Case No 264/92

IN THE SUPREME COURT OF SOUTH AFRICA APPELLATE DIVISION

In the matter between:

NATIONAL EMPLOYERS' GENERAL INSURANCE COMPANY LIMITED — Appellant

and

MICHAEL JOHN ROBERTS — Respondent

CORAM: HOEXTER, VAN HEERDEN, VIVIER, VAN DEN HEEVER, JJA et HOWIE, AJA

HEARD: 21 September 1993 DELIVERED: 29 September 1993

J U D G M E N T

HOWIE, AJA...

HOWIE, AJA

Respondent was injured when the motor cycle on which he was a pillion passenger overturned. Alleging that the accident was due to the driver's negligence, he sued appellant for damages as insurer of the motor cycle under the Compulsory Motor Vehicle Insurance Act, 56 of 1972 ("the MVI Act"). Para 4 of his particulars of claim reads as follows:-

> "4. At the time of the accident, Plaintiff was undergoing military training in terms of the Defence Act, No 44 of 1957 and was being conveyed upon the motor cycle in question while returning to his base from authorised leave during his said period of military training."

In its plea appellant admitted the conveyance but denied the remaining allegations in that paragraph. It also denied the alleged negligence and damages.

In the Court below the parties requested Tebbutt, J to decide the preliminary question whether, assuming

negligence, and accepting that respondent was a military trainee at the relevant time and proceeding to his base, he was returning from authorised leave within the meaning of s22(1) of the MVI Act. Acceding to this request, the Court heard evidence on that issue. In due course it answered the question in the affirmative and made the following order:

"1. The plaintiff is entitled to be compensated by defendant to the full extent of such loss or damage as he may be able to prove without any limitations in s 22(1) of Act 56 of 1972 being applicable.
2. Defendant is ordered to pay the costs of these proceedings.
3. The rest of this action is postponed sine die."

With the leave of the Court a quo appellant appeals against that order.

The judgment of the Court below is reported as Roberts v National Employees' (sic) General Insurance Co Ltd. 1991(1) SA 445(C). The facts found by the

learned Judge are set out at 446 C-H. Basically they are

not in dispute. It is therefore appropriate, with due

acknowledgement and subject to some elaboration presently,

to quote that paragraph in full for present purposes:

> "The plaintiff was born on 18 October 1959. In October 1985 he was a national serviceman, i e a member of the Citizen Force. On that day he started a so-called 60-day camp in the Navy and was assigned to a base at Simonstown known as 123 Harbour Protection Unit. Residential accommodation at this base was very limited and the Officer Commanding instructed the Master-at-Arms, Warrant Officer Leyland, to tell the servicemen starting their camp that those who lived locally in the Cape Peninsula could live at home and not in the barracks at the base when they were off duty. Plaintiff was one of those who were told. In Leyland's words 'they were encouraged to live ashore, after having completed -their duty'. A roster of duties was drawn up and plaintiff's shifts as a switchboard operator at the base were from 4:30 pm until midnight. Plaintiff normally lived with his parents at Plumstead but had arranged with a friend of his that from the beginning of October until the end of December 1985 he would live with his friend while the latter's parents were overseas, at their house in Scarborough. It suited plaintiff to do so because Scarborough is nearer to Simonstown than Plumstead.

> Plaintiff lived at the house at Scarborough during his 60-day camp and it was his home during that period.
>
> Shortly before 4:00 pm on 8 December 1985 and on the Main Scarborough Road, plaintiff was a pillion passenger on a motor cycle being driven by one S A Hallett when the cycle overturned and plaintiff was severely injured, suffering, inter alia, a spinal fracture with severance of the spinal cord, leaving him paralysed from the waist down and now confined to a wheelchair for life.
>
> Plaintiff's own motor cycle was being repaired on that day and Hallett, who was not a national serviceman, was taking him to Simonstown for him to report for duty at the base at 4:30 pm. In other words, it is common cause he was returning to his base at Slmonstown from his home. He was, however, it is also common cause, not in uniform at the time."

Tebbutt J found for respondent on the following reasoning. He held that on these facts, if respondent had been returning from leave, such leave had clearly been authorised. As to the meaning of "leave", he considered that the word had to bear its ordinary grammatical meaning. In that respect he adopted certain dictionary definitions

according to which "leave" meant permission to be absent from one's place of duty. . He then referred in detail to the two previous reported decisions dealing with the term "authorised leave" (Bray v Protea Assurance Co Ltd 1990(1) SA 776(T) and van Eyssen v Protea Versekeringsmaatskappy Bpk 1992(1) SA 610(C)).

