G.P.-S.43575—1969-70—2,000

J 219

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

(Provincial Division)
(APPELLATE Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

A. A. MUTUAL INSURANCE ASSOCIATION LTD *Appellant,*

versus

1. SYDNEY LIONEL BIDDULPH; 2. ROBYN van der RIET *Respondent*

Appellant's Attorney C. Reid & Haylet
Prokureur vir Appellant

Respondent's Attorney
Prokureur vir Respondent

Appellant's Advocate D. Reichman S.C. H.M.
Advokaat vir Appellant J. H. Conradie

Respondent's Advocate 1. P.M. Wulfsohn S.C.
Advokaat vir Respondent R.H. Zulman
2. D.M. Ettlinger

Set down for hearing on
Op die rol geplaas vir verhoor op

2. 4. 6. 8. 9

Coram: Botha, Wessels, Trollip, Corbett et Hofmeyr, JJA.

Reichman - 9.45-11.00, 11.15-12.47, 2.15-2.44; 5.57-6.02.

Wulfsohn - 2.45-4.00; 4.15-5.47;

Ettlinger - 5.47-5.57.

(W.L.D.)

1. The Court allows the said appeal with costs. The costs are to be paid by First Respondent (Plaintiff), and by Second Respondent (second Defendant) Security warned

Writ issued Lasbrief uitgereik	Bills Taxed—Kosterekenings Getakseer		
	Date Datum	Amount Bedrag	Initials Paraaf
Date and initials Datum en paraaf			

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

A.A. MUTUAL INSURANCE ASSOCIATION LTD. ..... APPELLANT

AND

SYDNEY LIONEL BIDDULPH ..... FIRST RESPONDENT

AND

ROBYN VAN DER RIET ..... SECOND RESPONDENT

Coram : Botha, Wessels, Trollip, Corbett and Hofmeyr, JJ.A.

Heard : 3 November 1975 Delivered : 25 November 1975

J U D G M E N T

Trollip, J.A. :

On Sunday, 18 July 1971, a Volkswagen motor

car .... /2

car, while being driven by Miss van der Riet ("the driver"), overturned on the road between Ariamsvlei and Karasburg on the way to Keetmanshoop in South West Africa. As a result the passenger in the vehicle, Dr. Biddulph ("plaintiff") was seriously injured. He claimed compensation for his injuries under the Motor Vehicle Insurance Act, No. 29 of 1942 ("the Act") in the Witwatersrand Local Division against the insurer of the vehicle as first defendant ("appellant") and, in the alternative, against the driver as second defendant. (The Act was replaced by Act No. 56 of 1972, but it was common cause that the former continued to apply to this action.)

Plaintiff's claim, as ultimately pursued against the appellant was based on section 11(1) of the Act, read with proviso (iii) thereto. He alleged that the accident was caused by the negligence of the driver, that at the time of the accident he was, in terms of that proviso, being "conveyed in the course of the business of the driver or owner of the

motor .... /3

motor vehicle", and that the appellant as the insurer was therefore liable under the Act. His alternative claim against the driver was founded on her liability under the common law for negligence. That the accident was caused by the negligent driving of the driver became common cause.

At the commencement of the trial Hiemstra, J., after hearing argument, ruled that the plea of the appellant had impliedly admitted that a Professor Solomon was the owner of the vehicle at all relevant times. In consequence of that ruling appellant elected to apply to amend its plea to specifically deny that at the time of the accident Prof. Solomon was the owner. This was opposed by counsel for the plaintiff and the driver. The learned Judge refused the application on the ground that the plaintiff would be prejudiced by the amendment to an extent which could not be remedied by an appropriate order of costs. The trial then proceeded on the basis that Prof. Solomon was the owner of

the .... /4

the vehicle at the time. Ultimately the Court a quo found in plaintiff's favour, holding that he was being conveyed in the course of the business of Prof. Solomon. Judgment was therefore granted for plaintiff for R8 000, the agreed amount of compensation, with costs against the appellant. The latter was also ordered to pay the costs of the driver. The appellant has appealed against the whole of the judgment, including the learned Judge's ruling on the meaning of appellant's plea and his refusal to allow it to be amended.

