Case No 155/91

IN THE SUPREME COURT OF SOUTH AFRICA APPELLATE DIVISION

In the matter between:

FLORIS NICHOLAAS PALVIE Appellant

and

MOTALE BUS SERVICE (PTY) LTD Respondent

CORAM: BOTHA, SMALBERGER, MILNE, GOLDSTONE, JJA et HOWIE, AJA

HEARD: 16 AUGUST 1993

DELIVERED: 30 AUGUST 1993

J U D G M E N T

HOWIE, AJA .....

HOWIE, AJA

On 20 October 1985, in Du Toit's Kloof Pass, a collision occurred involving a vehicle driven by appellant and a vehicle driven by an employee of the respondent company. Appellant was injured and his minor child killed.

Arising from the collision and the consequent damages sustained by appellant he sued respondent in the Cape Provincial Division at common law as the employer of the driver of the other vehicle, alleging that the latter had, while acting within the course and scope of his employment, driven negligently and so caused the collision. Appellant also alleged that because the other vehicle was not insured under the Compulsory Motor Vehicle Insurance Act, 56 of 1972, he was not entitled to claim compensation under S 21 of that Act.

In its plea respondent, a Ciskeian company

carrying on business in the Cape Peninsula, admitted being the driver's employer but denied the essential allegations which I have mentioned. Respondent averred, on the contrary, that the vehicle driven by its employee was duly insured in Ciskei in terms of that country's Compulsory Motor Vehicle Insurance Act, 4 of 1983 ("the Ciskei Act").

After the close of pleadings the parties submitted a stated case to the Court a quo in terms of Rule 33(1). The stated case embodied certain agreed facts and annexed a copy of the Ciskei Act as well as a copy of a written undertaking given by the Ciskeian Motor Vehicle Assurance Fund ("the Ciskei Fund") to the South African Minister of Transport and dated 13 June 1983.

The agreed facts may be summarised as follows. The vehicle driven by respondent's servant was registered in Ciskei under Ciskeian law. It was also insured there

by the Ciskei Fund in terms of the Ciskei Act. The existence of such insurance was reflected in a declaration of insurance in the owner's possession issued to the owner by the Fund, which declaration was issued subject to the undertaking. At no relevant time was the vehicle insured under Act 56 of 1972 ("the South African Act").

The question presented to the Court a quo for decision was whether, oh those facts, appellant was precluded by s 27 of the South African Act from suing respondent at common law for the damages in question.

The Court (MARAIS J), having analysed the provisions of the Ciskei Act, the South African Act and the undertaking, came to the conclusion that on a proper interpretation of s 27 of the South African Act, the terms of that section precluded appellant's common law suit. The claim was therefore dismissed, with costs.

The present appeal is brought with the leave of

the Court a quo.

At the outset of the hearing counsel for respondent (who did not appear in the Court below) applied for an amendment of the stated case to include the following factual allegations (the abbreviated references in brackets are mine):

(1) "...Plaintiff, through his then attorney intended but failed to institute action against the (Ciskei Fund) within the time period . stipulated in Section 22 of the (Ciskei Act) and ... plaintiff's claim against the said ....Fund has become prescribed."

(2) "Plaintiff's attorney is funding this action".

The application was opposed on behalf of appellant on the ground that these allegations, accepting their truth, were irrelevant. After hearing counsel's submissions the Court intimated that its decision would be incorporated in this judgment. I shall state that decision in due

course.

The judgment of the Court a quo is reported as Palvie v Motale Bus Service (Pty) Ltd 1991(2) SA 514 (C). In the circumstances I shall set out only a brief resume of its reasons for reaching the conclusion it did.

Before doing so it is appropriate to refer to the relevant terms of the statutes and undertaking in question as also certain regulations made under the South African Act.

Beginning with that Act, it came into force in June, 1972 and was the current South African third party insurance legislation at the time of the collision in this case. It was repealed in 1986 subject to certain savings. S 2(1) made it an offence to drive a motor vehicle in a public thoroughfare or place unless it was insured under the Act by an authorised insurer. An authorised insurer was defined as meaning, briefly, an

insurance company authorised by agreement with the State President to insure motor vehicles for the purposes of the Act. S 2(2) excluded certain vehicles from the basic prohibition in s 2(1). Among them was a vehicle described in s 2(2)(b) as one

> "....registered at a place outside the Republic in terms of a law in force at that place, if the person who drives or permits another person to drive such motor vehicle has made such provision as may have been prescribed, to ensure that compensation will be paid for any such loss or damage as is mentioned in section 21, which may be caused by or arise out of the driving of such motor vehicle in the Republic by its owner or by his servant or agent."

For convenience I shall use the word "foreign" in relation to such a vehicle or its owner or driver, or in relation to insurance pertaining to it.