The learned Judge considered that the interpretation of those words in van Eyssen's case exemption from military duty for vacation purposes - was unduly narrow. Having analysed the aim, purpose and history of the relevant provisions of s 22(1) he preferred the reasoning in Bray's case according to which "authorised leave" meant permission, properly granted within the framework and structure of the Defence Force, to be absent from one's camp or base.

Before dealing with the argument presented on behalf of appellant it is appropriate first to refer more

fully to some of the evidence and also to set out the relevant legislative provisions which pertain to the circumstances of respondent's conveyance.

The evidential aspect concerns the reasons why respondent came to be residing away from the base. He testified that he and his fellow-trainees were informed at the commencement of their training period that there was no accommodation at the base for those whose homes were in the Peninsula. They were therefore told to sleep at home or to find private accommodation. This evidence goes further, in my view, than the summary quoted above recounts. It shows that the Cape Town trainees were not merely offered the opportunity to leave the base when off duty, they were required to do so.

The other witness to give evidence, Warrant Officer Leyland, began by resorting to expressions such as "given a choice to live ashore" and "permitted to go

ashore". In answer to the pointed question whether the trainees were "virtually told" to live ashore he first said "encouraged to live ashore" but then conceded

"....if they could they would be required to live ashore."

As respondent was one who did have accommodation available away from the base this last answer provides clear confirmation for the conclusion to be drawn from respondent's evidence.

The factual position, therefore, is that respondent was, in effect, ordered to reside "ashore". At the very least he was required to do so.

Turning to the relevant statutory provisions applicable to respondent's conveyance, s 22(1) of the MV1 Act (since repealed by the Motor Vehicle Accidents Act, 84 of 1986) limited the sum recoverable by a passenger in an insured vehicle to R12 000. However, that restriction did not apply to certain passengers who were referred to

in an exception to the limitation. The exception read:

> "....except where the person concerned was conveyed .... while proceeding on authorized leave or returning to his base from such leave during any period in which he rendered military service or underwent military training in terms of the Defence Act, 1957 ....or while dressed in a uniform of the South African Defence Force during such period, or under circumstances where the owner or driver .... believed upon reasonable grounds that he was a person rendering such service or undergoing such training and dressed in such a uniform...."

It may be observed in passing that the corresponding exception contained in s 9(1) of the 1986 Act omits any reference to authorised leave in relation to a Defence Force passenger.

The other legislative provisions to be considered are certain of the regulations governing the grant of leave to members of the Defence Force. These regulations are part of General Regulations promulgated in terms of s 87(1) of the Defence Act and published in Government Gazette 3315 of 26 November 1971 under Government Notice R 2110.

Chapter VI deals with all aspects of leave and is entitled "Leave of Absence". In Part I "leave" is defined as meaning leave of absence and a classification is set out of various types of leave of absence. One of these is leave of absence having specific reference to members of the Citizen Force. That subject is dealt with in Part III which is also entitled "Leave of Absence" ("Afwesigheidsverlof") and comprises regs 26 to 32. Among the forms of leave covered by regs 26 to 31 are, for instance, compassionate leave and vacation leave. It is reg 32 which is important here. It is entitled "Absence from base or quarters" and reads as follows:

> "32.(1) Every member serving in terms of Chapter X of the Act, doing continuous service or a course of instruction or on special duty, shall whether on duty or not and subject to the provisions of subparagraph (2) at all times remain within the confines determined by the officer commanding concerned for the sub-unit, unit or training establishment with which he is serving, undergoing training or performing special duty.

(2) Such member may absent himself from such confines subject to such restriction as may
be imposed with due regard to the unit's efficiency and readiness for action by the officer commanding concerned -

(a) where such absence is required in the execution of any duty;

(b) where he is admitted to any hospital or detention barracks or any other place of detention;

(c) during any period of absence authorised in terms of regulation 15 of Chapter XV of these regulations;

,(d) during leave of absence granted in terms of this Chapter;

(e) for a continuous period of not more than 48 -hours, if he is an officer, warrant officer, staff-sergeant or sergeant and is not on duty, required for duty or required specifically to remain within such confines or if he is below the rank of sergeant and has been given the written permission of the officer commanding concerned or an officer acting on his authority;

(f) when not on duty or required for

duty or specifically detailed to remain within such confines and he has the written permission of the officer commanding concerned to live beyond such confines; or

(g) where he is, for any reason whatsoever, ordered, required or permitted to absent himself from such confines.