To determine whether or not the plea impliedly admitted that Prof. Solomon was the owner of the vehicle on 18 July 1971, it is necessary to quote the relevant passages in the pleadings. In the plaintiff's particulars of claim it was alleged:

> "4. On or about the 18th day of July 1971, the Plaintiff was a passenger in a motor vehicle registration No. TJ 123-537, then and there being driven by the Second Defendant on the road between Ariamsvlei and Karasburg, South West Africa, when the said vehicle left the said road and overturned.

5. .... /5

5. At the time of being conveyed as a passenger as aforesaid in the said vehicle, registration No. TJ 123-537, the Plaintiff was being so conveyed in the course of the business of the Second Defendant, or alternatively, of the owner of the said vehicle, or further alternatively, in the course of his employment with the Second Defendant or the owner of the said vehicle.

6. ALTERNATIVELY TO PARAGRAPH 5 HEREOF
The Plaintiff was being conveyed as a passenger in the said vehicle as aforesaid, otherwise than in the course of the business of the Second Defendant or the owner of the said vehicle, and otherwise than in the course of his employment with the Second Defendant or the owner of the said vehicle."

(The allegation that plaintiff was being conveyed in the course of the driver's or owner's employment was eventually not relied on.) In par. 10 it was alleged:

> "At all material times herein and more particularly on the 18th July 1971, motor vehicle registration number TJ 123-537 was insured by the First Defendant in terms of the provisions of the said Acts, the First Defendant having issued a declaration of insurance in respect thereof."

In reply to a request for further particulars to paragraph 5 as to (a) the nature of the business of the driver and of the owner of the vehicle and (b) the purpose

for .... /6

for which the plaintiff was being conveyed, the plaintiff replied:

"(a) The business of the Second Defendant was to act as a radiographer for the purpose of conducting an epidemiological survey in arthritis among the Hottentot people living in andaround Keetmanshoop, South West Africa. The business of the owner of the vehicle was to organise the said survey in his capacity as Professor of Orthopaedic Surgery at the University of the Witwatersrand.

(b) For the purpose of conducting the said survey."

(It was common cause that the professor there mentioned was Prof. Solomon.) Appellant answered those allegations in its plea thus:

"3. AD PARAGRAPH 4:
Save for admitting that on about 18th July, 1971 a motor vehicle with registration number TJ 123-531 (not TJ 123-537 as the Plaintiff alleges) was being driven on the road between Ariamsvlei and Karasburg, South West Africa, and that the said vehicle thereafter overturned, the First Defendant has no knowledge of the allegations made, accordingly does not admit the same, and puts the Plaintiff to the proof thereof.

4. AD PARAGRAPH 5:
The First Defendant denies as if specifically traversed each and every allegation contained in this paragraph.

5. AD PARAGRAPH 6:
The First Defendant admits the contents of this paragraph.

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8. AD PARAGRAPH 10:
Save for stating that the registration number of the insured vehicle was TJ 123-531 the First Defendant admits the contents of this paragraph."

It is unnecessary to refer to the plea of the driver, since it is irrelevant to the issue under inquiry.

The plaintiff did not react in any way to appellant's plea by requesting further particulars thereto or otherwise, nor did he file a replication. Consequently, in terms of Rule 25(2) of the Uniform Rules of Court, close of pleadings and joinder of issue thereon were thereupon deemed to have occurred.

The first inquiry is whether, on this state of the pleadings, appellant impliedly admitted that Prof. Solomon was the owner of the vehicle at the relevant date, i.e., 18 July 1971, when the accident occurred. Plaintiff's case was that such an admission was contained in par. 8 of appellant's plea, in which it admitted the

contents .... /8

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To: _____

contents of par. 10 of plaintiff's claim. Appellant thereby admitted, it is clear, that on 18 July 1971 the vehicle was insured by it "in terms of the provisions of" the Act and that it had issued a declaration of insurance in respect thereof. According to those provisions, so it was contended, it is only the owner of a vehicle who can effect such insurance and to whom the declaration of insurance can be issued (sections 3, 4 and 6), and such insurance only subsists while he remains the owner (section 17(d)). Consequently, so the contention proceeded, the appellant, by admitting that the insurance had been duly effected and was still effective on 18 July 1971, had impliedly admitted that the insured was the owner of the vehicle on that date.