The loss or damage mentioned in s 21 was, broadly put, that which a third party sustained as a result of bodily injury to himself, or the death or bodily injury suffered by anyone else, caused by or arising out

of the negligence or otherwise unlawful driving of an insured vehicle anywhere in South Africa.

The provision required to be made in terms of s 2(2)(b) was prescribed in regulations made under the Act as published in Government Notice R 1710 contained in Regulation Gazette 1670 of 29 September 1972 and later amended from time to time. Reg 4 laid down that no foreign vehicle was to be driven in South Africa unless i.a. insured under the Act or unless its owner or driver possessed a declaration of insurance issued in respect of the vehicle under insurance legislation corresponding to the Act and operative in certain named countries. The countries referred to at the outset were Botswana, Lesotho and Swaziland. Later, Transkei, Bophuthatswana and Ciskei were added. In respect of each such country it was stipulated that the issue of the declaration was to be subject to an undertaking by the relevant insurer or Motor

Vehicle Assurance Fund in that country, as the case might be. - The undertaking required by the regulation in the case of Ciskei was one by the Ciskei Fund to pay compensation in respect of loss or damage caused to any person "in the circumstances and subject to the conditions prescribed" by the South African Act.

S 3 of the Act imposed upon the owner of an uninsured vehicle the same obligation as rested upon an authorised insurer. However, this liability was specifically excluded in the case of a foreign vehicle carrying foreign insurance.

S 27 provided as follows:

> "When a third party is entitled under section 21 to claim from an authorised insurer 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, that third party

> 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 authorised insurer concerned is unable to pay the compensation."

S 28 gave an authorised insurer who paid compensation under ss 21 or 26 a right of recourse in certain specified circumstances against i.a. the owner or driver of a vehicle insured under the Act.

As far as the Ciskei Act is concerned, it contains provisions which are practically identical to the sections of the South African Act to which I have referred. The sole material difference is that there is only one insurer in Ciskei and that is the Ciskei Fund itself.

The undertaking given by the Ciskei Fund says this:-

> "Undertaking by the Motor Vehicle Assurance Fund of Ciskei to ensure payment of compensation in

respect of the liability as defined in the South African Compulsory Motor Vehicle Insurance Act, 1972 (Act 56 of 1972) of the said Ciskeian Motor Vechicle Assurance Fund arising out of the driving in the Republic of South Africa of motor vehicles insured by it in terms of the Republic of Ciskei's Compulsory Motor Vehicle Insurance Act, 1983 (Act 4 of 1983) with effect from the 1 May 1983.

Whereas the Motor Vehicle Assurance Fund of Ciskei (hereinafter referred to as the CMVA Fund), a body corporate established in terms of Ciskei's Compulsory Motor Vehicle Insurance Act, 1983 (Act 4 of 1983) is the insurer of Ciskeian registered motor vehicles in terms of the said Act;

And whereas similar legislation relating to compulsory motor vehicle insurance has been enacted in the Republic of Ciskei (hereinafter referred to as Ciskei) and the Republic of South Africa (hereinafter referred to as the Republic);

And whereas it is expedient that compulsory motor vehicle insurance undertaken in Ciskei and the Republic should be mutually recognised;

Now therefore the CMVA Fund:

(1) warrants that, whenever a motor vehicle insured in terms of Ciskei's Compulsory Motor Vehicle Insurance

Act, 1983 (Act 4 of 1983) is involved in an occurrence arising out of the driving of that vehicle in the Republic, the CMVA Fund will make good to any person the compensation which he would have been entitled to recover in terms of the Republic's Compulsory Motor Vehicle Insurance Act, 1972 (Act 56 of 1972) had such motor vehicle been insured in the Republic in terms of the provisions of the said Republic's Compulsory Motor Vehicle Insurance Act No. 56 of 1972.

(2) undertakes and agrees that this undertaking shall remain binding on the CMVA Fund notwithstanding any amendments which may from time to time be made to the enactment relating to compulsory insurance of motor vehicles in the Republic.

This undertaking is given to the Republic of South Africa's Minister of Transport who is charged with the administration of Act No. 56 of 1972 and to whomsoever else it may concern.

Thus done and signed at Zwelitsha this 13th day of June 1983.

The Motor Vehicle Assurance Fund of Ciskei

(signed) .....

Director-General for Transport on behalf of CMVA fund."

It remains to mention that an undertaking in substantially similar terms was given by the South African Motor Vehicle Assurance Fund to the Ciskei Minister of Transport, and whoever else it might concern, on 20 April 1983.

Turning now to the judgment of the Court below, I would summarise its reasoning as follows.