4. Absence in terms of any provision of subregulation (2) other than subparagraph (d) thereof shall not be recorded as leave of absence in terms of the other provisions of this Chapter.

5. Any member who is absent in terms of the provisions of this regulation may be recalled at any time to his unit by the officer concerned."

Turning to the argument proffered in support of the appeal, counsel essentially advanced two contentions.

The first focused on the word "authorised". In counsel's submission, assuming that respondent had been on leave, he could not succeed without having shown that such leave had been properly authorised. It could only so qualify if it had been given in proper compliance with the

terms of the regulations. The only regulation pertinent to respondent's situation, said counsel, was reg 32(2)(f) and that demanded that the required permission be in writing. As the evidence showed that no written permission had ever been given, respondent's absence from base did not constitute authorised leave.

The second contention put forward by appellant's counsel was that even if respondent's absence from base had been properly authorised, it was not "leave" within the meaning of s 22(1) of the MVI Act. According to this submission the legislature could not have intended the word to cover random ad hoc grants of permission for brief absences in order, for instance, to visit a nearby shop. At the same time, said counsel, he did not seek to espouse the vacation element inherent in the interpretation of "leave" which was propounded in van Eyssen's case, supra. In between, it was submitted, there was an interpretation

which drew a distinction between leave and mere absence from base and which, on the foundation of that distinction, warranted a narrow meaning being given to the word "leave", namely, permission to be absent from duty.

In support of this interpretation appellant's counsel said it would be anomalous, if the Court a quo were right, that a passenger in the situation of respondent would be compensated but not a Permanent Force member who might also be on his daily way to his base in civilian dress. Furthermore, the other two categories of passengers covered by the exemption concerned were either Defence Force members in uniform or passengers liable to engender the reasonable belief that they were such members in uniform. That protection was so extensive that it would cover a member absent without leave and even someone who was not a member at all. For that reason, urged counsel, "leave" should be so interpreted that it did not include

cases of mere absence from base which did not at the same time also involve absence from duty.

Finally, so it was submitted, it was important that except for absence in terms of reg 32(2)(d), the other forms of absence in that subregulation were not to be recorded as leave of absence.

As to counsel's first contention, its success or failure depends entirely on whether reg 32(2)(f) was the sole provision empowering authority for respondent's absences from base. In my view it was undoubtedly not. Although the wording of para (g) may be wide enough also to cover the situations referred to in the preceding paragraphs of this subregulation, thus attracting the argument that the words "any reason" should be interpreted to mean "any other reason", the fact is that the word "other" is not used. Its inclusion would have entailed very simple drafting.

The other, more important, factor is that respondent and his fellow-trainees did not ask permission to live at home. Had they done so there would have been reason to say that para (f) would have been the applicable provision. What happened was that they were ordered, or at least required, to live beyond the confines of the base. And this order or requirement did not. eventuate merely because they were not on duty or not required to remain at the base as envisaged in para (f). The order or requirement came about because, to all practical intents and purposes, there was simply no accommodation for them. This being the case, the situation fell fairly and squarely under para (g) and not under (f).

It follows that respondent's absence was properly authorised in terms of the regulations and counsel's first contention therefore fails.

Turning to the second contention, the MVI Act

does not define "leave". Therefore the meaning of that word must be ascertained by way of the accepted principles of interpretation. In that regard dictionary definitions are not helpful in deciding whether it means absence from duty or absence from one's place of duty. The Shorter Oxford Dictionary and Collins English Dictionary (1985) define the word as permission to be absent from a post of duty but Chambers 20th Century Dictionary (1983) gives "permitted absence from duty". Even with specific reference to the military the position is not clear. The Oxford English Dictionary cites C James, Military Dictionary, 1802, as defining leave of absence as "a permission which is granted to officers .... and soldiers to be absent from camp or quarters for any specific period" but itself gives the current definition pertaining to the military context as:

> "(e) In military, navy and official use (also sometimes in schools):

> (a) leave of absence, or simply leave, permission to be absent from a post of duty (See also sick-leave.) On leave: absent from duty by permission."

