319/74

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between:

INCORPORATED GENERAL INSURANCES LIMITED. APPELLANT

and

ANDRE REINECKE RESPONDENT

Coram: Van Blerk, A.C.J., Wessels, Trollip, Corbett, et Hofmeyr, JJ.A.

Heard: 6 November 1975

Delivered: 25 November 1975

J U D G M E N T

HOFMEYR, JA.

This is an appeal against the judgment of Human, J., granted in the Transvaal Provincial Division, declaring in terms of section 19(1)(a)(iii) of the Su-

preme ...../2

preme Court Act, 59 of 1959 (as substituted by section 2 of Act 41 of 1970), that the appellant is liable in terms of an insurance policy to indemnify the present respondent in respect of certain claims which are being brought against him in respect of injuries suffered by his mother and two minor sisters in a collision in which the respondent was involved while he was the driver of and they the passengers in his motor car.

The historical background of this litigation is summarised by Wessels, JA., in Reinecke v. Incorporated General Insurances Ltd., 1974(2) S.A. 84 (A). In that case the issue was whether the present respondent had an existing or contingent right or dispute (with the present appellant) which would be appropriate for determination in terms of the abovementioned subsection of the Supreme Court Act. This Court rejected the contention of the present ap-

pellant ...../3

pellant that the respondent was not entitled to the declaratory order claimed by him and it was ordered that the matter proceed to trial. Human, J., at this trial dismissed four further special pleas filed by the appellant. The sole ground of the present appeal concerns the remaining special plea, viz. that the learned judge a quo erred in holding that the present respondent was not a member of the same household as his mother and two sisters and that he was accordingly entitled to claim the cover provided for in the abovementioned policy.

It was common cause at the trial and on appeal, and rightly so, that the onus rested upon the present respondent to prove that he was in fact not a member of the same household as his mother and sisters at the time of the accident.

The facts bearing upon the question whether the respondent, as well as his mother and sisters, was

a ...../4

a member of the household in question on 17 March 1968, the date of the accident, can in so far as they are common cause be summarised as follows:-

At all relevant times the respondent's mother and two sisters were members of the household of the respondent's father at 59 Hertz Boulevard, Vanderbijlpark. The respondent matriculated at Vanderbijlpark in 1964 and was 21 years of age at the time of the collision on 17 March 1968. In January 1965 he proceeded to Pretoria where he took up employment with the Post Office and resided at a Youth Centre without receiving any financial assistance from his father. During the same year he went on military service and after completing his stretch of service he resumed residence at the Youth Hostel in Pretoria. He was then transferred to the Post Office Training Centre at Baragwanath for six months where he paid for the accommodation provided by the authorities.

Thereafter ...../5

Thereafter the respondent was transferred to Pietersburg, Witbank and Port Elizabeth in the course of his employment. He was finally transferred back to the Baragwanath Training Centre for a further period of six months.

In so far as his subjective intention prior to the accident may legitimately be gathered from what actually occurred subsequently, it is interesting to note that he never returned to live permanently with his parents after he left school until the time of the trial in 1974 when he was a married man living in Pretoria.

It was during the second period at Baragwanath that the accident occurred. It is common cause that he spent the week-end from Friday to Sunday at his parents' home as he had been in the habit of doing at long or short intervals depending upon the distance he was living away from the parental home.

He ...../6

He slept and enjoyed his meals there during the week-end. It should be stated that his parents had not reserved a particular room for his exclusive use. He usually slept in the spare bedroom and occasionally in the lounge when there were other visitors staying over.

On the Sunday in question the respondent took his mother and two sisters in his car to Kempton Park to visit relatives. During this visit they, i.e. the respondent, his mother and his two sisters, made a trip to a cemetery in the vicinity and a collision occurred on the way as a result of which the respondent lost consciousness for some days and his passengers where seriously injured. The present dispute arose from this accident, the respondent claiming to be indemnified by the appellant against the claims of his mother and sisters.

As far as the evidence at the trial is con-

cerned ...../7

cerned the appellant called no witnesses and the only witnesses called on behalf of the respondent on the present issue were the respondent himself and his father.

At this stage I refer briefly to the pleadings. The respondent alleged, as he was obliged to do, that the injured persons, although his passengers, were not members of the same household as himself. The appellant averred that the respondent's passengers on 17 March 1968 were in fact members of the same household as the respondent, namely at 59 Hertz Boulevard, Vanderbijlpark. The respondent thereupon requested the following further particulars:-

"(a) Is it alleged that the plaintiff was resident at 59 Hertz Boulevard, Vanderbijlpark, on the 17th day of March 1968?