On the other hand, appellant relied on par. 4 of its plea in which it denied, as if specifically traversed, each and every allegation contained in par. 5 of plaintiff's claim. As the further particulars to par. 5, supplied by

plaintiff .... /9

plaintiff, form part of this paragraph (see Rule 21(2)(a)), appellant's denial must be regarded as also relating to the allegations in those further particulars.

Now, in my view, those further particulars relating to "the business of the owner of the said vehicle" contained two separate allegations: (a) the owner on 18 July 1971 was Prof. Solomon, and (b) it was his business to organise the aforementioned epidemiological survey at Keetmanshoop. Hence par. 4 of the plea must be regarded as denying each of those allegations. That construction of par. 4 of the plea also accords with the intention manifested in pars. 3 and 5 thereof, namely, that, except for admitting that the accident happened, appellant disputed every attendant circumstance fixing it with liability therefor under the Act, and it maintained that only the driver was liable to the plaintiff under the common law.

It was, however, contended for plaintiff that

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the pleadings had to be read as a whole; that, so read, it was implied in par. 10 of the plaintiff's claim that Prof. Solomon was the owner of the vehicle on 18 July 1971; that, by admitting that paragraph, appellant admitted this implied allegation; that the denial in par. 4 of the plea had to be read as being subject to that admission; and that the plea therefore meant that every allegation in par. 5 of plaintiff's claim and the further particulars thereto was denied except the one that Prof. Solomon was the owner of the vehicle on 18 July 1971, which must be regarded as having been admitted.

This contention is unacceptable for these reasons. The plea only admits "the contents" of par. 10 of plaintiff's claim. In the context of the plea that admission must be confined to the contents expressed in the paragraph, especially as the relevant allegation about Prof. Solomon's ownership that plaintiff sought to imply in par. 10 in order to bring it within the admission, had just been expressly denied by appellant in the preceding par. 4 of the plea. On that

construction .... /11

construction there is no inconsistency in the plea. For, by admitting par. 10, the appellant accepted that, whosoever the "owner" of the vehicle might be, it was duly insured by appellant and that such insurance still subsisted as at 18 July 1971, but that appellant denied specifically that Prof. Solomon was then the owner of the vehicle as alleged in par. 5 of plaintiff's claim; in other words, appellant was not disputing that, as the insurer of the vehicle, it was on risk under the Act, but it denied Prof. Solomon's ownership pro hac vice in order to rely on the special defence available to it in respect of this accident under section 11(1), proviso (iii), of the Act. Such an attitude could conceivably be adopted where, for example, the insurer was uncertain at the time of pleading whether or not the insured had ceased to be the owner when the accident occurred or who the owner then was.

Putting it crisply another way, I think that

the .... /12

the admission in the plea of the "contents" of par. 10 of plaintiff's claim must rather be read as being subject to the express denial of each of the allegations of par. 5 thereof, and not conversely, as plaintiff contended. For an admission of a fact in a plea has important and serious consequences for the defendant: while it stands it usually binds him, the plaintiff need not adduce any evidence to prove the admitted fact, and the defendant cannot seek to contradict it (see, for example, Gordon v. Tarnow 1947 (3) S.A. 525 (A.D.) at p. 531). Hence, to sustain those consequences against the defendant, it must clearly and unequivocally appear from the pleadings that the alleged admission has been made expressly, or by necessary implication, or, according to Rule 22(3), by omitting to deny or deal with the relevant allegation of fact in the plaintiff's claim. Otherwise the defendant might be prejudiced. As de Villiers, J.A., said in Rance v. Union Mercantile Co. Ltd. 1922 A.D. 312, at p. 315:

"The .... /13

> "The fact of the matter is the party making the admission is bound by it to the extent to which the admission goes. To press it against him beyond that, under all circumstances, may lead to inequitable results."

