent, the appellant must have been fully aware that she was in many respects an exceptional woman - cultured and sensitive, with academic talents and interests. The appellant's persistent endeavour to mould her to his will and ideal of a housewife, on occasion erupting into abuse, threats and even physical violence, must, in all the circumstances, be considered to constitute "unlawful" conduct and the true cause of the failure of the marriage. The apparent lull in hostilities during the latter half of 1968 was not a reflection of a fundamental and permanent change in the appellant's attitude. That this remained, basically, the same, is amply illustrated by the violent incident in December 1968, his reluctance throughout to heed the respondent's pleas for a larger allowance

and ..... /47

and, even with due regard to a measure of provocation, his inflexibility and explosive reaction in the final crisis of the cupboard. (As to the allowance, it must be remembered that even after the increase upon going to the Moolman house, the respondent did not have enough for her clothes, and that the prospective increased allowance for the housekeeping in the new home at Constantia was only fixed after discussion with the marriage counsellor). Even though the appellant made every attempt after the final breach to persuade the respondent to return to him, even to the extent of offering inter alia to adopt her religion, to have her back 'without "sex", and offering her expensive gifts, it is not without significance that he did not comply with a formal request for maintenance for the respondent and the child. The respondent discussed the matter with him but "his argument was that he would provide for me provided that I returned to him." He also wanted back the engagement ring.

Nor are there sufficient grounds to impugn the finding of the Court a quo that the respondent was

"at the ..... /48

"at the end of her tether." When Mr. Bruwer fetched the respondent on the 28th of March 1969, she appeared to be under mental strain and he was struck by her loss of weight and poor physical appearance. The comparative calm during the second half of 1968 and the fact that the respondent allowed the appellant marital privileges even a short while before the final break, do not go very far, in the circumstances, to show that the respondent did not really find cohabitation intolerable and only left the respondent in a fit of pique. The events of the first half of 1968 undoubtedly caused substantial scars that could not easily be erased. Although the appellant was in August 1968 prepared to give the marriage a further trial, this was obviously in the expectation that the fundamental difficulties would in the course of time disappear. Events at the end of 1968, and thereafter, were to disillusion her and convince her that the basic causes of extreme unhappiness were still present, the incident of the cupboard being the last straw. The fact that she might have been,

somewhat ..... /49

somewhat influenced by the views of the marriage counsellor does not negative that she herself felt the situation intolerable. She did, it is true, after issue of summons seriously consider returning to the appellant and even desired a postponement of the trial so as to have more time to think it over. But in all the circumstances this does not reflect an absence of any feeling that further cohabitation would be intolerable, but is a measure of her responsibility towards their child and her reluctance to break up a marriage except as a last resort, and only after due reflection when passions had subsided. In the final analysis there is no reason to doubt her considered view, given in cross-examination: "We do not get along well enough even to contemplate going on with the marriage."

As to the optimism of counsel for the appellant that the parties were on the verge of a greater mutual understanding when the final incident occurred, that the marriage has not had time enough to be truly tested, it seems sufficiently clear that the breach was

only ..... /50

only the culmination of events spread over the better part of nineteen months and that neither psychiatrist nor marriage counsellor was able to avoid the final rupture.

The appeal is dismissed with costs.

My Brother Rumpff was present throughout the hearing of this appeal but has, by reason of his absence through subsequent indisposition, been unable to be a party to the final decision. The judgment of the remaining members of the Court consequently becomes the judgment of the Court in terms of sec. 12 (3) of the Supreme Court Act, 1959.

E.L. JANSEN, J.A.

Van Blerk, A.C.J.)
Wessels, J.A.) Concurred.
Muller, A.J.A.)

8-8-70 77/70

G.P.-S.33967—1968-69—1,000. J. 219.

In the Supreme Court of South Africa.
In die Hooggeregshof van Suid-Afrika.

(Appellate Provincial Division.)
(Provinsiale Afdeling.)

Appeal in Civil Case.
Appèl in Siviele Saak.

1. MANUEL PERREIRA DA SILVA 2. SYLVIA MARGARET DA SILVA *Appellant,*

versus

1. SANTINA COUTINGO 2. J.F.C. COUTINHO *Respondent*

Appellant's Attorney / *Prokureur vir Appellant*: Schuurman & Honey

Respondent's Attorney / *Prokureur vir Respondent*: Messrs. Fred S. Webber & Son.

Appellant's Advocate / *Advokaat vir Appellant*: M.E. Kumleben

Respondent's Advocate / *Advokaat vir Respondent*: J.E. Kriegler

Set down for hearing on / *Op die rol geplaas vir verhoor op*: 23 & 24 — 11 - 70.

1 2 6. ##. 7. 11

Coram: van Blerk, Bekker, Thompson, Jansen JJ.A.
Smit et Muller A. JJ.A.

on Friday
11.70 OPD. 9.45 am — 11.00 am
11.15 am — 12.45 pm
2.15 pm — 4.15 pm

Tuesday. 24.11.70
9.45 am — 11.00 am
11.15 am — 12.10 pm
C. a. V.

Postea 5-4-71. Jansen J.A. allowed with Costs

Bills Taxed.—Kosterekenings Getakseer.

Date. Datum.	Amount. Bedrag.	Initials. Paraaf.

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

MANUEL PERREIRA DA SILVA .....

AND

SYLVIA MARGARET DA SILVA ..... APPELLANTS
(Plaintiffs in the Court a quo)

AND

JOAO FERNADIS CORREIA COUTINHO ..... RESPONDENT
(Second Defendant in the Court a quo)

Coram: Van Blerk, A.C.J., Ogilvie Thompson, Jansen, JJ.A., Smit et Muller, A.JJ.A.

Heard: 23rd November, 1970

Delivered: 5th April, 1971

JUDGMENT

JANSEN, J.A. :-

On the 30th of April 1965 the two appellants, husband and wife, travelling on the Harmony-Welkom road in a motor car driven by the first appellant, were involved in a collision with another car, driven by one Santina Coutinho.

The ..... /2

The owner of this car was the respondent, Santina's father. The appellants, who were seriously injured in the collision, in due course consulted an attorney at Virginia, Mr. Maree, and instructed him to take the necessary steps to claim damages. After certain initial inquiries, Mr. Maree instructed his Bloemfontein correspondent, Mr. Honey, to proceed with the matter.

The appellants' attorneys had reason to believe that the respondent's car had been insured, at the time of the collision, by the A.A. Mutual Insurance Association Limited, in terms of the Motor Vehicle Insurance Act, 1942 (hereinafter referred to as "the Act"), and intended proceeding against this company on the basis of the alleged negligence of the said Santina Coutinho. Enquiry, however, revealed that this company was not in fact the insurer, thus placing the attorneys in a dilemma. The available information pointed to the fact that the car had [redacted] been insured with some company in terms of the Act, but the identity of the company was not apparent. They did not find the respondent to be

helpful [redacted] .. /3

[redacted] helpful and he was unable to produce the relevant declaration of insurance. Further inquiries by the appellants' attorneys were to prove, in their view, unsuccessful and by the time the period of prescription provided for in section 11 (2) of the Act had elapsed at the end of April 1967, they had not yet resolved the dilemma.

Eventually, two claims for damages were instituted in the alternative, on behalf of each of the appellants, in the Orange Free State Provincial Division. The main claim, on the basis that the car driven by Santina Coutinho had not been insured in terms of the Act at the time of the collision, cited Santina Coutinho as first defendant, alleging his negligence as the cause of the damage suffered by the appellants, and the respondent as second defendant, the allegation being that Santina Coutinho had driven the car at the time of the collision "in the course of his employment as servant" of the respondent or, alternatively, as his "agent ..... within the scope of his authority". The alternative claim was brought against the respondent only, and proceeded on the

assumption .. /4

assumption that the car in question was at the time "insured with a registered insurance company in terms of section 3 of Act 29 of 1942, the identity of which is and was at all material times unknown to either of the Plaintiffs". This claim rested on the basic allegation that the respondent, as owner of the car driven by Santina, had "in breach of the statutory duty imposed by section 22 (2) of the said Act ..... wrongfully and negligently failed to produce the Declaration of Insurance whereby the said motor vehicle was insured at the time of the collision in terms of the said Act, upon the request of the Plaintiffs' (viz. appellants') legal representative and agent or at any time thereafter" and on the further allegation that "as a direct and foreseeable result of the breach of duty ..... plaintiffs were unable to institute action in terms of the said Act against the Insurance Company concerned and to recover the compensation referred to in section 11 (2) of the said Act, which compensation the insurance company concerned would have been obliged and able to pay". The damages claimed from the respondent were assessed at the same figures mentioned in the

main ..... /5

main claim.

It is unnecessary at this stage to refer in any detail to the plea to the main claim, save to mention that the material allegations were denied and it was specifically pleaded that the respondent's car

> "was insured in terms of the provisions of Act no. 29 of 1942 by Rondalia Assurance Corporation Ltd. at the time of the collision".

Of the plea to the alternative claim, certain features should be mentioned. The respondent repeated denials already made in respect of the main claim. He admitted:-

(a) the alleged insurance in terms of the Act;

(b) that he had failed to produce a copy of the declaration of insurance on the request of the appellants' legal representative, or at any time thereafter as alleged, and that he was obliged in terms of section 22 (2) to produce the declaration of insurance.

He denied:-

(c) that the said failure by itself constituted a wrongful act which entitled the appellants to recover the alleged damages from him;

(d) that he was negligent in any respect;

(e) ..... /5 (a)

(e) the appellants' alleged inability to ascertain the identity of the insurance company concerned within the relevant period, alternatively that such inability "was the result, alternatively a forseeable result", of the alleged breach of statutory duty.

He alleged:-

(f) that such inability (if it existed) "was the direct result" of the appellants' "negligence in failing to make proper inquiries and/or failing to have proper inquiries made to ascertain the identity of the insurance company concerned timeously, and/or failing to enforce the right against him in terms of section 22 (2) ..... by obtaining an order against him to compel him to comply with the duty imposed upon him by virtue of the said subsection";

(g) that by virtue of the provision of section 13 of the Act, the appellants were not entitled to claim compensation from him;

(h) that by virtue of the provisions of clause 6(b) of the Agreement published in the Government Gazette of the 6th November 1964, between the Minister of Transport and the Motor Insurance Association of Southern Africa (hereinafter referred to as the M.I.A.) the appellants had been entitled to recover compensation from the latter, had failed to enforce their right, and that consequently, the damages they seek to recover "have directly been caused by their own failure to institute timeous action against the M.I.A.".

In ..... /6

In proceedings under Rule 37 the appellants were constrained to concede that at the material time the respondent's car had been insured by Rondalia, and, therefore, withdrew their claims against Santina Coutinho (in view of section 13 of the Act) and they, thereafter, only prosecuted the alternative claim, viz. against the respondent. In terms of the Rule it was also agreed that had Rondalia been sued successfully, it would at all times have been able to pay any damages awarded, and the quantum of damages in respect of the claims of both appellants (amounting to several thousand rand) was also settled. In the course of the subsequent trial the respondent was forced to admit that the sole cause of the collision was the negligence of Santina Coutinho in his driving of the respondent's car.