(b) Is it alleged that the said address was his ordinary residence at the time?

(c) ...../8

(c) Is it alleged that the plaintiff supported or contributed to the support of any of the said persons? If so, full particulars are requested.

(d) Full particulars are requested of what is meant by being a 'member of the same household' as used by the defendant herein.

(e) Full details of how and in what manner the plaintiff was a member of the same household as the persons mentioned".

Whether or not the appellant was obliged to reply to all these requests, he in fact furnished the following particulars, namely:-

"At all times material hereto the Plaintiff was temporarily residing at the Post Office Training Centre at Baragwanath, and it was his practice every Friday afternoon, after finishing at the Training School, to proceed to his home at 59 Hertz Boulevard, Vanderbijlpark, in order to spend the week-end there, where his parents and two sisters lived. It was similarly his practice to sleep over at the said address on Friday nights and Saturday nights, and to proceed back to the Post Office Training Centre at Baragwanath on Sunday afternoons. The said address at 59 Hertz Boulevard, Vanderbijlpark, was the permanent home of the parents, namely David Andries Reinecke and Margaretha Aletta Reinecke and their children, namely,

the ...../9

the Plaintiff and the said Amanda Reinecke and Magda Reinecke.

In respect of the relevant weekend, namely from Friday afternoon, 16th March 1968 to Sunday afternoon, 18th March 1968, the Plaintiff stayed at his said permanent home, and slept over on the nights of the 16th and 17th March 1968.

In the above respects, the Plaintiff, the said Margaretha Aletta Reinecke, the said Amanda Reinecke and the said Magda Reinecke, were all members of the same household as the Plaintiff in the present action, namely, at 59 Hertz Boulevard, Vanderbijlpark, of which household the said father, the said David Andries Reinecke, was the head at all material times.

Save for the particulars hereinbefore set forth, the Plaintiff is not entitled to the remaining particulars requested in paragraph 1 of the Plaintiff's Request for Further Particulars, as such particulars are not strictly required in order to enable the Plaintiff to plead".

The respondent in his replication denied expressly that the persons referred to were members of the same household as himself and that he lived at 59 Hertz Boulevard, Vanderbijlpark, at any time relevant to this action. All other allegations on this issue were also denied.

The ...../10

Counsel for the appellant, in cross-examination of the respondent and his father, endeavoured to elicit as many admissions as possible in support of the proposition that the respondent was, on one footing or another, a member of the household in question on 17 March 1968. His efforts were not crowned with any conspicuous success.

It was for instance suggested in argument that it had been admitted by the respondent that his father had "consented" to his living at the Youth Centre at Pretoria. Counsel was, however, forced to concede that the evidence did not bear out the implied suggestion that the respondent was at the time in question living under the parental control of his father. It was, even if correct, at best a tenuous argument if it is borne in mind that it related to a date some years prior to the accident. On a proper reading of the evidence it amounted to no more than a

statement that his father was aware of his taking up residence at the Youth Hostel.

As regards the frequency of the respondent's visits to the parental home, counsel had to content himself with the admission that the respondent visited his parents two or three weekends in a month while living at Baragwanath but when stationed far from Vanderbijlpark, at most once a month. During periods of leave, it was admitted, the respondent would spend a few days at his parents' home, either at the beginning or towards the end of the vacation.

It was contended on behalf of the appellant that the respondent had admitted that although he was residing away from home, he was nevertheless only "temporarily" residing at the Post Office Training Centre, Baragwanath, at the stage of the collision. Counsel was, however, constrained to agree with a suggestion from the bench that this apparent admission of the temporary nature

of his residence at the Training Centre compared with his relationship with his parental home, in reality related to his various other places of residence in the course of his employment which resulted in a permanent or indefinite absence from his parents' establishment. Some reliance appeared to be placed on respondent's statement that he visited the family "in order not to grow estranged from them but to maintain the unity of the family". This, however, goes no further than to show a desire to retain his links with the family: it does not establish that he intended remaining a member of the household.

It was also pointed out that the respondent would, during his periodic visits, not only take his meals but also tea with the family; spend time with them and their other guests and converse with them; conform to their pattern of life; and on occasion go to the cinema with members of the household or possibly

to ...../13

to visit other persons. Although he kept his clothes and other possessions with him where he was boarding he nevertheless admitted having left some items of clothing, namely a pair of shorts and a shirt, to wear on his visits to the family. There is also a vague suggestion that a particular letter may have been addressed to the respondent care of his father. Even if such a letter had been sent to the respondent at his father's address, it would, in my opinion, not take the appellant's case any further.