The passage in Beck's Pleading in Civil Actions, 3rd. ed., par. 38, pp. 54/5 relating to an admission in a plea, is also apposite and supports the above approach. It reads:

> "Its effect is to bind the party making it and he is bound to the extent of its inevitable consequences or necessary implications unless these are specially stated to be denied .... But an admission does not entail the admission of anything which cannot fairly be regarded as an inevitable consequence or a necessary implication."

Here, it was not, in my view, an inevitable consequence or necessary implication of the admission of the "contents" of par. 10 of plaintiff's claim that Prof. Solomon was the owner of the vehicle on 18 July 1971, and, if it was such a consequence or implication, it was specially denied by appellant's preceding denial of par. 5 thereof.

In Ash v. Hutchinson & Co. 1936 Ch. 489 (C.A.), too, Greene L.J. said at p. 503:

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> "A plaintiff who relies for the proof of a substantial part of his case upon admissions in the defence must, in my judgment, show that the matters in question are clearly pleaded and as clearly admitted; he is not entitled to ask the Court to read meanings into his pleading which upon a fair construction do not clearly appear in order to fix the defendants with an admission."

The present situation is similar. The plaintiff is seeking to read into par. 10 of the claim an allegation that the owner of the vehicle on 18 July 1971 was Prof. Solomon in order to fix appellant with an admission of that allegation. He is not in my view entitled to do that.

In arriving at the above conclusion I have not been unmindful of the fundamental need for clarity and precision in a plea in order to inform the plaintiff of what case he has to meet. It is to satisfy that need, of course, that generally each material allegation of fact in the particulars of claim should be dealt with separately and specifically in the plea (see Rules 18(5), 22(2) and (3)). But a simple, composite denial (as in par. 4 of appellant's plea) of each

and .... /15

and every allegation in a particular paragraph of the claim is permissible if no ambiguity is thereby created (see Beck, supra, at p. 56, and cf. John Lancaster Radiators Ltd. v. General Motor Radiator Co. Ltd. and Others (1946) 2 All E.R. 685 (C.A.)). In the present case, for reasons already given, I do not think that appellant's composite denial in par. 4 of the plea rendered it ambiguous. But even assuming that, when it is read with the admission of par. 10 of the claim, it does render the plea ambiguous and thus vague and embarrassing, that does not assist the plaintiff. For the admission on which he seeks to rely would then ex hypothesi not clearly or unequivocally emerge from the pleadings and so satisfy the abovementioned requirements. If plaintiff wanted to have the plea clarified in that respect, he could have taken steps under Rule 23 by notice to the appellant or by excepting to the plea or by applying to strike out its alleged offending parts. However, he did not do that. He went ahead with the proceedings on the

pleadings .... /16

pleadings as they then stood. Consequently, if, as is assumed, the plea was ambiguous, I think that it ought to be regarded as denying rather than admitting the allegation of Prof. Solomon's ownership of the vehicle on 18 July 1971. The reasons are: (a) this is not a case where the plea omitted to deny or deal with that allegation: it dealt with it, but (on the assumed hypothesis) it dealt with it ambiguously; and (b) according to Wigmore on Evidence, 3rd. ed., vol IV, par. 1058, an admission in a plea is "a waiver relieving the opposing party from the need of any evidence." The other important consequences of an admission have already been mentioned. Hence, such a waiver by the appellant should not be lightly inferred.

Probably the reason why plaintiff did not take any steps to clarify the plea was that he believed that appellant would not dispute at the trial that Prof. Solomon was the owner of the vehicle on 18 July 1971. That belief was possibly due to his misreading of appellant's plea in the

light .... /17

light of (a) the declaration of insurance which was issued by appellant in the name of the Professor as owner of the vehicle on 1 May 1971, (b) a certain letter of 26 August 1971, i.e. after the accident had occurred, written by appellant to plaintiff's attorneys, in which the Professor is referred to as appellant's "insured", and (c) certain other correspondence that apparently passed between the parties or their attorneys. The documents mentioned in (a) and (b) were handed into the Court a quo from the bar as exhibits during the argument on the pleadings. We were informed that those in (c) would also have been handed in but for the learned Judge having called upon appellant's counsel before plaintiff's counsel had completed his argument. But none of those documents formed part of the pleadings; they would merely have constituted evidence in the trial; and they could not at that particular stage of the proceedings, be used to construe the pleadings in an attempt to spell out of the plea an

admission .... /18

admission by appellant of the ownership of the vehicle.