At the conclusion of the trial the presiding Judge held that "no civil liability for damages is to be read into the Act for a breach of section 22 (2)" and continued "on a construction of the scope and language of the Motor Vehicle

Insurance ..... /7

Insurance Act I am constrained to come to the conclusion that plaintiffs cannot recover damages from second defendant personally in the present case". In the result he dismissed the appellants' claims but awarded the respondent costs only "on an exception basis". It may be added the learned Judge found that in any event, even if on a true interpretation of the Act an action for damages was competent, the appellants could not have succeeded as they had failed to establish "on a balance of probabilities that second defendant's breach of a statutory duty was due to his culpa or fault and that he would have foreseen the harm to plaintiffs". The validity of the appellants' claims against Rondalia the learned Judge accepted, as also the absence of contributory negligence on the part of the appellants - to such a degree that he expressed himself as follows:-

> "As I have said before, this is a very unfortunate case. I cannot help but sympathise with plaintiffs. They clearly sustained serious bodily injuries, and for the damage arising out of such injuries Rondalia Assurance Corporation would have been compelled to compensate them had their claim not become prescribed. It clearly had no other defence to plaintiffs' claim. The company's liability towards plaintiffs is still in existence but has merely become unenforceable due to prescription. It can also not be said that plaintiffs' attorneys are to blame for the fact that the said company was not sued timeously. Mr. Honey impressed me as a witness, and it is quite clear the he

is not to blame for the delay. He made extensive and exhaustive enquiries as to the identity of the registered insurance company in question. Had it not been for the incorrect information given by the police and for the unfortunate error made by Mrs. Murray of the M.I.A., I have no doubt that Mr. Honey's efforts would not have been in vain. To my mind he could not have done more to establish the identity of the company in question. I feel that in this case I would be failing in my duty if I do not recommend that either Rondalia or the M.I.A. should seriously consider to compensate the plaintiffs for the damages suffered by them. Through no fault of their own or of their legal representatives, the damage which they have suffered cannot now be recovered. I therefore strongly recommend, although, of course, my recommendation in this matter merely has persuasive force, that either Rondalia or the M.I.A. in consultation with the Minister of Transport, should seriously consider to compensate plaintiffs. Failure to compensate them would to my mind cause grave injustice".

In the present appeal against the order of the Court a quo, Counsel are agreed that, allowing for some overlapping, six main questions now fall to be decided:-

(i) Whether upon breach of the statutory duty imposed upon the owner of a motor vehicle by section 22(2), an action for damages is competent;

(ii) Whether section 13 precludes a claim for damages against the respondent in respect of the damage alleged by the appellants;

(iii) Whether the respondent's failure to comply with the requirements of section 22(2) was negligent;

(iv) Whether the respondent's failure, if negligent, was the cause of the damage sustained by the appellants;

(v) Whether the appellants or their legal representatives

were 8A

were guilty of contributory negligence;

(vi) Whether, on the particular facts of the case, the appellants were entitled to recover compensation from the M.I.A. in terms of Clause 6 (1) of the Agreement.

I turn ...../9

I turn to the first question. Section 22 (2) of the Act reads as follows:-

> "When, as a result of the driving of a motor vehicle insured under this Act, any person other than the driver of that motor vehicle was killed or injured, the owner of the motor vehicle shall, at the request of any person or of the agent of any person, who has suffered any loss or damage as a result of the death of the person so killed, or at the request of the person so injured (or at the request of his agent) ..... produce to the person making the request, the declaration of insurance whereby the motor vehicle was insured at the time of the occurrence in question, ...".

No sanction is expressly provided save that of a fine, in section 22 (3):-

> "If the owner ..... fails to comply with any requirement of sub-section (2), he shall be guilty of an offence and liable to a fine not exceeding fifty rand unless he is unable to comply with such requirement and his inability is not due to his own action or default".

The absence, however, of any express provision that, on breach by the owner of his duty under section 22 (2), the person damnified thereby will be entitled to institute an action for damages, does not necessarily preclude that remedy. In this regard reference may be made to Salmond on Torts (14th ed.

at ..... /10

at p. 352) :-

> "If the statute imposes a duty for the protection of particular citizens or a particular class of citizen, it prima facie creates at the same time a correlative right vested in those citizens and prima facie, therefore, they will have the ordinary remedy for the enforcement of that right - namely, an action for damages in respect of any loss occasioned by the violation of it".

This is, of course, merely an attempt by the learned author to formulate a principle to be derived, in his view, from the many, and sometimes conflicting, cases in England. However, the concept of a prima facie right, clothed with the ordinary civil remedies, being complementary to such a statutory duty, has been recognized by this Court, subject to the qualification that "such a prima facie right of action must, however, yield to the intention of the Legislature as reflected in the statute ..... the question is in every case one as to the intention of the Legislature in creating the duty", and "if it be clear from the language of a Statute that the Legislature, in creating an obligation, has confined the party complaining of its non-performance, or suffering from its breach, to a particular remedy, such party is restricted thereto ...."

(Callinicos .... /11

(Callinicos v. Burman, 1963 (1) S.A. 489 (A.D.) at 497H - 498A).

Where the Legislature, as in the present instance, creates a new duty and imposes a criminal penalty for the breach thereof, but is silent on the question of a civil remedy, how is the intention of the Legislature to be determined? In an illuminating passage dealing with the position in England Winfield on Tort (8th ed., p. 130) states the following:-

> "Not the least of the difficulties in seeking to discover the intention, or rather presumed intention, of Parliament is that it is not altogether clear which of two diametrically opposed initial presumptions actually prevails. According to one view 'prima facie a person who has been injured by the breach of a statute has a right to recover damages from the person committing it unless it can be established by considering the whole of the Act that no such right was intended to be given'. According to the other view, however, 'where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner'. The second of these views has the greater measure of acceptance today but whichever is preferred, it must at once be qualified by the statement that it is subject to a large number of exceptions. It is probably unwise, therefore, when investigating the position under a given statute to start with a presumption of any kind".

In ..... /12

In view of the approach adopted in Callinicos v. Burman (supra) it could hardly be suggested that the "general rule" mentioned by Winfield as being "the greater measure of acceptance" in England today, now bears the same recognition in our law. It may be pointed out that even in the early case of The Liquidator of the Cape Central Railways v. Nothling (8S.C. 25), to which we were referred, De Villiers, C.J., did not purport to apply such a rule, but found upon an examination of the statute as a whole "clear indication ..... that the penalty was intended in substitution for any other remedy" (at p. 29 infra - p. 30). As was said by Stratford, J., (Greenberg, J., concurring) in Coetzee v. Fick and Another, (1926 T.P.D. 213 at p.216):-

> "We must look at the provisions of the Act in question, its scope and its object, and see whether it was intended when laying down a special remedy that that special remedy should exclude ordinary remedies. In other words, we have no right to assume, merely from the fact that a special remedy is laid down in a statute as a remedy for a breach of a right given under statute, that other remedies are necessarily excluded".

(Cf. Balagooroo Senaithalwag Educ. Trust v. Soobramoney, 1965 (3) S.A. 627, where a Full Bench of the Natal Division

applied ... /13

applied this dictum). In any event, where the sanction expressly provided is an ordinary criminal penalty it is difficult to see what particular significance that penalty has in relation to the Legislature's unexpressed intention in respect of civil remedies. As pointed out by Prof. McKerron (The Law of Delict, 6th ed. p. 257 n. 3): "No inference can be drawn from the fact that the duty is enforceable by ordinary criminal proceedings, because nearly every statute contains a provision to that effect". Salmond on Torts (supra, p. 354) states that "a pecuniary penalty payable wholly to the Crown has comparatively little significance in excluding an action for damages". (See also Coetzee v. Fick and Another, supra, at p. 216, where a penalty, recoverable from an employer, accrued to the State and not to the person who suffered from the infringement, was considered to be no "real remedy at all").

The mere fact that the duty created by the Legislature in section 22 (2) is reinforced with the criminal sanction of a fine does not, therefore, in my view indicate an intention by the Legislature to confine a person damnified by a

breach ..... /14

breach thereof to that remedy. It is, however, argued that in certain other instances the Act specifically visits a breach of duty by the owner of a motor vehicle with civil liability, either as the only sanction or additional to a fine, and that the failure to mention civil liability in section 22 (2) is, therefore, deliberate and a reflection of an intention to confine the remedy, upon breach of the duty, to the criminal penalty. In this regard reference may be made to a number of sub-sections of section 14, section 15 (5) and section 19 (3). This application to section 22 (2) of a principle akin to that of expressio unius est exclusio alterius, rests, however, upon the assumption that these provisions manifest a deliberate intention on the part of the Legislature, in respect of the whole Act, to provide a civil remedy only when saying so in express words. Upon analysis it would appear that sections 14, 15 (5) and 19 (3) hardly allow of such an inference. As to section 14, the Legislature here ex necessitate deals expressly with civil liability. The very scheme of the Act produces, in effect, this result: by paying the third party in terms

of ..... /14 (a)

of the Act, the insurer pays the delictual claim (i.e. based on "negligence or other unlawful act") the third party would have had against the owner or driver; on the other hand the owner has, after all, entered into a contract of insurance with the insurer and paid the premium. The Legislature, had, perforce, to regulate the incidents in the relationship between insurer, owner and driver. It did this by, in effect, subrogating the insurer in respect of the third party's delictual claim, and freeing the owner (or a person driving with his consent) of liability in certain cases. Thus section 14, in effect, sets out the statutory terms of the contract of insurance and circumscribes the cover provided vis-à-vis the owner (or the person driving with his consent). That in certain cases a breach of duty here results in civil liability has, in reality, little to do with the question of policy whether for a breach of that duty a civil remedy should be allowed or not. Section 15 in terms also deals with the incidents of the relationship of owner vis-à-vis insurer, inter alia the circumstances requiring the payment of an additional premium by the

owner. ..... /15

owner. The express provision in section 15 (5), relating to the payment to the insurer of a penalty of three times the amount he should have paid, is obviously occasioned by the desire to impose a liability other than a normal liability for payment of the amount he should have paid. Neither does section 19 (3) provide an action for damages should the owner fail to insure - it visits the owner with the special circumscribed liability of an insurer under the Act.

It is further suggested that in appropriate circumstances (such as the present) liability for damages to the person damnified as a result of a breach by the owner of the duty imposed by section 22 (2) could result in the owner, in effect, being liable for personal injury flowing from an accident involving his motor car, where he was neither the driver nor vicariously liable for the negligence of the latter. It is said that "so radical a departure from the common law cannot be inferred" and, if intended, would surely have been done expressly. But the Act does provide that a failure by the owner to insure his vehicle in terms of the Act gives rise to his own

liability ..... /16

liability as insurer. It is then certainly not so startling that if he should by his own fault, in particular circumstances, make nugatory an existing insurance, he be saddled with a comparable liability as a result of the loss occasioned to another by his own act. The significance of the owner having a right of recourse in the former case and not in the latter, could easily be pitched too high. The right of recourse was only expressly given to the owner in 1959 (by section 8 (b) of Act 31 of 1959, amending the principal Act). Moreover, the liability of the owner who does not insure would follow as of course; in relation to a breach of section 22 (2) the owner (as will be seen) will only become liable if the breach is due to his "default" and the quantum of damages would be assessed in relation to the damage caused by that breach.