In the circumstances it appears that the appellant has failed to prove a number of the allegations, contained in the abovementioned further particulars furnished to the respondent.

The allegation that he was only temporarily resident at the Post Office Training Centre vis-à-vis his parental home, is not borne out by the evidence. The averment that he visited his parents home every week-

end ...../14

end is an overstatement even in relation to his sojourn at Baragwanath and quite inaccurate in respect of periods when he was residing elsewhere. The allegation that 59 Hertz Boulevard, Vanderbijlpark, was the permanent home of the respondent's parents, his sisters and himself, as a recital of the facts in ordinary everyday parlance, is unacceptable in the light of the evidence concerning himself. The conclusion that the respondent was a member of the same household as his mother and sisters at 59 Hertz Boulevard, Vanderbijlpark, at the time of the accident, appears to be highly unlikely in any ordinary sense of the words.

This view of the matter is further justified by the admission made by counsel for the appellant that the respondent's position would ordinarily be difficult to distinguish from the position of an occasional visitor.

Since the respondent had on the day in ques-

tion ...../15

tion left the parental home without any intention to return during that weekend for any other purpose than to drop his mother and sisters before proceeding back to Baragwanath, the appellant could not rely on any physical occupation by the respondent of the alleged common household at the time of the accident. His weekend visit had definitely come to an end.

In this connection it must be borne in mind that this court was requested by counsel for the appellant to strike out the following words in his heads of argument namely:-

> "The Respondent was, at the time of the collision, temporarily resident at his parents' house".

A submission in counsel's heads of argument had to be amended by deleting in the passage quoted hereunder the words underlined by me:-

"The ...../16

> "The fact that the Respondent had been ordinarily residing away from his parents' home would not, it is submitted, preclude him from being a member of his parents' household during the particular days when he was temporarily staying over with his parents".

In so far as indicated by the words underlined hereunder, counsel for the appellant also withdrew a submission in his heads that a person could be ordinarily resident in one place where he might be a permanent member of a household, "but still be a temporary member of another (in this case his parents') household if he sleeps over at his parents' house as a temporary guest".

In view of the foregoing alterations in counsel's submissions and upon a realistic assessment of the evidence there is no room for reliance being placed upon any physical ground for the retention by the respondent of membership of his father's household. Counsel has not been able to contend that the respondent has conformed to the minimum requirements imaginable

of ...../17

of intermittent and recurrent presence at his parents' home to support any cogent inference of continued membership or to distinguish his visits from those of an occasional visitor. He has admitted, correctly in my opinion, that an occasional visitor would not as such qualify as a member of a household.

In these circumstances counsel has resorted to the notion of a household which is a permanent establishment analoguous to a corporation which exists irrespective of the members constituting it at any particular point of time. Membership of this entity could, if I follow counsel's argument rightly, be maintained even in cases of prolonged absence depending upon the subjective state of mind of the individual whose membership of a household is being investigated. In his endeavour to apply the facts of the present case to the criterion thus formulated by him,

counsel ...../18

counsel for the appellant suggested that the respondent constantly remained a member of his parents' household throughout his peregrinations over nearly four years from 1964 to 1968. Counsel could not refer the court to any express manifestation of an intention on the part of the respondent to maintain a position as member of his father's household and all the evidence before the court pointed the other way. This submission seems to me, therefore, to be without any substance.

Both counsel referred the court to numerous dictionary definitions of the word "household" and elements considered to be part of this notion and also to decisions not only of South African courts but also of the courts of England, Canada, Australia and of the United States of America and finally, to various textbooks. I consider that these authorities were of no real assistance since the definitions given were inten-

ded to embrace a wide variety of circumstances wherein the notion "household" or constituent parts thereof might be used. The words must in the present case, be interpreted in the context of the insurance policy as a whole and not in vacuo or in connection with situations unrelated to insurance policies as, for instance in connection with taxation (Robinson v. Commissioner of Taxes, 1917 T.P.D. 542); naturalisation (Biro v. Minister of Justice, 1957(1) S.A. 234 (7) at p. 240 D/G); native administration (Ex parte Minister of Native Affairs, 1941 AD. 53), all of which cases deal with various aspects of "residence" which was assumed by both sides to be an element in the notion of "membership of a household".