Possibly appellant might originally have intended not to contest the ownership of the vehicle at the trial. That is, however, beside the point, for it not infrequently happens that a defendant in his plea denies an allegation for reasons of safety or strategy, at any rate until he has prepared for trial when he is better placed to assess the evidence available on the issues. That is, I think, what happened here. Initially, appellant, except for admitting the accident, disputed in pars. 3, 4, and 5 of its plea every attendant circumstance that might fasten it with liability for the accident under the Act. And, according to the recorded argument on the pleadings in the Court a quo, when appellant came to prepare for trial, it discovered, so it said, that Prof. Solomon was not the owner of the vehicle. That information was conveyed to plaintiff. At the pre-trial conference appellant then refused to admit,

for .... /19

for the purposes of the trial, that the Professor was the owner. The minute recording that refusal was handed into the Court a quo at the commencement of the trial. Hence, by that stage of the proceedings, it ought to have been quite clear to the plaintiff that appellant did not intend admitting at the trial that Prof. Solomon was the owner on 18 July 1971. Plaintiff, however, then chose to rely on the pleadings as they stood for such an admission by appellant. For reasons already given they do not sustain it.

To sum up. The ruling by the learned Judge that the pleadings contained an implied admission by appellant that Prof. Solomon was the owner of the vehicle at all relevant times was incorrect and must be set aside. He ought to have ruled that appellant's plea denied, or must be regarded as having denied, that the Professor was the owner on 18 July 1971.

It .... /20

It follows that the appellant should not have been put to an election whether or not to amend the plea to raise such a denial. We therefore need not consider whether the refusal of the amendment was justified or not. It was indeed the plaintiff who ought to have faced an election, i.e., whether to proceed with the trial on the present pleadings and attempt to have the issue of ownership resolved by evidence in his favour, or whether to apply for an amendment to his pleadings, for example, by filing a replication alleging that appellant is estopped from denying that the Professor was then the owner of the vehicle. Because of the learned trial Judge's ruling and refusal of the appellant's amendment, none of the above issues could be canvassed at the trial. Unless therefore the judgment against appellant for payment of R8 000 in plaintiff's favour can be supported on some other ground under the Act, presently to be considered, the judgment ought to be set aside, and the matter remitted

to .... /21

to the Court a quo for further hearing on the issue of ownership. At such re-hearing plaintiff ought to be afforded an opportunity of applying to amend his pleadings by filing a replication raising estoppel or in some other way, if he so desires.

I turn now to consider the only other ground in proviso (iii) to section 11(1) of the Act on which plaintiff relied for its claim against appellant. It will be recalled from the pleadings set out earlier in the judgment that plaintiff alleged that he was being conveyed at the time "in the course of the business of the driver" in terms of that proviso. The relevant provisions of the Act have so often been fully quoted and canvassed in this Court that it is supererogatory to repeat them here.

It was common cause that the purpose of plaintiff's and Miss van der Riet's (the driver's) journey in the vehicle to Keetmanshoop was to participate in an epidemiological

survey .... /22

survey in arthritis among the Hottentots living in that area. This survey was part of a broader project of research into the incidence of arthritis in different population groups in this country. This research was being conducted by the Department of Orthopaedic Surgery of the University of the Witwatersrand. It was financed by a trust fund administered by the University. The project was of considerable importance to medical science. Several persons were engaged in it, including Prof. Solomon and Dr. Beighton, acknowledged experts in this field. The former was the head of the Orthopaedic Department. Dr. Beighton was brought out from the United Kingdom for the purpose of the project on a fellowship provided by the trust fund. The plaintiff, an orthopaedic surgeon, held an appointment as such with the Department at the time. He also assisted in the project as part of his ordinary work with the Department.