Sections 2 quat and 2 quin, read with the Agreement of the 6th November 1966 between the M.I.A. and the Minister of Transport, do not appear to take the matter any further. On the assumption that clause 6 (1) of the Agreement provides a specific remedy where the insurer cannot be identified in circumstances such as those present in this case (a contention, by the respondent, which will again be mentioned later ../16 (a)

later in this judgment), it could be argued that the whole scheme of the Act now envisages a particular remedy to be employed by the third party where he is unable to identify the insurer, including those cases where the inability arises from a breach by the owner of his duty, under section 22 (2), to produce the declaration of insurance. But even if the assumption were to be true, this could hardly afford material by which to interpret the intention of the Legislature in only providing, in express words, for a fine in respect of a breach of the duty created by section 22 (2). In the absence of [redacted] prophetic gifts on the part of the Legislature (Swart N.O. and Nicol N.O. v. De Kock and Garner, 1951 (3) S.A. 589 (A.D.) at 613G - 614) the new sections (and the new remedy assumed to exist), only introduced in 1964 by Act 60 of that year, can afford, in the circumstances, but little, if indeed any, inference as to the intention of the Legislature over twenty years before, when it originally enacted section 22 (2). In terms, it may be pointed out, the new provisions do not purport either expressly or by implication ..... /16 (a) 1

implication to interpret or attempt to clarify the then existing Act (cf. Clan Transport Co. (Pty) Ltd v. Road Services Board, 1956 (4) S.A. 26 (S.R.) at 34A - B); nor can it be inferred, from their mere introduction, that the duty imposed by section 22 (2) was never complemented by a right to claim damages.

Section 13, in view of the true meaning to be attached thereto (as will appear later in this judgment), may also be disregarded at this stage of the enquiry.

As ..... /16 (b)

As against the alleged indicia of an intention by the Legislature to limit the remedy for a breach of duty by an owner under section 22 (2) to the fine expressly provided for, there are weighty considerations pointing the other way. The intention of the Legislature in imposing upon the owner the duty created in section 22 (2) of the Act must relate to what it sought to achieve by the Act. As stated by Centlivres, J.A., in Rose's Car Hire (Pty) Ltd v. Grant (1948 (2) S.A. 466 (A.D.) at 471:-

> "..... the intention was to ensure, through the compulsory insurance of motor vehicles, that injured persons or their dependants who might not be able to recover damages owing to the inability of the parties liable to pay, should receive full compensation from insurers .....".

In broad outline the scheme evolved was that the owner of a motor vehicle should insure the vehicle and that the insurer should then be liable for any loss or damage as a result of

bodily ..... /17

bodily injury or death "caused by or arising out of the driving of the insured motor vehicle" and "due to the negligence or other unlawful act of the person who drove the motor vehicle or of the owner of the motor vehicle". It is, however, obvious that for the scheme to succeed the party damnified (the "third party") must be able to prove the existence of the contract of insurance, with an insurer he is able to identify. For this reason among others, no doubt, provision was made for the issue to the owner of a token of insurance, setting out inter alia the name of the insurer (section 4 (1), read with Regulation 16.) and a duty imposed upon the owner to attach the token to the vehicle concerned and keep it so attached (section 20 (1)). But the Legislature could hardly have been unaware of the fallibility of such a token as a means of proof and identification for a third party in view of its possible loss or destruction, should, e.g., the vehicle become involved in a collision. It is, therefore, easy to understand that it was considered necessary to impose, in terms of section 22 (2), a duty upon

the ..... /18

the owner to produce to the third party, upon request, the declaration of insurance whereby the motor vehicle was insured.

Seen against the scheme of the Act, it becomes plain that performance of this duty is crucial to the achievement of the purpose of the Act, and that its breach may result in the total failure of the Act to provide the third party with the defendant envisaged, with the means to pay the damages to which the third party might be entitled. As pointed out by Winfield on Tort in dealing with criteria by which to determine the intention of the Legislature (supra, p. 131):-

> "A more useful guide, perhaps, is to be found in an examination of the kind of mischief the statute was intended to prevent. If it is exactly the type of harm which the plaintiff has suffered, is a strong argument in favour of his right".

(Monk v. Warbey, (1935) 1 K.B. 75 is referred to - a case of some interest owing to a somewhat startling resemblance to the present). In the case of the duty created by section 22 (2) its breach may, in appropriate circumstances, cause the third party to suffer the very loss the Act seeks to prevent.

A consideration of the Act as a whole, its

object ..... /19

object and provisions, and an investigation of the opposing contentions in regard to alleged indicia of the Legislature's intention leads, in my view, to the conclusion that the latter did not intend to confine the remedy for a breach by the owner of section 22 (2) to the fine provided for, but to permit and action for damages by the person damnified by such breach. It follows that in any event it could not be said that there is any clear indication to the contrary.

I now turn to the second question.

Section 13 provides:-

> "When a person is entitled under section eleven to claim from a registered company any compensation in respect of any loss or damage resulting from any bodily harm to or the death of any person caused by or arising out of the driving of a motor vehicle insured under this Act by the owner thereof or by any other person with the consent of the owner, the first-mentioned person shall not be entitled to claim compensation in respect of that loss or damage from the owner or from the person who drove the vehicle as aforesaid or if that person drove the vehicle as a servant in the execution of his duty, from his employer, unless the registered company concerned is unable to pay the compensation".

It was pleaded, and remains the contention of the respondent,

that ..... /20

that these provisions preclude the appellants from suing the respondent for the damages claimed - even if the claim purports to rest upon a breach of a statutory duty, viz. of section 22 (2). As the appellants were entitled to sue Rondalia under section 11, a registered company that would have been able to pay any damages awarded, and as Santina Coutinho drove the insured car with the respondent's consent, so the argument proceeds, the appellants, in terms of section 13 are not entitled to claim compensation from the respondent (the owner of the car) "in respect of that loss or damage", i.e. "loss or damage resulting from any bodily injury to ..... any person caused or arising out of the driving of a motor vehicle insured under the Act". It is suggested that, in effect, regardless of the purported cause of action, this is the very thing the appellants are trying to do - claim compensation "in respect of <u>that</u> loss or damage". This contention, however, is founded on an assumption that the Legislature used the words "in respect of" in a widely extended sense which the context does not justify. From the judgments

in ..... /21

in Rose's Car Hire (Pty) Ltd v. Grant (1948 (2) S.A. 466 (A.D.)) it is clear what the person in question is not entitled to claim from the owner of the vehicle, is "that compensation" which he is entitled under section 11 to claim from the registered company. Reference to section 11 (1) (i) indicates that the latter is, indeed, the compensation the third party would have been entitled to claim in delict from the owner or driver. Sections 11 and 13 are complementary and purport to do no more than to substitute for the common law action for damages, based upon the negligence or other unlawful act of the owner or driver causing injury or death, an action against the insurer, which involves relieving the owner or driver, vis-à-vis the third party, of his original liability. Section 13 does not go beyond this and to equate damages for breach of a statutory duty to "that compensation" would therefore, be to ignore all distinction between differing causes of action - a disregard of legal principle which the wording of sections 11 and 13, as also the purpose of the

Legislature, ... /21 (a)

Legislature, does not justify. That the quantum could, in circumstances such as those in the present case, be the same as that which could have been claimed from the registered company, and that it would be determined with reference inter alia to "the loss or damage ..... suffered as a result of ..... bodily injury ..... caused by or arising out of the driving of the insured motor vehicle" does not alter the position. The liability itself is founded on totally different grounds. In my view section 13 is no bar to the appellants' claims.

As the remaining issues are more closely

related ..... /22

related to the specific facts of this case, reference may now conveniently be made to certain events consequent upon the appellants instructing Maree to institute action on their behalf. In the course of his preliminary investigations Maree acquired a copy of a form completed for census purposes by the constable who was summoned to the scene of the accident. It purported, inter alia to record, in respect of each of the two cars involved in the collision, the third party insurance token number and the name of the insurance company concerned: in the case of the first appellant's car, the number "563369" and the name abbreviated as "A.A."; in the case of the respondent's car, the number "89863" and the name abbreviated as "A.A.". Maree took the abbreviation "A.A." to be a reference to the A.A. Mutual Insurance Association Limited. The latter was in fact the insurer of the first appellant's car and the number appearing on the form was the correct number. Hence the assumption by Maree, and later Honey, that the respondent's car was also insured by that company and that the number of the token issued to the respondent was that stated on the form.

On the .... /23

On the 9th of June 1966 Maree instructed Honey to proceed with the action. The latter wrote to the A.A. in this regard and on the 4th August 1966 John Murray and Co., Insurance Assessors at Bloemfontein replied on behalf of the company that the latter had no record or token of number 89863 having been issued to the respondent, and that it could not accept liability under the circumstances. They suggested, however, that Honey should obtain the correct token number from the respondent and that they would again take up the matter with their principals, when advised of this number. Under date the 9th August 1966 Honey sent a registered letter to the respondent, which referred to sections 22 (2) and (3) of the Act, and asked for the name of the company that had issued the third party token, the number of the token and/or of the declaration of insurance, and a copy of the latter "if available". This letter has been criticized by Counsel for respondent as demanding information which the respondent was not bound to supply and as not being a clear request for the production of the declaration of insurance.

However, ... /24

However, nothing really turns on this, in view of the admission in the plea (referred to at the commencement of this judgment) that the respondent was obliged in terms of the section to produce the declaration and yet failed to do so at the request of the appellants' legal representative. The admission is a true reflection of the facts. If the respondent was at any time uncertain as to what was required from him by this letter, that uncertainty was removed later. Not only did the first appellant, upon Maree's instructions, ask the respondent for the declaration of insurance, but the respondent consulted Mr. Immelman, an attorney at Virginia, in regard to this letter. Immelman replied to Honey's letter on the 29th of August 1966, as follows:-

> "Kliënt het sy derde party versekering uitgeneem by die 'A.A.' en die kenteken nommer is, volgens die polisie, 89863.
> Mnr. Coutinho beskik ongelukkig nie meer oor die Deklarasie nie en soos reeds hierbo gemeld, het ons die ander informasie van die plaaslike polisie bekom".