It must clearly have been apparent to the South African legislature in 1972 that it was necessary to provide in the South African Act for reciprocal arrangements with neighbouring states in order to ensure third party protection not only in the country where the offending vehicle was insured (offending in the delictual sense conveyed in s 21) but also in any neighbouring country in which it might be driven. Only with such arrangements statutorily in place was it understandable

that a foreign owner or driver would not contravene s 2(1) or incur a self-insurer's obligation under s 3. It was consistent with this extension of protection that the undertakings in question expressly recognised that it was expedient that insurance effected in the respective countries be mutually recognised.

Moreover, both the South African and Ciskei Acts had the same objects. Those were, firstly, to provide a source of third party compensation that would have adequate financial substance and, secondly, to enable an owner to insure himself against common law claims. It would accordingly be in conflict with the attainment of those objects were a South African owner not to enjoy s 27 exemption, or an authorised insurer not to have a s 28 right of recourse, where the offending driving occurred in one of the foreign countries concerned. The corresponding anomalies would arise in the case of a

Ciskei owner and the Ciskei Fund were the occurrence to take place in South Africa. Furthermore, it could not have been the South African legislature's intention to cater for the possible insolvency of the Ciskei Fund by not exempting the Ciskei owner or driver if the offending driving occurred here. The respective Acts and undertakings were virtually identical and it was not realistic to conclude that neither country had any confidence in the respective insurers or Fund of the other. If the insurer or Fund could not pay, the exemption would fall away in any event. In all the circumstances it was permissible to depart from the language employed in s 27 of the South African Act in order to give effect to the unmistakable intention of the legislature that third parties, owners and insurers would have the same respective rights and obligations whether the driving in issue occurred at a

domestic venue or a foreign one. Such interpretative departure involved modifying ad hoc the wording of s 27 so as to read into it appropriate references to Ciskei insurance, the Ciskei Fund and the Ciskei Act. Thus modified, the section exempted respondent from common law liability for appellant's damages.

In my opinion, accepting that there are tenable reasons why rights and obligations should not differ simply depending on the locality of the relevant accident, the modifications effected by the Court a quo to s 27 are nevertheless drastic. According to long-settled principle a departure from the ordinary meaning of legislative language is only permissible where adherence to that meaning would lead to a construction plainly in conflict with what was undoubtedly the lawmaker's intention: Summit Industrial Corporation v Claimants Against the Fund Comprising the Proceeds of the Sale of

the MV Jade Transporter 1987(2) SA 583 (A) at 596 G - 597 B and S v Tieties 1990(2) SA 461 (A) at 463 C - 464 F.

Basic to the resolution of the question of statutory interpretation raised by the stated case are three fundamental considerations.

Firstly, but for s 27, appellant would unquestionably have a common law claim against respondent based on vicarious liability for its servant's negligence.

Secondly, in the light of the presumption against the abolition of existing rights, a legislative intention to remove appellant's common law right of action will not be inferred in the absence of statutory language which clearly conveys that intention expressly or by necessary implication: see Land- en Landboubank van Suid-Afrika v Die Meester en Andere 1991(2) SA 761 (A) at 771 A - C.

Thirdly, the wording of s 27 is clear and

unequivocal. It is not repugnant to the scheme of the South African Act. On the contrary, it is wholly consistent with it.

The essential enquiry, then, is whether evidence of the legislative intent referred to above is clearly discernible whether in s 27 or in any other provision of the South African Act. Put another way, is there anything in that Act which warrants the conclusion that the exemption in s 27 was intended to apply not only to claims against an authorised insurer under the Act but also to claims against a foreign insurer or foreign fund under foreign legislation?

As I have said, the wording of the section is clear. It affords no support for an affirmative answer. The language used simply does not and cannot apply to foreign insurance, particularly a foreign fund, or to foreign legislation. And without violent linguistic

distortion there is no manner in which, specifically, the words "entitled under section 21" "authorised insurer" and "under this Act" can be so extended.

Looking to other relevant considerations, it must be observed that although the legislature made specific reference in s 2(2) (b) (read with reg 4) to foreign vehicles covered by foreign insurance, that was in the limited context of a concession that such vehicles could be lawfully driven in South Africa. Significantly, such vehicles are not mentioned in the Act in any other connection.

The legislature must have been aware in 1972 that Botswana, Lesotho and Swaziland had similar legislation and were therefore readily available members of a reciprocal third party insurance network. If it was intended that the Act should in any measure other than in s 2(2) extend to vehicles covered by their insurance it

would have been a straightforward matter to insert the appropriate provisions. The definition of "authorised insurer" could have been extended, either generally or for the specific purposes of s 27, to include a foreign insurer or fund. Alternatively, the exemption in s 27 could have been made to cover the owner or driver of a vehicle carrying foreign insurance. The opportunity to insert the appropriate language was not taken initially or in later years when other countries were added to the list in reg 4.