In ordinary parlance, therefore, leave in the circumstances of the present case could mean absence of either sort. The regulations illustrate as much. Absence from duty does not necessarily mean absence from base (see reg 32(1)) and absence from base does not always involve absence from duty (see reg 32(2)(a)).

What is clear, however, is that in using the words "authorised leave" in s 22(1) of the MVI Act the legislature was only concerned with a serviceman or trainee who was absent from his base. The question, then, is whether the legislature could have had any cogent reason to confine the Act's protection to a serviceman or trainee who would, but for such absence, have been on duty at his base. The sole submission offered on appellant's behalf in support of an affirmative answer was that a comparative

analysis of the respective situations of the three categories of passenger referred to in the exception compelled the conclusion that the first category had to be narrowly construed.

That submission cannot succeed.

In the first place the suggested limitation is not justified either by the legislature's express language or by any implication readily apparent in it.

Secondly, and more importantly, the argument under discussion overlooks the history of the exception. When the MVl Act came into operation s 22 contained no provision concerning Defence Force passengers. By way of a 1978 amendment the section offered limited cover. However, this applied only to Citizen Force and Commando members and then only during the first period of their national service. In addition, the member concerned had to be in possession of a written authority by his

commanding officer.

In 1980 the section was again amended. This time, by way of an exception to the restricted cover

applicable to other passengers, unlimited cover was afforded to all Defence Force passengers who were, during the period of their service or training, proceeding on authorised leave or returning to base from such leave.

It was only in 1983 that the exception was expanded to encompass the Defence Force member in uniform and the passenger who was reasonably believed to be a uniformed serviceman or trainee.

In the lights of that legislative development it" is obvious that "authorised leave" bore the same meaning after the 1983 amendment as it did before. That being so, its meaning cannot possibly have been altered by the introduction of the two further categories of protected passenger.

Moreover, long-established authority referred to by the Court a quo requires that, with the object of affording the greatest possible protection to injured third parties, the provisions of the MV1 Act be given a liberal interpretation. There appear to me to be simply no logical grounds for the argument that because the protection given to Defence Force members in uniform, or supposed Defence Force members in uniform, might lead to instances of unwarranted compensation, therefore "leave" should be so construed that it would exclude cases perfectly deserving of compensation. That argument involves a complete non sequitur.

For these reasons there exists no justification, in my view, for giving a narrow interpretation to the words "authorised leave".

As to the submission that on the Court a quo's interpretation the exception would operate unfairly in the

present type of situation by covering a Citizen Force trainee such as respondent but not a Permanent Force member who was also proceeding to work at his base, the answer is that unlike a Citizen Force member, who is required to be at base unless given leave of absence, a Permanent Force member (to whom no regulation such as reg 32(1) applies) who lives at home and works each day at a base would not be returning from authorised leave.

As regards the reliance by appellant's counsel on reg 32(3), this, in my view, does not say that any of the absences referred to in subreg 32(2) do not constitute leave of absence. It merely says that, excluding the absence referred to in subpara (d), they are not to be recorded as leave of absence in terms of the other provisions of Chapter VI. The purpose of subreg 32(3), therefore, is merely to ensure that any period of absence under subreg 32 does not diminish a member's entitlement

to, say, vacation leave or sick-leave.

Concerning the example given by counsel of cases of random ad hoc permission, it is possible that consent could indeed be given for an absence of such short duration or for a purpose so trivial that it might not rank as leave within the meaning of the regulations. For obvious reasons the present is not such an instance.

Finally, it is true that the regulations recognise a distinction between absence from duty and absence from base but a study of the regulations makes it abundantly plain that both forms of absence, when authorised, constitute leave of absence. There is no reason to think that the legislature, when introducing the term "authorised leave" into the MVl Act in 1980 and retaining it in 1983, was ignorant of the leave regulations under the Defence Act as promulgated in 1971. It follows that it must be taken to have intended "leave" to apply to

a serviceman or trainee whether or not, but for such leave, he would have been obliged to be on duty at his base.

The second contention can therefore also not succeed.

In my view the Court a quo was clearly right.

The appeal is dismissed, with costs. Such costs will include the costs of two counsel.

C T HOWIE, AJA

HOEXTER, JA)

VAN DEN HEEVER, JA)