The identity of the insurer thus confirmed as being the A.A., Honey then tried to trace the issue of the declaration by

referring to certain ..... /25

certain agents of the A.A. and to the Welkom branch of the A.A. This being unfruitful, Honey thereafter proceeded on the theory that perhaps "A.A." should have read "S.A.", and made several enquiries on this basis. All this led to nothing. It then occurred to Honey that the M.I.A. could be of assistance, as he believed that they were the distributors of all insurance tokens under the Act. He telephoned them and spoke to a Mrs. Murray, the secretary. He gathered that she could inform him which companies had, during the relevant year, received tokens bearing the number "89863". She subsequently did so, providing the names of three companies. She also suggested that if this did not prove to be of assistance, he could write a letter to the Accident Offices Association of S.A., a body related to the M.I.A. and that they would make further enquiries. Reference to the three companies mentioned by Mrs. Murray proved to be of no assistance. In desperation, Honey, on 20th October 1966, wrote to the secretary of the Accident Offices Association of S.A., put to them his problem, mentioned inter alia the information gained from the census form, and appealed for

their ..... /26

their assistance. In the course of the telephone conversation Mrs. Murray had mentioned the possibility that the number of the token, derived from the police, could be incorrect as the result of the omission of a digit, as the tokens issued by the A.A. all contained six digits. Also following up this possibility, Honey asked Maree to check the original note book of the constable. The latter did so and it was found that the census form was a true reflection of what was there written. Not yet having received a reply to the letter of the 20th October 1966, Honey sent a reminder and under date 30th November 1966 Mrs. Murray, in her capacity as secretary of the M.I.A., replied:-

> "I have to advise that I am still awaiting information from the A.A. Mutual Insurance Association who have been asked to make a further check on their files".

Honey, however, did not leave it at that. The first appellant was asked to approach the respondent and find out whether he could not at least say where he had obtained his insurance token and declaration. It was thought expedient

that ...../27

that the first appellant should do this as they were both Portuguese, knew each other and had been on a friendly footing for some years.

It must have been during January 1967 when the first appellant reported back to Maree and the latter then telephoned Honey. As a result of the first appellant's report and discussions with Maree of the implications thereof, Honey wrote, on the 30th January 1967, to the M.I.A. as follows:-

> "We refer to correspondence in the above matter and more particularly to our letter of the 20th October 1966, and we wish to advise that the insured, Mr. Coutinho, now seems to have remembered that he purchased the token in question from a certain Mr. Noorman who had a business under the name of 'Goldfields Hairdressers and Watchmakers' in Bullion Buildings, Bullion Street, Virginia, at the time. Mr. Noorman was an agent for the Rondalia Assurance Corporation and we wonder whether you could ask that company to check its records urgently in order to establish whether it was on risk at the date of the accident. Your co-operation herein is appreciated".

This letter is of some importance to the respondent's case and forms the basis for the allegation in the plea "that at

the ..... /28

the latest by the 30th January 1967, the plaintiffs were aware of the fact that the insurance company in question was Rondalia Insurance Corporation Ltd". Honey has explained in evidence that this letter was not based only on the report made by the first appellant to Maree of the information he had received from the respondent, but was also based on additional information which he and Maree had obtained themselves. From Maree he had understood that the report by the first appellant was only to the effect that the respondent had pointed out two buildings in Virginia where he possibly could have taken out the insurance, on an occasion when he had come to town for a haircut, and that he had not been specific in any respect, such as mentioning any names, or even stating that he had actually obtained the insurance at the hairdressing saloon. The additional details in the letter, Honey explained, were based upon information obtained inter alia by phoning Noorman, who had formerly owned - to Maree's own knowledge - a hairdressing saloon in one of the buildings pointed out by the respondent and who had sold third party insurance. Noorman told Maree that he had

been ..... /29

been an agent for Rondalia but that he had no records whatsoever. According to Honey, as a matter of inference and elimination, he and Maree then considered it a possibility (but no more) that the respondent had obtained third party insurance from Noorman. The following passage from his evidence reflects Honey's state of mind then:-

> "HIS LORDSHIP: At that time, did you think that Rondalia could possibly be the company? — It is difficult to say what one thought. My strongest line of thought was still on the basis of so many indications that it was still the A.A. and that we were looking for a missing numeral, but when this information..... not that it came to hand. It was sort of deduced between myself and Mr. Maree. I passed it on once again for the simple reason that if anybody could check whether Rondalia had in fact received that token then it would be the M.I.A. in collaboration with Rondalia itself.
> MR. KUMLEBEN: And I tke it the M.I.A. had a better entreé to Rondalia than a person who was thinking of suing them? —
> The M.I.A., as you said yourself, is the parent body of all these companies and they had told me that they had records of the token number which had been issued to the companies and for this reason I passed this information on. Albeit be it sceptically, I passed it on to the M.I.A.".

There is no reason to reject this explanation by Honey. On

the ..... /30

the contrary, he impressed the trial Judge as a witness, his evidence is supported by that of Maree, which in turn is in conformity with that of the first appellant, in respect of what had happened between him and the respondent, and the nature of the report made by him to Maree. The only evidence to the contrary is that of the respondent, who claims to have been much more specific in pointing out the premises to the first appellant and alleges to have specifically said to him that he had obtained the third party insurance at the barber's shop. This version appears to be against all the probabilities. The first appellant was fully aware of the importance of determing the identity of the insurer. It is most improbable that if the respondent had actually told him that he had bought insurance in the barber's shop and had pointed out the particular premises, that he would not have informed Mr. Maree thereof. That he did not so inform Maree, is apparent from the latter's evidence and that of Honey.

By the 16th February 1967 Honey had as yet received no further communication from the M.I.A. He, there-

fore ..... /31

fore, sent a reminder to them and again did so on the 9th of March. On 14th March 1967 Mrs. Murray, the secretary of the M.I.A., replied as follows:-

> "In reply to your letter of the 9th March I regret to advise that no progress has been made in locating any valid insurance. I can only suggest that, in the interests of your client, you should consider the advisability of issuing summons against either Santina or Coutinho or both".

Honey's next step was to give notice to the M.I.A., in terms of clause 6 (3) of the aforementioned Agreement between the Minister of Transport and the M.I.A., of an intention to sue for damages on behalf of the appellants. This was in a letter dated 31st March 1967, setting out the circumstances. A reply, dated 12th April 1967, was received and therein the M.I.A. acknowledged that "as stated by you all efforts to trace the insurer have been unsuccessful". It concluded "I would like to point out that your client's action does not lie against the Association, but should be either against Santina or Coutinho and, no doubt, this will receive your attention". By letter dated 6th July 1967, the

attorneys .... /32

attorneys acting for the M.I.A. repudiated liability and stated "we have been instructed by our clients to notify you that they refuse consent to be sued". It was stated that this attitude was based upon the opinion of an eminent senior counsel practicing at Johannesburg. Extracts from this opinion were quoted in this regard, the tenor being:-

> "Clause 6 requires the third party to show more than that he cannot obtain a judgment either against the company or against the individual owner or driver. He must show that this is owing to his inability to identify the owner or driver of the motor vehicle or the registered Company, if any, which insured the motor vehicle. In my view, the natural interpretation of this phrase is that the clause applies only if the third party is unable to identify any of the parties referred to. If he can identify any one of them, he cannot invoke this clause".

The letter concluded as follows:-

> "If therefore your clients wish to proceed with the matter, it will now be necessary for him to refer the matter to the Minister of Transport, in terms of the agreement between our clients and the Minister. As we have already advised you, our clients will not take any point of your client being out of time with regard to his rights in terms of clause 6 of the Agreement, and will give your client reasonable opportunity to refer the matter to the Minister and to

bring ..... /33

bring his action against our clients if so authorised by the Minister. Your client must, however, refer the matter to the Minister without delay if he wishes to do so".

Before deciding what to do as a result of the repudiation of liability by the M.I.A., Honey took the precaution of briefing Senior Counsel in Bloemfontein for an opinion on the matter. This opinion was to the same effect as that upon which the M.I.A. relied. It was then decided not to proceed with any action against the M.I.A. Honey, however, attempted to persuade the latter to make an ex gratia award to his clients, without success. Ultimately, the summons initiating the present proceedings was issued.

The subsequent course of these proceedings has been sketched at the outset of this judgment. However, to complete the picture, some matters, which are common cause, may be mentioned now. It is clear that the entry in the constable's notebook, reflected on the census form, was incorrect: the token must have disclosed its number to be AA89863 and the insurer to be Rondalia; the constable's entry made no reference to Rondalia, gave the number as 89863 and identified the insurer as the A.A. Furthermore, from the correspondence between the M.I.A. and Rondalia, it emerges that the secretary, by letter dated

3rd ...../34

3rd February 1967, conveyed to Rondalia the information set out in Honey's letter of the 30th January 1967 to the M.I.A. and requested Rondalia to:-

> "be good enough to scrutinize your records to find out whether you have any information regarding a token issued to Mr. Coutinho for the period 1st May 1964 to 30th April 1965. Your urgent attention to this matter would be appreciated".

It is also apparent that the M.I.A. had instructed John Murray and Co. to investigate the matter and that the latter were doing so. To the request by the M.I.A., Rondalia replied, by letter dated 8th March 1967:-

> "We refer you to your letter dated the 3rd February 1967 and regret to inform you that we were unable to trace anything in this connection.
>
> As far as we are able to ascertain we never had an agent by the name of Noorman. We were also unable to place any agency by the name of Goldfield's Hairdressers and Watchmaker. Unfortunately we were also unable to trace anything in the name of Mr. Coutinho.
>
> We shall institute a further search if you would kindly furnish us with the number of the insurance token displayed on Mr. Coutinho's vehicle at the time of the accident".

On the 15th of March 1967, the M.I.A. again wrote to Rondalia:-

"In ..... /35

involved of negligence and remoteness, namely the requisites for a right to damages when the wrong alleged is a breach of statutory duty. Prof. McKerron (op. cit. p. 257) summarizes the position as follows:-

> "To entitle a person to sue for breach of a statutory duty he must show that
>
> (1) the statute was intended to give a right of action;
> (2) he was one of the persons for whose benefit the duty was imposed;
> (3) the damage was of the kind contemplated by the statute;
> (4) the defendant's conduct constituted a breach of the duty; and
> (5) the breach caused or materially contributed to the damage".

It is to be noted that negligence on the part of the defendant is not stated as a requirement. In respect of (4), however, the learned author (at p. 260 - 1) states:-

> "In every case it is a question of the interpretation of the particular statute whether it is sufficient for the plaintiff merely to prove that the duty was not fulfilled, or whether he must go farther and show that its non-fulfilment was due to fault on the defendant's part or on the part of a servant or independent contractor. Except in the case of statutes imposing duties for the protection of workmen, the courts tend to lean against an interpretation that would involve the imposition of liability without fault.

It is clear that the "fault" here mentioned, if called "negligence", is negligence constituted by the failure to exercise due and reasonable care "in the performance of the duty imposed" and not negligence in relation to the loss suffered. Foreseeability of the loss is not a constituent of the former; it is of the latter. A further aspect that must be remarked upon, flows from requirement (5), that relating to causation. The learned author quotes Bonnington Castings, Ltd. v. Wardlaw, (1956) A.C. 613, as deciding that, where the breach is not the sole cause of the damage, any contribution which does not come within the de minimis non curat lex rule is to be regarded as material. Finally, it must be mentioned that according to the learned author (p.262) the only defences open to the defendant "would appear to be contributory negligence and voluntary assumption of risk". Thus stated, the requirements for a right

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of action for damages, based on a breach of statutory duty, appear to be in certain respects at variance with some of the concepts ordinarily applicable in our law of delict.

The argument before us (as will be adverted to later) proceeded on the assumption that those ordinary principles applied in the present case (save for a reference by counsel for the appellants' to causation in the sense defined above). Such assumption, however, does not permit us to ignore completely the possibility of the principles set out by Prof. McKerron being applicable.