The survey at Keetmanshoop was to last for

about .... /23

about four weeks. (It actually lasted three weeks.) About eight persons were to be engaged in it, including Prof. Solomon, Dr. Beighton, plaintiff, and several radiographers. Amongst the latter was Miss van der Riet. At the time she was employed by a firm of radiologists, but she accepted the invitation to join the survey as one of its radiographers. Arrangements had to be made to transport the members of the survey team and their equipment to Keetmanshoop and to have transport available there. In accordance with those arrangements Dr. Beighton drove the Department's landrover there; plaintiff was to drive the Volkswagen (the vehicle in question, which, to use a neutral description, was then at Prof. Solomon's disposal); Miss van der Riet was to accompany him in the vehicle with all her radiographic equipment; and the others went by air. Plaintiff, and presumably the others too, were to be reimbursed for all their travelling and subsistence expenses. Miss van der Riet was in addition

to .... /24

to receive an honorarium for her services as radiographer. Presumably the other radiographers were to be similarly remunerated. All the costs of the survey were to be paid out of the moneys provided by the trust fund.

On these facts, did the survey constitute a "business" within the meaning of proviso (iii) of section 11(1) of the Act? Now "business" is a vague, elastic concept capable of sustaining a great variety of connotations, some wide, others narrow. Most of them are referred to and discussed by Fannin, J., in Maharaj v. New India Insurance Co. Ltd. 1963 (3) S.A. 704 (D), and by Milne, J.P., in Singh v. Provincial Insurance Co. Ltd. 1963 (3) S.A. 712 (N). Both learned Judges concluded that "business" there meant, at most, "an active occupation or profession continuously carried on." That conclusion is derived from certain dicta of Rowlatt, J., in C.I.R. v. Marine Steam Turbine Co. Ltd. (1920) 1 K.B. 193 on p. 202/3. The learned Judge there said that the word

"business" .... /25

"business" has two distinct meanings: (a) a wide one - "any particular matter or affair of serious importance", and (b) the narrow one just quoted. He chose (b) as the true meaning to be applied in deciding the issue before him. I emphasize, in passing, that that issue concerned the meaning of the expression "carrying on business". (I shall return to this point presently.) In Maharaj's and Singh's cases the narrower meaning was also chosen. One of the reasons was (see Maharaj's case at p. 708 F to p. 709 D) -

> "because the Act interferes with the prior activities of insurance companies, the tendency would be to adopt that interpretation which narrows rather than widens the scope of the liabilities of a registered insurance company under the Act."

However, this Court has now firmly pronounced that, as the Legislature intended by the Act to give the greatest possible protection to third parties, words or phrases in proviso (iii) of uncertain meaning should be construed in their favour and against insurers (see Aetna Insurance Co. v. Minister of Justice 1960 (3) S.A. 273 (A.D.) at p. 286 E - F; Van Blerk

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v. African Guarantee & Indemnity Co. Ltd. 1964 (1) S.A. 336 (A.D.) at p. 341 C - F; and Hladhla v. President Insurance Co. Ltd. 1965 (1) S.A. 614 (A.D.) at p. 624 A - C). It follows that "business" should be given a wide rather than a narrow meaning. Precisely how wide is difficult to say and unnecessary and unadvisable to determine here. Each case must be decided on its own particular facts. For the purposes of the present case it suffices to make these observations about the meaning of the word in proviso (iii).

Firstly, while it, of course, includes "an active occupation or profession continuously carried on", that should not be regarded as the boundary of its widest sense, as was decided in the two Natal cases. I do not think that Van Blerk's case, supra, in referring to those cases at p. 442 G - H, approved of any such limitation. The real difficulty with that meaning lies in the qualification "continuously". It probably owes its presence there to the fact

that .... /27

that Rowlatt, J., in the Marine Steam Turbine case, supra, was dealing with the expression "carrying on business", which imports some idea of continuity. But here the crucial phrase under consideration is different. It is "the business of the driver", in which such an element of continuity is not necessarily essential. Thus, I think that even a single, isolated activity, enterprise, or pursuit of serious importance that occupies a person's time, energy, or resources would also, in appropriate circumstances, be included within the meaning of "business" in proviso (iii).