It would, in my opinion, be unwise to attempt a definition of the words "member of a household" for any purpose outside the present context. At most

I would be prepared to agree with the suggestion advanced by Human, J., which can, however, only be regarded as an approximation of what the notion presently in issue would normally embrace, viz.:

> "A household unit, generally, consists of one or more people who ordinarily reside in the same dwelling and who are bound to some extent by ties of dependency to one of them who is the head of the household".

It suffices further merely to hold that the judge a quo was justified in deciding that the respondent was not at the time of the collision in question a member of the same household as his mother and two sisters and that the appellant's special plea based on this issue should therefore be dismissed with costs.

The appeal is dismissed with costs.

L. Hofmeyr

HOFMEYR, JA.

Van Blerk, A.C.J.)
Wessels, JA.) Concur
Corbett, JA.)

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

INCORPORATED GENERAL INSURANCES LTD. ..... APPELLANT

AND

ANDRE REINECKE ..... RESPONDENT

Coram : Van Blerk, A.C.J., Wessels, Trollip, Corbett and Hofmeyr, JJ.A.

Heard : 6 November 1975 Delivered : 26 November 1975

J U D G M E N T

Trollip, J.A. :

I agree that the appeal should be dismissed with costs. I wish to state, very briefly, my reasons for having .... /2

having reached that conclusion.

The contract under which the respondent insured his motor car with appellant contained, inter alia, an indemnity in respect of liability to third parties. The relevant part of the clause reads as follows:

> "The Company will Indemnify the Insured in the event of an accident caused by or through or in connection with any motor car described in the Schedule hereto .... against all sums including claimant's costs and expenses which the Insured shall become legally liable to pay in respect of .... bodily injury to any person not being a member of the same household as the Insured ...."

This appeal turns on the meaning and application to the facts of the underlined limitation to appellant's liability. It was common cause, rightly so, that those critical words bear their ordinary connotation. Several dictionaries and authorities were referred to in argument relating to the meaning of "member of a household". It is perhaps difficult to define precisely what the expression means. However, this much seems to be clear: that for a

person .... /3

person to be a member of a household at least two fundamental elements must co-exist, namely, (a) there must be some relationship, affinity, or tie between him and the other member or members of the household, such as a family tie, and (b) the person must "occupy", or "live" or "dwell" in the household premises, which imports some degree of continuous or permanent presence there.

That approach also accords with the probable purposes of including such a limitation in the policy: the likelihood of members of the insured's household being frequent passengers in his motor car thereby increasing the insurance risk to the insurer, and the possibility of collusion between those members and the insured in making false claims against the insurer (see English v. Western (1940) 1 K.B. 145 at p. 148/9, and (1940) 2 K.B. 156 (C.A.) at pp. 166/7).

Appellant's .... /4

Appellant's counsel naturally relied heavily on element (a) - the close family tie between respondent and his father, mother, and two sisters. His contention was that the tie was so close and predominant that his membership of his father's household continued to subsist despite his absences from home while he was away on military service and working for the Post Office. Those absences were merely temporary, so it was contended, as was demonstrated by his frequently returning home whenever he could. Hence, so the argument concluded with reference to element (b), those absences did not terminate his membership of his father's household.

The argument for respondent concentrated on element (b): when he left home at the end of 1964, after he had matriculated, he did so in order to live on his own and make his own way; he thereupon ceased to occupy or live or dwell in the household premises; despite the strong family

tie .... /5

tie, he ceased to be a member of his father's household; and his visits home thereafter were purely temporary sojourns there.

I have no doubt that the argument for the respondent is correct. The objective facts established by the evidence are that on leaving home at the end of 1964 he took virtually all his belongings with him; he took up employment with the Post Office; he made his own arrangements for accommodation wherever his employer required him to be; he paid for such accommodation himself; he purchased, ran, maintained, and insured his own motor car; indeed, he entirely supported himself; and at no stage did he return home except for those visits to see his parents and sisters. As to the subjective facts he stated that after leaving home he no longer regarded his parents' home as his; he never returned to their home, except to visit them because of his filial ties with

them .... /6

them; and that is also borne out by his same *modus vivendi* after the accident up to the date of the trial. His father, too, in effect testified that, after respondent left home, he regarded him as living on his own and no longer being at home. And both respondent and his father were regarded by the Court *a quo* as credible witnesses whose evidence was accepted.

For those reasons I agree that the appeal should be dismissed with costs.

W.G. Trollip, J.A.

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