Applying these principles, as stated by the learned author, to the facts of the present case and leaving aside possible defences, such as contributory negligence, the appellants would seem to have established

the requirements for ..... /39

for success. The necessary intention on the part of the Legislature is present; the appellants are persons for whose benefit the duty was imposed; the damage (inability to sue the registered company) is of the kind contemplated by the Act; if the failure to produce the declaration was a breach, it at least materially contributed to that damage. The only real question is whether the respondent's conduct constituted a breach of the duty, in the sense of having been wanting in the application of that care, in the exercise of his duty, which the Act envisaged. I do not understand respondent, by admitting in his plea a breach of duty under section 22 (2), to have also admitted "negligence" in this sense; nor, on the other hand, do I understand him to contend that he had to exercise no care in the performance of his duty. On the contrary, counsel for the respondent urged upon us that he had acted reasonably.

It was argued that the respondent, after obtaining the token and declaration at the barber's shop, fixed the former to the windscreen of his car and placed the

latter .... /40

latter in a drawer in his house. He was only requested to produce the declaration in August 1966, some 15 months after the collision, 27 months after the declaration was obtained and 15 months after expiry of the relevant insurance period. His practice was to put the current declaration away and to discard it when he obtained the new declaration the following year. This, it was said, was not an unreasonable practice and he could not be faulted for following his normal practice despite his car having been involved in a collision in view of the particular circumstances. These being that the day after the collision he became aware that the police had recorded the details appearing on his token and had no reason to believe that it had been incorrectly done, that he had agreed to pay the first appellant R1,000 towards the purchase of a new car and was under the impression that he had no further liability, that the collision occurred on the last day of the insurance, and, finally, that only an unusual concatenation of events deprived him of being in possession of the insurance token, which would otherwise have been an added

record ..... /41

record of the relevant details.

The contention that the respondent acted reasonably is largely based on the findings of the trial Judge, in particular the following reference to the respondent:-

> "Second defendant, who is clearly semi-illiterate and not very intelligent, had to give his evidence through an interpreter as he is not conversant in English. His knowledge of English is clearly very limited. Although there are unsatisfactory features in his evidence, his evidence cannot be rejected by me. According to his evidence the declaration of insurance was issued to him in May 1964. He put it in a drawer where he keeps his other papers, and mounted the token on the windowscreen of the car. To my mind a reasonable man would not have behaved otherwise".

The respondent's evidence, however, is far from clear in regard to what he did with the "paper" (the declaration of insurance) that accompanied the token. In fact it is contradictory. In his examination-in-chief he never mentioned the drawer:-

> "Can you remember whether, when you got the disc, the third party disc for your Pontiac, did you get a piece of paper that came with the disc? ---
> There were some papers together with the disc. Do you know what happened to those papers? ---
> I don't know what happened to them.

> HIS LORDSHIP: What happened to your papers which were delivered to you together with the disc, or can't you remember what happened to them? ---
> It was such a long time ago. I do not know what happened. It was nearly three years ago.
> The accident was three years ago? ---
> I just threw them somewhere at home and I don't know where they are".

Incidentally, he is speaking of what he had done almost six years before. (The trial was held in March 1970). It is only in cross-examination that he speaks of putting the declaration into a drawer. There is no reason to consider this a more credible version than the first. On the contrary, there are strong indications that he was then starting to reconstruct, to telescope events and confuse times. Only after he had said in cross-examination that he had put the declaration relating to the "Chev" car (which he had bought shortly after the collission to replace the Pontiac that had been wrecked) in a drawer, did he for the first time speak of placing the Pontiac declaration in a drawer. Having conceded that he had thought the Chev declaration important, his cross-examination continued:-

> "When you got that disc and document at the hairdresser, did you also realise that that

--document ..../43

document was equally important? --- (witness hesitates)
When you took out the insurance at the hairdresser did you likewise think that document was of the same importance as the one you subsequently got for the Chev? ---
I used to put it in my drawer, but I never realized the importance of the paper. The only thing I knew, that I had to have the disc on my screen ..... I want you to listen to the question. You have told me that you put the Chev document in the drawer because you realised it was important. Now I want to know, when you took the Pontiac documents from the hairdresser, did you or did you not realise that that was also important? --- No, I only thought the important thing was the disc. ....."

Cross-examing counsel reverted to the "Chev" declaration and the respondent then admitted that in that case "also I did not think it was so important". The cross-examination continued:-

"But why did you keep it then? For what purpose? ---
I just simply kept it in the drawers.
HIS LORDSHIP: For how many years did you keep the document? --- Every year I replace it.
For how many years, more or less? Can you remember? --- In the last two years I always keep the documents because I am in a house. Before I used to stay on a farm.
MR. KUMLEBEN: Wasn't there a house on the farm? --- There was, yes.
Now, tell me - when you got this document from the hairdresse, did you go an put it in the

drawer ...../44

> drawer with yout other papers? ---
> Yes, I took it home and I put it in the drawer.
> Why? --- I just put it there.
> You must have had a reason for doing that? You don't just keep some papers and throw away others? What is your policy with keeping papers? ---
> Simply because I got the disc on the car and I put the paper in the drawer".

A careful reading of the respondent's evidence suggests that he no longer spoke of "throwing" the declaration "somewhere at home" at this stage as a result of what he seemed to remember about the Chev and a pattern of conduct he at some stage adopted. His statement that "in the last two years I always keep the documents because I am in a house", whereas "before I used to stay in a farm" suggests that it was a recent practice and that he had changed his place of residence. It is to be noted that he does not claim to have discarded the Pontiac declaration because of obtaining the Chev declaration:-

> "If, as you say, your working rule used to be to take out an old document, an old declaration, and put in a new one when you renew your insurance, when you got your insurance for the Chev motorcar and put it into the drawer, did you think of throwing away the old declaration? ---
> I just threw the document or declaration into the drawer but I never looked for the one of the previous car - the Pontiac.

But ...../45

> But I thought you said to His Lordship: what you do is, when the one becomes obsolete, no longer current .....? ---
> No, I did not look for the declaration of the Pontiac. I simply put it in a drawer - this new declaration - and that is all".

Nor does he suggest that anyone could have removed the declaration from the drawer:-

> "Nobody could go and take anything from the drawer ..... it was not locked? ---
> I never noticed anything missing from the drawer".

On the probabilities his first version of what he had done with the papers relating to the Pontiac insurance, "I just threw them somewhere at home", is the true one. It is clear that he thought the declaration to be of no consequence. He did not understand the workings of third party insurance, was unable to read the declaration, he did not bother to find out what it was all about and did not care. All he wanted was the token. He never again gave the declaration a thought until the import of Honey's letter, dated 9th August 1966, was explained to him.

On this view of the respondent's evidence, was his failure to produce the declaration on request to be

ascribed to a failure by him to apply that care in the exercise of his duty which the Act envisages? The standard, regarding section 22 (2) in its context, particularly the provisions of section 22 (3) and the objects of the Act, appears to be that of the reasonable man, the bonus or diligens paterfamilias. How would he in the circumstances have conducted himself? He would, undoubtedly have informed himself of at least the nature of third party insurance, the significance of the declaration of insurance and its contents. Thus, he would become aware, inter alia, of the "Important Notice" printed on the declaration, which refers in particular to "giving information of accident to insurers and third party" and quotes section 22 in full. ([redacted]). He would have realized the importance of keeping the declaration safe and acted accordingly. He would certainly not throw it somewhere at his home and leave it at the mercy of the exigencies of housekeeping and fate, and forget about it. He would have foreseen the possibility of its loss and taken steps to prevent it. The respondent's

conduct ...../47

conduct did not attain this standard.

In the widest sense it must be accepted that the respondent committed a breach of the duty imposed upon him by section 22 (2). Not only did he not produce the declaration on request, but his inability to do so is to be attributed to his failure to exercise the degree of care which the Act requires. This establishes the 4th requisite mentioned by Prof. McKerron, thus fully complementing the others that have already been dealt with. It follows that (leaving aside the question of any defences) the appellants have established all the requirements enumerated by Prof. McKerron.

These requirements, however, are based mainly on English authorities, and reference to textbooks dealing with the law of tort in England shows that they are clearly derived from that system. It may well be questioned whether the reception of these principles into our system is as complete as appears to be assumed, thus displacing to some extent principles of negligence and remoteness basic to our

law ..... /48

law of delict. However, it is unnecessary to decide this, a fundamental question which has not been argued. In view of what I consider to be the ultimate result in the present matter, it may now be assumed in favour of the respondent that, in order to succeed, the appellants must also prove that the respondent was guilty of that negligence which involves foreseeability of harm to a "third party", and also that with the application of the usual principles of causality and remoteness the respondent is liable for the loss suffered by them. This will certainly do no violence to the arguments. They were, indeed, based upon this tacit assumption.

Having thus disposed of the preliminary matter, affecting the proper approach to be adopted in dealing in this case with matters of negligence and remoteness, I turn to the question whether the respondent was negligent. We have seen what care a reasonable man would exercise in the performance of his duty under section 22 (2), and that this entailed taking steps for the safekeeping of the declaration. The inquiry at this stage, on the assumption made above, goes further: would a reasonable man have foreseen the possibility of harm to a "third party" should ..... /49

should he not do so? Assuming the knowledge of the general scheme of the Act postulated above, he would from the outset—realize that in the case of a third party claim arising, the declaration could possibly be the only means to establish and prove the insurance and identity of the insurer, and that without that proof the third party, to his detriment, might be unable to enforce his rights. This would be an added inducement for the safekeeping of the declaration. He would not consider the token a sufficient alternative source of information open to a third party. Nor would he, if a claim arose during the currency of the insurance, consider it unnecessary to keep the declaration merely because he happened to know that the police had purported to make a note of the information on the token, particularly if he himself had not the slightest recollection of the name of the insurer.

Measured by this standard, the respondent's conduct was throughout, from receipt of the declaration to the failure to produce it upon request, negligent in relation to the loss suffered by the appellants. His subsequent conduct

is ..... /50

is not relevant to this enquiry, although it may have a bearing on the question whether the loss is not to be attributed to appellants' own fault, a matter which may now conveniently be dealt with.

The alleged negligence on the part of the appellants centres round the conduct of Honey, their attorney and, therefore, their agent, on and subsequent to the 30th January 1967, when he wrote the letter to the M.I.A. mentioning Noorman and Rondalia. It is said that he should then, without further ado, have sued Rondalia either alone or jointly with respondent and Santina, or have sued the M.I.A., or he should at least have pressed the matter by himself communicating with Rondalia.

On the facts of this case the alleged negligence, here invoked by the respondent, relates to the principle that a plaintiff should not be the author of his own loss, a principle which also bears upon the so called "duty to mitigate damages". As said by ..... /51

Mayne & McGregor on Damages (12th ed., para. 62):-

> "A plaintiff may have his damages cut down because his own conduct has constituted contributory negligence, has rendered some of the damage too remote, or has constituted a failure to mitigate the damage which may be defined as a failure on the part of the plaintiff to take reasonable steps either to reduce the original loss or to avert further loss. This covers the whole ground of contributory negligence and mitigation, but damage may be too remote from causes other than the plaintiff's conduct, whether acts of third parties or natural events: this factor does of course distinguish remoteness from the other two, but since the difficulties to be discussed arise only with cases of remoteness stemming from the plaintiff's conduct, cases of remoteness beyond these are not included in the present context".