Secondly, the object of the activity, enterprise, or pursuit need not be the making of a profit or income; any altruistic or philanthropic object, such as the advancement of medical science, can also suffice (see, for example, Modderfontein Deep Levels Ltd. v. Feinstein 1920 T.P.D. 288 at p. 290/1; Maharaj's case, supra, at pp. 707 H, 708 C).

Thirdly, an occupation indulged in purely

for .... /28

for pleasure, sociability, or the like, does not ordinarily constitute a business (Maharaj's case, supra, at p. 708 A - C).

Following upon these observations I need only say this for the purposes of the present case: having regard to the object and importance of the Keetmanshoop survey, its intended duration, the number of persons participating therein, the arrangements it necessitated, and the appreciable expenditure of time, energy, and money it involved, I am satisfied that, even if it is regarded as a single, isolated activity, enterprise, or pursuit, it constituted a "business" within the meaning of proviso (iii).

Mr. Reichman for appellant contended that, if this Court so decided, then the business did not start until the team of survey workers had arrived at Keetmanshoop and commenced work, and that the driving of the Volkswagen there was thus not in the course of that business. Van Mentz v. Provident Assurance Corporation 1961 (1) S.A. 115 (A.D.) was relied on.

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But this contention is unacceptable and that authority is distinguishable on this simple ground. An integral part of the business was arranging with the trust fund for the necessary finance, the engagement of the personnel for the survey, and the arrangements for transportation to and accommodation at Keetmanshoop. That was all done beforehand in or from Johannesburg. Hence the business must be regarded as having started in Johannesburg and was to be continued at Keetmanshoop.

The next question is, whose business was it? It is obvious that it was the University's business - that was common cause. But as the University is a corporate body, it can only function through natural persons. Hence it can also be regarded as the business of the person or persons charged with carrying it out on behalf of the University; or, putting it perhaps more accurately, it would be the business of such person or persons to carry it out. That was not disputed.

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The Court a quo held that it was Prof. Solomon's business to do so. For the following reasons I agree with that conclusion. He was the head of and controlled the Department of Orthopaedic Surgery; as such it was he who decided on what research projects should be embarked on in this particular field; once funds were allocated by the trust fund for research by the Department, he decided on the details about how they were to be used; it was he who decided on the Keetmanshoop survey, which was to be conducted under the auspices of the Department; although he did not himself choose all the members of the survey team or make all the arrangements for getting them and their equipment there, that was all done with his approval; he himself participated in the survey; and it is a fair inference that he must have been in command of it at Keetmanshoop.

On appeal it was contended that the relevant business was that of Dr. Beighton and not Prof. Solomon.

True .... /31

True, Dr. Beighton played an important role in the survey both as an expert and organizer. In particular, he arranged for the transportation of personnel and equipment to Keetmanshoop and probably also attended to other administrative details concerning the survey. But that was done, it can be inferred from all the evidence, under the supervision and with the approval of Prof. Solomon. In any event, even if it was Dr. Beighton's business to see to the execution of the survey on behalf of the University, that does not detract from the conclusion that it was also Prof. Solomon's business. For the element in proviso (iii) - "the business of the driver or owner" - does not postulate that it should be exclusively the business of the driver or owner: it suffices if it was his business even if it was also someone else's business. Hence, if Prof. Solomon was the owner of the vehicle at that time (an issue which the Court a quo has still to decide), appellant would be liable to plaintiff under the Act. For

the .... /32

the latter had undertaken to drive the vehicle to Keetmanshoop for the purpose of the survey; there was thus a close relationship between his presence in the vehicle and Prof. Solomon's business; and that justifies the conclusion that he was being conveyed in the course of Prof. Solomon's business at the time (see Standard General Insurance Co. v. Hennop 1954 (4) S.A. 560 (A.D.) at p. 565 B - E, and Van Blerk's case, supra, at p. 343 A - B).