The next factor to be borne in mind is that the South African Act had, as is obvious, no extraterritorial effect. It was confined to accidents occurring in this country. It was also expressly confined to insurance effected under its own provisions. There was therefore neither need nor reason for the legislature to extend any of the Act's benefits, including

the exemption under s 27, to foreign accidents or to vehicles carrying foreign insurance. All that goes, correspondingly, for the Ciskei Act too. It is therefore unlikely that the respective legislatures simply overlooked the case of the foreign accident when s 27 and its Ciskeian counterpart were drafted.

The conclusion that the subject was consciously omitted is strengthened by the fact that when the respective Motor Vehicle Assurance Funds of the countries concerned did give attention to the case of the foreign accident they did not obtain amendments to their domestic _ legislation so as to provide, for example, that a foreign offending vehicle was deemed for all purposes to have been insured under that legislation. They limited their actions to giving the undertakings and left their domestic legislation confined, as it always had been, to accidents occurring within their own countries.

In the circumstances linguistic modification to extend s 27 to cases of foreign insurance is not necessary to realise the ostensible legislative intention or to make the Act workable: cf Rennie NO v Gordon and Another NNO 1988(1) SA 1 (A) at 22 E - G.

In addition to all the considerations already mentioned, the legislature could well have meant to leave a common law claim available just in case the foreign fund or insurer became unable to pay. The Court a quo rejected this notion (at 524 G - I) and relied upon the similarity of the respective South African and Ciskeian Acts and undertakings as support for the inference that the two countries' mutual contemplation of such,insolvency was ' most unlikely. The point is rather, I would think, that the one might well have had confidence in the lasting solvency of its own fund but not necessarily such confidence in the other fund. This is especially so

where the solvency and management of the other fund was to be beyond the former's knowledge and control.

A further possible reason for leaving the common law action available might have been as a matter of jurisdictional convenience. Although all the countries referred to in reg 4 are dealt with on the same footing, and while it might not be difficult or inconvenient for a South African to sue in Ciskei or a Ciskeian to sue in South Africa, it might be quite another matter for either to sue, say, in Botswana. It could well have been the legislature's intention to leave it to a claimant to sue a foreign owner locally. - That naturally implies ,a defendant worthwhile suing. Legislative contemplation that such a foreign defendant might bring assets within reach of jurisdictional attachment or, like the present respondent, carry on some business in South Africa, would not have been far-fetched.

It is not necessary for appellant's success that a firm answer in his favour be reached on these points. If, as is the case, a convincing answer the other way is not possible then the legislative intention justifying a modification of s 27 has not been ascertained with the requisite certainty.

A comprehensive study of all the features I have mentioned warrants two conclusions. One is that the further facts sought to be incorporated at this late stage in the stated case are wholly irrelevant for present purposes. Upon their possible relevance to other defences that might in due course be raised it is unnecessary to comment. Respondent's application at the commencement of the appeal must consequently fail. Secondly, the modification of s 27 effected by the Court a quo is not a permissible interpretation. I

find no indication at all that the legislature intended to provide anywhere in the Act for the case of what I have called the foreign accident. That subject is dealt with solely in the undertakings and there is nothing in the Act which serves to incorporate the provisions of the undertakings within the statute. Therefore the terms of s 27 must be accorded their ordinary, plain meaning and according to that meaning the section has not removed appellant's common law right of action against respondent. No basis other than s 27 was advanced in support of respondent's case at any stage prior to the appeal but in the course of his argument respondent's counsel sought to contend that, on a proper construction, the undertaking given by the Ciskei Fund meant that it deemed the vehicle in question to have been insured under the South African Act. In my view that submission cannot be sustained. The undertaking in no way purports to create

a deeming provision. At best for respondent the undertaking simply says that the Ciskei Fund will pay what could have been obtained from an authorised South African insurer. More pertinently, it does not seek to prescribe what an injured party could or could not have recovered from a Ciskeian owner, driver or employer.

The appeal therefore succeeds.

No argument was advanced as to what costs order should be substituted relative to the hearing in the Court below in the event of the appeal succeeding. It is fair to infer, therefore, that no good reason exists why appellant should not get his costs in that Court.

The following order is made: 1 . The application to amend the stated case is

dismissed, with costs. 2. The appeal is allowed, with

costs.

3. The order made by the Court a quo is set aside and replaced by the following:-

> "(1) It is declared that on the facts of the stated case the common law action instituted by plaintiff against defendant is not precluded. (2) The costs of and concerning the hearing of the stated case are to be paid by defendant."

C T HOWIE, AJA

BOTHA, JA) SMALBERGER, JA)
MILNE, JA) Concur
GOLDSTONE, JA)