The distinction between contributory negligence in this sense and a failure to mitigate appears to be a fine one (Mayne & McGregor, para. 63-65; Glanville Williams, Joint Torts and Contributory Negligence, para. 67 et seq.), and the two concepts appear to have in common that they do not rest upon any "duty" towards the defendant (cf. McKerron, p. 56; Charlesworth on Negligence, 4th ed., para. 1101 et seq; Glanville Williams, para. 87; Van der Merwe & Olivier, Onregmatige Daad, 2nd ed., p. 133; Mayne & McGregor, para. 149; ...../52

149; but see Charlesworth, para. 1107). Mayne & McGregor state that in the case of the duty to mitigate the plaintiff "is only required to act reasonably and the standard of reasonableness is not high in view of the fact that the defendant is an admitted wrongdoer" (para. 158). In regard to contributory negligence it is commonly accepted that the standard of care is the same as that applied in respect of original negligence. It may, however, be questioned whether this should be so. If it is accepted that the plaintiff owes the defendant no "duty", but has only a "duty" towards himself, he at no stage commits a wrong. It is the defendant's wrongful act which forces the plaintiff into the position of having to act ..... /52A

in his own interest. Why should he now be saddled with the same standard of care as that applying to the wrong-doer on pain of forfeiting his damages? Some reflection of this underlying consideration may, perhaps, be found in the doctrine of "sudden emergency", and various writers express some doubt as to the equity of setting such a standard. As examples of the latter, two writers may be selected from different countries, applying different systems of law. Glanville Williams ([redacted], para 88) puts it thus:-

> "In theory the same standard should be required of a plaintiff (in determining contributory negligence), but one cannot help feeling in reading the cases that the actual standard required has often been lower, and has rarely exceeded an average level of care. In a word, the reasonable defendant is not allowed to have lapses, but the reasonable plaintiff is."

A.R. Bloemberger, writing on the law of the Netherlands, in his work Schadevergoeding by Onrechtmatige Daad (para. 279, at p.402) says:-

> "Handelt de benadeelde pas redelijk als hij doet wat een voorzichtig mens, die

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> de schade zelf moet dragen, in eigen belang zou doen of noet bij de beoordeling van zijn handelen medegewogen worden, dat hij door een onrechtmatige daad, waarvoor een ander aansprakelijk is, in een situatie is gebracht, waarin hij moet handelen. Ik zou zeggen; het laatste. Het is niet billijk om het handelen van de benadeelde los van de gehele situatie, inclusief de voorafgaande onrechtmatige daad, te beoordelen. Dit brengt mede, dat men aan het gedrag van de benadeelde geen al te hoge eisen mag stellen, want het was tenslotte de wederpartij, die hem door zijn onrechtmatig optreden tot handelen noopte en wie zelf te kort schiet kan niet te veel eisen van anderen".

In the present case it is, however, unnecessary to investigate fully the position in our law relating in the aforegoing. Suffice it to say that in my view the alleged failure to sue the M.I.A. would constitute an alleged failure to mitigate the loss, and I will assume (without deciding) that the other allegations of negligence against Honey are properly to be considered as falling within the ambit of contributory negligence. As to the standard of care to be observed, I shall also assume, without deciding, that in both instances it is that of a bonus paterfamilias. (As to the duty to mitigate see Hazis v. Transvaal and Delagoa Bay Investment Co. Ltd., 1939 A.D. 374, at 398.)

On Honey's evidence, which was accepted, he was even on the 30th of January 1967 far from sure that

Rondalia was the insurer. He was more inclined to believe that it was the A.A. and that the real problem was to trace the correct number. It could hardly be said that he was unreasonable in this. Not only did his original information point to the A.A. being the insurer, but the letter from Immelman, acting on behalf of the respondent, fully confirmed this. A degree of scepticism in relation to the significance of the belated "pointing out" by the respondent would have been natural, and there was really nothing substantial to indicate to Honey that his (and Marais') inference, that led to Noorman and Rondalia, was anything more than a further clue to be followed up. The decision to pass on this information to Rondalia appears also to have been a sensible step to take.

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They were acquainted with the circumstances and were investigating the matter (it has been mentioned that John Murray & Co. were conducting inquiries for the M.I.A.). It was reasonable in the circumstances to await the result. It is difficult to conceive of the bonus paterfamilias rushing off to Court and instituting action against Rondalia before hearing from the M.I.A. There was some delay, it is true, by the M.I.A. but Honey sent reminders and, not unreasonably, must have assumed that they were conducting the necessary enquiries (as indeed they were). Upon receipt of the letter from the M.I.A., dated the 14th March 1967, to the effect "that no progress has been made in locating any valid insurance", he concluded that he could take the matter no further. In this he was justified in view of the history of investigations to date. I do not think as a result of Honey's conduct any negligence is to be attributed to the appellants.

It only remains to consider whether the appellants (acting through Honey) have failed to mitigate their loss by suing the M.I.A. Logically, it should first

be ..... /54

be decided whether the appellants had a right of action against the M.I.A. under Clause 6 of the Agreement. As I have a clear view of the ultimate result, I do not find it necessary to do so, but will assume, in favour of the respondent, that upon a true interpretation of the Clause, such right of action did exist. Honey did in fact contend this to be the position, but he was discouraged by the opinions produced by the M.I.A. and that of counsel consulted by him. In my view the appellants cannot be faulted for declining to pursue the matter. The so-called "duty" to minimise the damage does not extend to the plaintiff having to embark upon uncertain litigation. (Cf. Mayne & McGregor op cit, para. 159 (3), where Pilkington v. Wood, (1953) Ch. 770 is referred to).

In view of the above conclusion it is unnecessary to decide whether it was at all incumbent upon the appellants to sue the M.I.A., even if it were clear that the action was competent, on the principle of res inter alios acta, or that of a "collateral source". (Cf. Mayne & McGregor, para. 159 (5), and cases such as Teper v. McGees Motors (Pty) Ltd, 1956 (1) S.A. 742 (C), Van Dyk v. Cordier, 1965 (3) S.A.

723 (c)).

The remaining contentions on behalf of the respondent may be conveniently classified as relating to causality and remoteness. It is suggested inter alia:-

> "The reasonable man would not have foreseen the curious sequence of events commencing with the policeman's failure to record the details of his insurance correctly and culminating in Rondalia wrongly repudiating liability and the (appellants') attorney accepting such repudiation".

It is also argued that in various ways the "chain of direct causation" had been broken and that e.g. the failure of the M.I.A. to furnish the number of the token to Rondalia "is a causative factor separate and distinct from the respondent's failure to produce the declaration and a factor which was not reasonably foreseeable by him". Whether the terminology here used is appropriate, depends largely upon the test adopted for remoteness of damage.

At the moment three tests, so it appears, vie for full and exclusive recognition. (See the article by D.R. Stuart in 1967 S.A.L.J. at p.76; Van der Merwe & Olivier,

Die Onregmatige Daad in die Suid-Afrikaanse Reg, 2nd ed., at p. 177). It is, however, in the present case neither desirable nor necessary to decide which is the true test in our law: this question was not argued before us and I do not think that the end result would be affected, whatever test be applied.

It is clear that the breach of duty by the respondent was a cause-in-fact of the damage suffered - it was a conditio sine qua non of the damage and it remained that throughout. Does the foreseeability test (applied e.g. in Kruger v. Van der Merwe and Another, 1966 (2) S.A. 266 (A.D.)) absolve the respondent? In dealing with the question of the respondent's negligence we have already come to the conclusion that a reasonable man would have foreseen damage to a "third party", and it is implicit in that conclusion that he would reasonably have foreseen the general nature of the harm that might, as a result of his conduct, befall some person (i.e. the third party in the present case) exposed to a risk of harm by such conduct. The contentions for the

respondent ... /57

respondent, however, relate to the manner in which the damage occurred. But assuming in favour of the respondent that in the present instance the manner in which the damage occurred could not, reasonably, be foreseen, this does not avail the respondent. It is fundamental to this test that foresight of the concatenation of events leading up to the damage is not required. (Cf. Stuart, supra at p. 82; American Restatement of the Law, Torts (Negligence) para. 435; S. v. Bernardus, 1965 (3) S.A. 287 (A.D.) at p. 307 B-C)

The foreseeability test, therefore, does not assist the respondent. Does the direct consequences test? It would seem not. It must be emphasized that here the respondent's negligence operated throughout and that, in the absence of negligence on the part of the appellants (or their agents), there is no active intervening act. But even assuming that errors committed in the process of investigation, following upon the respondent's failure to produce the declaration, could be considered as candidates for an "intervening act", i.e. "a cause not set in operation immediately or mediately" by the

respondent's act (McKerron, op. cit., p. 123), it remains difficult to conceive of them being independent. Such errors seem to be "a risk inherent in the situation created by the" respondent (McKerron, op. cit., p. 125). In my view, adopting the approach dictated by the direct consequences test, the negligence of the respondent set in motion a train of events necessitating an investigation to determine the identity of the insurer, and such investigation carried with it the inherent risk of a mistake being made by someone. In the absence of negligence by the appellants or their agents, the "chain" of causation cannot be considered to have been broken. As to the third test, that of the "probable consequences": a major difficulty lies in deciding which variation of the basic theory of adequacy to apply. Prof W.A. Joubert (Codicillus Vol. VI, No. 1, May 1965, p. 11) suggests the following: "n Skade wat die dader feitlik veroorsaak het, is regtens gevolg van sy gedraging indien die gedraging volgens die algemene lewenservaring geëien was om daardie skade teweeg te bring". This also appears to offer no obstacle to the appellants' claims.

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The quantum of damages has been agreed upon in terms of Rule 37, the relevant part of the minute reading as follows:-

"Past Medical expenses (both Plaintiffs) R1,609-45
First Plaintiff's loss of earnings (from 30th April 1966 to 31st October 1966) 1,267-00
First Plaintiff's loss of future earnings 1,500-00
First Plaintiff's general damages 3,500-00
Second Plaintiff's general damages .... 1,300-00"

In the result the appeal is allowed with costs and the order of the Court a quo is altered to read:-

"Judgment against Joao Fernadis Correia Coutinho (Second Defendant) with costs -

(a) for the First Plaintiff in the sum of R7 876,45;

(b) for the Second Plaintiff in the sum of R1 300,00."

E.L. JANSEN

JUDGE OF APPEAL

Ogilvie Thompson, J.A.)
Concurred
Smit, A.J.A.)

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between:

MANUEL PERREIRA DA SILVA
SYLVIA MARGARET DA SILVA .....Appellants.

AND

JOAO FERNADIS CORREIA COUTINHO .....Respondent.

Coram: VAN BLERK, A.C.J., OGILVIE THOMPSON, JANSEN, JJ.A., SMIT ET MULLER, A.JJ.A.

