CASE NO: 745/92 /mb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

THE MINISTER OF EDUCATION AND CULTURE

(HOUSE OF DELEGATES)

APPELLANT

and

EUGENE JULIAN AZEL FIRST RESPONDENT

B AZEL SECOND

RESPONDENT

CORAM : VAN HEERDEN, E M GROSSKOPF, VIVIER,
KUMLEBEN et NIENABER JJA

HEARD : 26 AUGUST 1994

DELIVERED : 15 SEPTEMBER 1994

J U D G M E N T

KUMLEBENJA/..

KUMLEBEN JA:

The plaintiff, now the first respondent, sustained severe injuries in a motor car collision at a time when he was still a minor. After gaining majority he instituted action against the Minister of Education and Culture (House of Delegates) as first defendant, the present appellant, for payment of damages in an amount of R765 252,00. The first respondent alleged that Mrs J K Jhinabhai, acting as a servant of the appellant within the scope of her employment, through her negligence caused his injuries. (She was initially cited as the second defendant but the case against her was withdrawn.) At the pleading stage the appellant served a third party notice on Mrs B Azel, a widow, who is the mother of the first respondent and was during his minority his natural guardian. In this notice the appellant relied on an indemnity signed by Mrs Azel, which was raised as a defence in the plea in the main

action, and the allegation that in terms thereof she had signed an indemnity against a claim of this nature. For this reason the appellant averred that the question of her liability towards him ought to be determined in this action.

The matter was heard in the Durban and Coast Local Division of the Supreme Court before Hugo J on the merits only, the parties having agreed that the question of damages should stand over. On that basis the court found in favour of the first respondent and the third party. It held that the indemnity was not a bar to the former's claim or effective as against the latter. It declared that the appellant was liable for such damages as the first respondent may prove and ordered that the third party be absolved from the instance.

With leave granted by the court a, quo, both these orders are now before us on appeal.

For a decision in this appeal it is only necessary to recount

certain of the undisputed facts.

The first respondent was a pupil at the Laudium Secondary School in Pretoria. His biology teacher, Mrs Jhinabhai, arranged an educational, and incidentally recreational, excursion for some of the pupils in one of her classes. The first respondent was one of their number. With reference to this proposed outing, Mrs Azel signed an indemnity absolving the Department of Education and Culture (House of Delegates), in effect the appellant, from liability in certain circumstances should the first respondent be injured. The minibus provided to transport the scholars could not accommodate all of them. Mrs Jhinabhai agreed to use her private car and the first respondent was one of the two pupils who accompanied her. On the way to their destination Mrs Jhinabhai lost control of her car with the result that it left the road and collided with a tree causing the first respondent's injuries.

4 It was common cause that Mrs Jhinabhai drove negligently by failing to take reasonable precautions necessary to avoid the accident.

The parties at a pre-trial conference agreed that on the merits the only issue was whether the indemnity "is enforceable and constitutes a defence to the plaintiffs claim". The following is the relevant part of the indemnity:

> "I fully understand and accept that all tours and excursions shall be undertaken at my child's own risk and I undertake, on behalf of myself, my executors and my child aforesaid to indemnify, hold harmless and absolve the Department, the principal and his staff against and from any or all claims whatsoever that may arise in connection with any loss of or damage to the property or injury to the person of my child aforesaid in the course of any such tour or excursion, in the knowledge that the principal and his staff will, nevertheless, take all reasonable precautions for the safety and welfare of my child."
>
> (I shall for convenience refer to the portion of the indemnity emphasised by me as the "additional phrase" and to the words preceding it as the "exemption".)

The exemption unambiguously absolves the appellant from

liability in the circumstances of this case. It is the interpretation of the additional phrase that is decisive of this appeal. If it is an integral of the preceding exemption and qualifies it, the indemnity cannot avail the appellant as a defence to the claim. If, on the other hand, this was intended to be no more than a recital of a fact known to the signatory at the time the indemnity was granted, the immunity from liability afforded by the exemption is unaffected by it. In short, the question is whether it is a proviso or a postscript.

I have no doubt that the latter interpretation is not the correct one.

The words "in the knowledge that" are to my mind the equivalent of "on the understanding that" or "provided that". They thus introduce a pre-condition for the undertaking to grant the exemption from liability and

therefore a pre-condition for its operation.

Mr Alkema, who appeared for the appellant, submitted, to quote from his written heads of argument, that:

> "The concluding words may just as well have preceded the operative portion and it is simply a matter of linguistic choice (and therefore of no legal consequence) that they follow the operative part rather than precede it. Accordingly, although the words may not linguistically be termed a preamble to the indemnity, they have the same status and legal effect."

The additional phrase self-evidently cannot be regarded as a preamble or equated with one: it is not an introductory statement or prologue.

The fact that it features after the exempting provision - with the inclusion of the word "nevertheless" meaning "by no means less" or "not in any way less" - is a distinction of significance. This is perhaps best illustrated by inverting the sequence of the two parts. Had the indemnity read: "In the knowledge etc, I nevertheless ... undertake to indemnify ..." the argument of the

appellant would have had substance.

Regarding the phrase as a qualification of the exemption does, as Mr Alkema stressed in argument, substantially reduce the range of operation of the indemnity. On this construction its applicability is restricted to damage to property as opposed to injury to persons; to negligence on the part of employees of the appellant apart from the principal and members of staff; and perhaps to claims based on other causes of action, for instance, the actio de pauperis. However, the fact that an interpretation warranted by the language used and by the manner in which the indemnity was set out results in an extensive curtailment of its operation, cannot justify a contrary interpretation.

In this regard counsel for the appellant referred to a recent decision of this court, Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd 1993(3) SA 425, in which the effect of introductory words which

preface an exclusionary provision were considered. They read: "Whilst reasonable care will be taken to ensure that first class materials and workmanship will be used in the execution of the contract..." The argument put forward, the converse of the appellant's in this case, was that they meant "on condition that reasonable care will be taken to ensure ..." The court held that such meaning could not be ascribed to the words of the preamble and in addition observed that to do so "would create an antithesis between the recitals and the operative part which would entirely deprive the exclusionary provisions of contractual force" (at 429C). In this case, as I have indicated, the phrase if construed as a qualification or proviso does not deprive the indemnity of all contractual efficacy. Looked at from the point of view of the signatory there are no grounds for concluding that she was not relying on this limitation when signing, in other words, that she would have signed the

indemnity had the phrase not been included in it.

There is a further consideration militating against the appellant's submission. Unlike the case of a preamble which serves an introductory function, if the additional phrase was not intended to relate to the exemption and qualify it, one wonders why any need arose for the recording of her knowledge of the fact that reasonable precautions would be taken.

For these reasons I consider that the finding of the court a quo as to the meaning and effect of the indemnity was correct. In the circumstances it is unnecessary to consider the alternative arguments advanced by Mr Singh and Mr Marais on behalf of the respondent and the third party respectively.

The appeal is dismissed with costs.

M E KUMLEBEN
JUDGE OF APPEAL

VAN HEERDEN JA) E M
GROSSKOPF JA) - Concur VIVIER
JA) NIENABER JA)