That conclusion is relevant to but does not necessarily preclude a finding that plaintiff was also being conveyed in the course of the driver's (Miss van der Riet's) business. That issue depends upon the facts, which I must now examine more closely. Originally it was intended that she and plaintiff would go to Keetmanshoop by air. Plaintiff, however, expressed a preference for travelling there by car. Dr. Beighton thereupon agreed that he should drive the Volkswagen there. As the journey would be long and

lonely .... /33

lonely, the plaintiff asked Dr. Beighton for some member of the survey team to companion him. He arranged for Miss van der Riet to do so, and for her radiographic equipment to be conveyed by the vehicle too. Prof. Solomon approved of all these arrangements. Merely being one of the radiographers participating in the survey or a passenger accompanying the plaintiff in the vehicle did not, per se, authorize or oblige her to share in the driving. The plaintiff, however, did assume that it would be one of her duties to assist him with the driving. But that assumption was not justified. For he conceded that he did not stress to Dr. Beighton that he wanted a companion for that purpose, and that neither Dr. Beighton nor Prof. Solomon said anything about that. Indeed, if the question had been specifically raised, it is unlikely that either of them would have agreed to her driving since she was unlicensed - she had only a learner's driving licence. But be that as it may, as far as they were concerned the

arrangement .... /34

arrangement simply was that plaintiff would drive and she would companion him. Nor did they, by necessary implication, authorize him to require her to share the driving. For although the journey was long and arduous, it was left to him to determine its duration and route, provided only that he arrived timeously at Keetmanshoop. He did in fact do some sight-seeing en route. And he in fact admitted that he had no authority whatsoever over her on this journey. Although she did assist him with the driving, she was not under any duty to anyone to do so. It so happened that, on the second day of the journey, he asked her to drive because he had been driving for four hours and was tired. She agreed, saying she "would very much like to drive." While she was driving the accident occurred. Consequently, it is obvious that she was then driving for pleasure or sociability and not in the course of any business. The plaintiff's claim against appellant on this ground must therefore fail.

In .... /35

In the result the appeal succeeds with costs. As to costs the correct order would be that plaintiff and Miss van der Riet should pay them jointly and severally since they made common cause in opposing the appeal. (Cf. Davies v. Gordonia Liquor Licensing Board and Others 1958 (3) S.A. 449 (A.D.) at p. 457.) However, Mr. Reichman said appellant would be satisfied with an order that plaintiff should pay the costs, and that she should only be rendered liable for them to the extent that they proved to be irrecoverable from plaintiff. I did not understand that plaintiff objected to such an order. It will therefore be made in that form.

The order of this Court is as follows:

1. The appeal succeeds with costs. The costs are to be paid by first respondent (plaintiff), and by second respondent (second defendant) to the extent that they are irrecoverable from first respondent.

2. .... /36

2. The rulings of the Court a quo –

(a) that the pleadings contained an implied admission by appellant (first defendant) as to the ownership of the vehicle in question at the relevant time, and

(b) that the application by the appellant (first defendant) to amend its plea be refused –

are both set aside.

3. The judgment and orders as to costs of the Court a quo are set aside.

4. The case is remitted to the Court a quo –

(a) in order to consider whether any application by the first respondent (plaintiff) to amend his pleadings in relation to the issue of ownership of the said vehicle should be granted, and if so, on what terms and conditions it should be granted;

(b) in order to receive and consider any further evidence any of the parties wish to adduce in relation to the

aforesaid .... /37

aforesaid issue and to decide it and give judgment accordingly; and

(c) in order to make such order as it may deem fit regarding any costs occasioned or wasted in the Court a quo by or in respect of the rulings mentioned in paragraph 2 hereof and the application to amend mentioned in paragraph 4(a) hereof.

W.G. Trollip, J.A.

Botha, J.A.)
Wessels, J.A.) concur
Corbett, J.A.)
Hofmeyr, J.A.)