Heard: 23rd November, 1970. Delivered: 5th April, 1971.

J U D G M E N T.

MULLER, A.J.A.:

The facts of this ~~judgment~~ case are recited in the judgment of my Brother Jansen, ~~J.A.~~

The main issue in the appeal is one of law, namely, whether a civil action for damages lies for a breach of the obligation imposed by Section 22(2) of the Motor Vehicle Insurance Act, No. 29 of 1942, as amended; hereinafter referred to as the Act.

The question whether the breach of a particular statutory duty gives rise to an action for damages at the suit of a person injuriously affected thereby, depends on the intention

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of the legislature; which intention must be gathered from the statute creating that duty.

There appears to be a divergence of views amongst the authorities as to the justification for relying on general presumptions concerning the intention of the legislature when seeking to ascertain what the legislature in fact intended in a particular case. There can, as I see it, be no objection to the view that, where a statute creates a duty but provides no means of enforcing it, a presumption operates that the legislature intended the duty to be enforceable by civil action at the instance of a person for ~~which~~ whose benefit the duty was imposed and who is injuriously affected by its non-performance. See in this regard Winfield on Tort, 8th Ed., at p. 129 and McKerron: The Law of Delict, 6th Ed., at p. 257. The provisions of the statute itself may, however, in a particular case contain sufficient indications for concluding that the legislature did not so intend.

Difficulties, however, arise in those cases where the statute, in creating a duty, provides for a sanction in the form of a penalty but is silent on the question whether a civil remedy for its breach was intended or not. Salmond on Torts, 14th

3/ Ed. .....

Ed., at p. 352 under a sub-heading "General Principles" states as follows:

> " If the statute imposes a duty for the protection of particular citizens or a particular class of citizen, it prima facie creates at the same time a correlative right vested in those citizens and prima facie, therefore, they will have the ordinary civil remedy for the enforcement of that right - namely, an action for damages in respect of any loss occasioned by the violation of it. "

The author then proceeds to state that these are exceptions to this rule and, in that context, the following is said at p. 354:

> " So where a special remedy is expressly provided, prima facie this was intended to be the only one and to exclude by implication any resort to the common law. But this is by no means conclusive. The weight to be attributed to this consideration will depend largely on whether the statutory remedy does or does not involve compensation to individual persons injured. Thus a pecuniary penalty payable wholly to the Crown has comparatively little significance in excluding an action for damages."

Winfield op.cit. p. 130, indicates, with reference to certain English decisions, that "two diametrically opposed initial presumptions" are contended for, and states in this regard:

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" It is probably unwise, therefore, when investigating the position under a given statute to start with a presumption of any kind. "

McKerron op.cit. p. 258, appears to come to the same conclusion in stating:

" The truth of the matter is that it is always a question of construction of the particular statute, and that the only rule that can be laid down for ascertaining the presumed intention of the Legislature, is that the whole Act and the circumstances, including the pre-existing law, in which it was enacted, must be considered. "

In argument before us reference was made to several South African decisions, including:

The Liquidators of the Cape Central Railways v. Nothling, 8 S.C. 25.;
Madrassa Anjuman Islamia v. Johannesburg Municipality, 1917 A.D. 718; and
Callinicos v. Burman, 1963(1) S.A. 489 (A.D.).

In the first mentioned case de Villiers, C.J., stated in general, at pp. 27/28 that:

" .....where a statute or statutory bye law enacts that a cartain thing shall be done for the benefit of a person he has, in the absence of any indication in the Statute or

> Byelaw of an intention to the contrary, a civil remedy for any special damages sustained by him by reason of non compliance with the terms of the statute or byelaw. "

Later in his judgment, at p. 28, the learned Judge stated:

> " But where a new duty is created and by the same Statute which creates such duty a penalty is imposed for breach of the duty, the question arises whether the infliction of the penalty is the only remedy intended by the Legislature, or whether a person who has been damaged by the breach of such duty is entitled to recover damages by civil action."

And that question the learned Judge answered by reference to the "object and language" of the statute then under consideration.

In the Madrassa Anjuman Islamia case Kotzé A.J.A., (as he then was) expressed the view, that a more correct and adaptive way of putting the rule of construction formulated by Lord Tenterden in Doe d.Rochester v. Bridges (1 B. & Ald., 859) would be as follows:

> " If it be clear from the language of a Statute that the Legislature, in creating an obligation, has confined the party complaining of its non-performance, or suffering from its breach, to a particular remedy, such party is restricted

> thereto and has no further legal remedy; otherwise the remedy provided by the Statute will be cumulative. "

The learned Judge then proceeded to state certain reservations concerning the application of rules or canons of construction, remarking that "It in reality depends in each case upon the true meaning of the particular statute whether the party is confined to the new remedy created thereby, or whether such new remedy is to be taken as merely additional ". ....."In other words the guiding principle is, what is the intention of the Legislature in the particular Case? ".

In Callinicos v. Burman the present Chief Justice, in dealing with a particular provision in the Insolvency Act, No. 24 of 1936, expressed himself as follows (at pp. 497/8):

> " It was defendant's duty to apply the provisions of this section; and, on the facts averred in the summons, plaintiff was entitled to the preference she claims. Prima facie, therefore, plaintiff would, on ordinary principles, have an action, sounding in damages, against defendant for breach of this duty (Liquidator Cape Central Railways v. Nothling, 8 S.C. 25 at pp. 27-28; Salmond Torts, 12th ed. p. 467). Such a prima facie right of action must, however, yield to the intention of the Legislature as reflected in the statute (ibid). As Salmond

> puts it, the question is in every case one as to the intention of the Legislature in creating the duty. "

It is important to note that in that case the Court was concerned with a statutory duty in respect of which no sanction, either criminal or civil, was provided for in the statute. It was therefore one of those cases where, according to the authorities, a person interpreting the statute would be justified in starting with a presumption that a civil right of action should be admitted unless it appears from the relevant statute itself that the legislature intended otherwise. I do not think that it was the intention of the learned Judge to formulate a general rule, which should apply without exception in every case of a breach of a statutory duty, that a presumption operates in favour of admitting a civil right of action.

In the present case the statute in question provides for a penalty for non compliance with the duty created by section 22(2) of the Act. That being so, and in view of what has been stated above, I think that, in an enquiry as to whether the legislature intended that a civil action for damages would be competent, in addition to the sanction specifically provided for, the safest

course would be to consider the object and the provisions of the Act as a whole, without the compulsion of predetermined presumptions either in favour of or against admitting such a right of action. And that is what I propose to do.

For a proper understanding of the purpose and effect of the Act the provisions thereof must be considered against the background of the state of the law existing at the date of its enactment. Prior to the coming into operation of the Act liability for loss or damage of the nature specified in Section 11 of the Act was, save for legislative provisions then in force in some of the Provinces of the Union of South Africa - which provisions were repealed by Section 33 of the Act - governed by the common law. The position was that an injured party could sue the person who was liable at common law for damages in respect of his injuries; such liability being founded on culpa or dolus. Ownership, as such, of a motor vehicle was no criterion for establishing liability for such loss or damage. On ordinary common law principles a person could be liable for such loss or damage only on account of his own unlawful conduct or unlawful conduct on the part of another for whose acts he was vicariously responsible.

The position under the common law often worked an injustice inasmuch as the injured party could in many cases not obtain satisfaction of his claim by reason of the financial circumstances of the person or persons legally responsible for the loss or damage sustained. The object of the Act was to afford better protection to such injured persons, and that object was sought to be ~~attained~~ achieved by introducing a system of compulsory insurance of motor vehicles. It was by means of such a system that the legislature intended, according to the preamble to the Act, "to provide for compensation for certain loss or damage caused unlawfully by means of motor vehicles and to provide for matters incidental thereto" - the kind of loss or damage envisaged being that specified in Section 11 of the Act.

The scheme evolved to make the Act workable required the introduction of several innovations which, subject to certain qualifications, in effect departed from or amended the common law in various respects. Thus, broadly speaking,

(a) The owner of a motor vehicle, save for certain exceptions, is obliged to insure it. If he fails to do so, he is, under certain circumstances, guilty of an offence and, moreover, renders himself liable as if he were the insurer

of the vehicle under the Act. His liability in this regard is based purely and simply on ownership coupled with a failure to insure.

(b) Registered Companies are, subject to certain qualifications, obliged to insure motor vehicles and, once such insurance has been effected, a registered company cannot repudiate liability on grounds which would at common law render the contract of insurance voidable. Provision is however made for a right of recourse, under certain circumstances, against the owner of the insured vehicle.

(c) Third parties who suffer loss or damage of the nature specified in the Act are entitled, subject to certain limitations, to claim compensation in respect thereof from the registered company which has insured the vehicle. And to the extent to which a third party is entitled so to claim compensation from the registered company concerned there is, with certain qualifications, a curtailment of his common law rights.

Efficacy of the Act necessitated the creation of a number of duties in so far as owners of motor vehicles were concerned and the imposition of concomitant sanctions. The duties thus created and

the sanctions imposed are the following:

Duties.	Sanctions.
1. The owner is obliged to insure his motor vehicle.	civil liability for any loss or damage caused by or arising out of the driving of the motor vehicle by any person, as if the owner were a registered company which had insured the vehicle. (Section 19(3)).
2. The owner is not allowed to drive or permit his vehicle to be driven on a public road or street or in a public place unless the vehicle has been insured.	a fine not exceeding R100 and, under certain circumstances, suspension of his driver's licence. (Section 19(4)).
3. The owner is obliged to attach a token of insurance to his vehicle and keep it attached thereto throughout the duration of the insurance.	a fine not exceeding R50. (Section 20).
4. The owner is obliged to make honest statements to the insurance company concerning the roadworthiness of his vehicle.	liability, under certain circumstances, to refund to the insurance company concerned compensation paid by it under the Act. (Section 14(2)(c)(i)).
5. The owner is obliged to comply with a direction given by a magistrate under Section 8(5) of the Act.	committal for contempt of Court (Section 8(9)); and liable, under certain circumstances, to refund to the insurance company concerned compensation paid by it under

	the Act. (Section 14(2)(b)(ii)).
6. The owner is obliged to comply with an undertaking given under Section 6(1) of the Act.	a fine not exceeding R100, (Section 6(2)), and liable, under certain circumstances, to refund to the insurance company concerned compensation paid by it under the Act.
7. The owner may not, under certain circumstances, himself drive the insured vehicle or permit certain persons to drive the vehicle.	liable, under certain circumstances, to refund to the insurance company concerned compensation paid by it under the Act. (Section 14(2)(b) and(c)).
8. The owner is, under certain circumstances, obliged to give the registered company concerned notice of any proposed change of use or alteration of the insured vehicle.	a fine not exceeding R100 or imprisonment without the option of a fine for a period not exceeding 3 months; and liable to pay to the insurance company certain prescribed sums. (Section 15(5)).
9. The owner is obliged, in the case of an accident causing bodily injury or death, to ~~cer~~ notify the insurance company concerned timeously of the occurrence and to furnish certain information.	a fine not exceeding R50 (Section 22(3)); and liable to refund to the insurance company concerned compensation paid by it under the Act (Section 14(2)(c)(ii)).
10. The owner is obliged, under certain circumstances, to produce his declaration of insurance and allow a copy thereof to be made.	a fine not exceeding R50 (Section 22(3)).

From the above it is clear that the legislature was alive to the

fact that in the case of non-compliance with some of the obligations created by it a penalty by way of a fine would not be an appropriate or sufficient sanction, and specifically provided in such cases for a civil remedy in favour of the party aggrieved either in lieu of, or in addition to, a fine.

In particular, the Act provides in express terms under what circumstances the owner of a motor vehicle can be held liable, directly or indirectly, for loss or damage resulting from any bodily injury or the death of any person caused by or arising out of the driving of such vehicle. These circumstances are the following:

(i) Where the owner fails to insure his motor vehicle. In terms of Section 19(3), read with Section 11, compensation is claimable from him as if he were the insurer. In such a case the owner has, in terms of Section 14(4), a right of recourse against any person whose negligence or other unlawful act caused the loss or damage in question.

(ii) Where, although the owner has duly insured his motor vehicle, the insurance company concerned is unable to pay the compensation (Section 13). In so far as an injured person, or the dependants of a deceased person, is or are able to recover compensation from the insurer, he or they have no right to claim compensation from the owner or from a person who drove

the vehicle with the owners consent. (Rose's Car Hire (Pty.) Ltd. v. Grant 1948(2) S.A. 466 A.D.)

(iii) Where, the motor vehicle having been insured under the Act, the insurance company has paid compensation under Section 11 and is entitled, on any of the grounds mentioned in Section 14, to a right of recourse against the owner.

Section 22(2) of the Act provides that where, as a result of the driving of a motor vehicle insured under the Act, any person other than the driver of that vehicle is killed or injured the owner shall, at the request of any person who has suffered any loss or damage as a result of the death of the person so killed, or at the request of the person so injured, produce to the person making the request the declaration of insurance whereby the vehicle was insured and allow a copy thereof to be made. As indicated above, section 22(3) provides for a fine not exceeding R50 for non-compliance with section 22(2).

It is the appellants' contention that it must have been the intention of the legislature that, in addition to the penalty provided for in Section 22(3), a civil action for damages would lie for a breach of Section 22(2). Such a contention can hardly be reconciled with the provisions of the Act which clearly

show that, where the legislature intended that an owner of a motor vehicle would, in his capacity as such, be liable, either directly or indirectly, for compensation such as envisaged in Section 11 on the ground of non-compliance with a duty imposed by the Act, it so provided in clear and express terms. No such provision was made relative to the obligation imposed by Section 22(2). Had the legislature intended that compensation would be claimable for a breach of Section 22(2), it could very easily have made such provision; and one would then also have expected provision to have been made for a right of recourse by the owner against the person whose negligence or other unlawful act caused the loss or damage in question (vide Section 14(4)) or, indeed, a right of recourse against the insurance company concerned.

The fact, however, is that the legislature did not make such provision, but, on the contrary, made express provision in Section 13 of the Act which in effect excludes a right of action such as contended for.

Section 13 reads as follows:

" Claim for compensation lies against insurance company only. - When a person is entitled under section eleven to claim from a registerd

company any compensation in respect of any loss or damage resulting from any bodily injury to or the death of any person caused by or arising out of the driving of a motor vehicle insured under this Act by the owner thereof or by any other person with the consent of the owner, the first-mentioned person shall not be entitled to claim compensation in respect of that loss or damage from the owner or from the person who drove the vehicle as aforesaid or if that person drove the vehicle as a servant in the execution of his duty, from his employer, unless the registered company concerned is unable to pay the compensation. "

With regard to the meaning of this section the following was stated by Centlivres, J.A. (as he then was) in Rose's Car Hire (Pty.) Ltd. v. Grant (supra) at p. 473.:

" The words "the compensation" at the end of the section seem to me to mean the same as "compensation" when that word occurs after the words "entitled to claim", and if that is so the section means that a person entitled to claim compensation from an insurer cannot claim the same compensation from the owner or his authorised driver, when he is entitled to recover it from the insurer and that he can claim it from the owner or his authorised driver only if the insurer is unable to pay it. "

17/ And .....

And later (at p. 474):

> " .....the meaning to be assigned to sec. 13 of the Act is that in so far as an injured person or his dependants is or are able to recover compensation from the insurer, he or they have no right to claim compensation from the owner or his authorised driver.1....."

In so far as the third party is entitled to claim compensation from the registered company concerned, and provided only that the registered company is able to pay, the third party has no right to claim compensation from the owner.

The position in the instant case is that the vehicle in question was duly insured, and it has been accepted that the insurer, Rondalia Assurance Corporation Limited, would at all times have been able to pay any damages awarded. That being so, the appellants are, on the plain meaning of the section, not entitled to claim from respondent that amount of compensation which ~~they are~~ they were entitled to claim (and but for the provisions of Section 11(2)(a) of the Act, ~~are~~ would still be entitled to claim) from the said company in respect of the loss or damage suffered by them resulting from bodily injuries caused by or arising out of the driving of the vehicle in question.

18/ It.....

It was, however, argued before us that the protection which the legislature conferred by Section 13 was intended to be limited to causes of action under the common law and not to extend also to a cause of action based on a breach of a statutory duty imposed by the Act. The truth of the matter, however, is that the language of Section 13 does not contain such a limitation. If the position is, as on my reading of the Act it should be held to be, that the legislature did not intend a civil action for damages to lie for a breach of Section 22(2), then it must be accepted that Section 13 was directed only at claims under the common law; and such claims could with equal effect ~~had~~ have been ~~in~~ex cluded either by specific reference to causes of action under the common law or by the simpler method, which was in fact employed, of excluding all claims against the owner and the other persons mentioned in the Section. On the other hand, however, if the position were to be as the appellants contend for, namely, that the legislature did ~~not~~ intend, but for some unexplicable reason refrained from stating, that a breach of Section 22(2) would give rise to a civil action for damages, then it is indeed strange that the legislature chose to word

Section 13 in such a way that, on the plain meaning of the words employed, the intended right of action would in effect be excluded. I cannot accept that to be the case.

A consideration of the object and the provisions of the Act as a whole leads me to the conclusion that it could not have been the intention of the legislature that a breach of Section 22(2) of the Act should give rise to a civil action for damages. The appellants' contention that the legislature did so intend must break down against the following considerations, namely:

(a) That, whereas, according to the preamble, the very object of the Act was to "provide for compensation for certain loss or damages caused unlawfully by means of motor vehicles ...", the legislature, though intending that such compensation should be claimable from an owner who fails to comply with the provisions of Section 22(2) (that is the contention), did not so provide, but merely made provision for a penalty by way of a fine, and left its intention regarding a civil action to be presumed. Such a

position is, to say the least, unlikely, in view of the clear manner in which the legislature in all other respects circumscribed the liability of an owner of a motor vehicle in the event of non-compliance with duties imposed on him by the Act.

(b) That, although the legislature intended that a civil action for damages such as contended for by appellants would be a competent one, it singularly failed to provide for a right of recourse by the owner who has breached Section 22(2) against the person or persons whose negligence or other unlawful act caused the loss or damage in question, or, indeed, against the insurance company concerned. This would indeed lead to inequitable results. An owner who breaches Section 22(2) would then be in a far worse position than the owner who fails to comply with the more important duty imposed on him, namely, to insure his vehicle; for the latter a right of recourse is specifically provided in Section 14(4) of the Act. No such provision is made for the owner who breaches Section 22(2) either to recover from the insurance

company concerned or from the person responsible for the loss or damage in question - and without such a provision the owner would not have a right of recourse either against the insurance company concerned, or against the person responsible for such loss or damage, save, perhaps, where he drove the vehicle without the owner's consent (vide Section 13).

(c) That, if a right of action as suggested was intended, the legislature, as I have indicated, chose to word Section 13 of the Act in such a way that the alleged intended right would indeed be ineffective.

Counsel for the appellant argued before us that the legislature must have realised that, in the absence of a right of action such as contended for, the whole object of the Act could be frustrated by an owner who negligently places himself in the position of being unable to comply with Section 22(2), or even wilfully refuses to comply with the Section. The fallacy in this argument is twofold. In the first place, if the legislature considered that compliance with the duty imposed by Section 22(2) was a *sine qua non* for the effective operation the Act, so much

22/ more .....

more the surprise that the legislature did not make provision for the suggested right of action. Secondly, the argument is based on the false premise that disclosure of a declaration of insurance is the only means of identifying the registered company concerned. On the contrary, the legislature may very well have placed reliance on the fact that the identity of the insurance company concerned could also be established by other means; for example by reference to the token of insurance (as to which see Sections 4 and 20 of the Act) or by making other enquiries. No doubt production of the declaration of insurance would be the most expeditious way of establishing the identity of the registered company concerned, and that may be the reason why the legislature made specific provision therefor so as to relieve the third party from investigations which in some cases could be cumbrous.

Counsel's argument does not meet with the realities of the situation, and that is that nearly 30 years have elapsed since the coming into operation of the Act, and this is the first time of which I am aware, that an injured third party has sought to rely on an alleged right of action under Section 22(2) of the Act. And the present case is indeed a most exceptional one as

23/ will .....

will be seen from the following brief statement of the facts.

The relevant token of insurance was attached to respondent's vehicle at the time of the collision (30 April 1965, which was also the date on which the period of insurance terminated), and particulars thereof ~~are~~ were recorded by the constable who was called to the scene of the collision. The constable unfortunately made a mistake in recording the name of the insurance company concerned but otherwise noted down the correct number appearing on the token. The information so noted down was, upon request, furnished to the appellants' attorney. It was, however, not until June 1966 - i.e. some 14 months after the collision - that steps were taken to proceed with a claim under Section 11 of the Act. Difficulties were then experienced on account of the incorrect information obtained from the police, and it was only in August 1966 that respondent was requested to furnish particulars of the declaration of insurance. By then some 15 months had expired since the lapse of the insurance in question. He could not produce the declaration, and the token of insurance could not be traced, respondent's vehicle having in the meantime been sold as scrap. Respondent approached the police, and also he obtained from the

24/ police ....

police the incorrect information which had been recorded by the constable concerned; and this information was furnished to appellants' attorney. Further steps taken by appellants' attorney to obtain certainty as to the insurance company concerned dragged on until the end of 1966, when respondent was approached in order to ascertain whether he could remember where he had taken out insurance for his car. He then supplied certain information from which it would have been possible, upon proper enquiry, to have established the identity of the insurance company concerned. On account, however, of the circumstances and complications which are set forth in the judgment of my Brother Jansen, and which I do not propose to repeat, matters dragged on until May 1967 by which time the period of prescription provided for in Section 11(2)(a) of the Act had run its course.

The present case can therefore hardly serve as an example to illustrate the alleged necessity for a right of action such as contended for by appellants.

In ~~view~~ my view the Court a quo correctly held that a breach of Section 22(2) does not give rise to a civil action for damages, and in my judgment the appeal should be dismissed.

G v R Muller

MULLER, A.J.A.

VAN BLERK, A.C.J.) concurs.