

CIV\T\535\91

IN THE HIGH COURT OF LESOTHO

In the matter of :

ALINA M. NTSIKE

Plaintiff

vs

LESOTHO NATIONAL INSURANCE COMPANY

Defendant

R U L I N G

**Delivered by the Hon. Mr Justice M L Lehohla on the
22nd day of September, 1997**

On 28-11-96 this Court heard arguments relating to points of law raised on behalf of the defendant by *Mr Grundlingh*.

The background to the case as set out in the summons and plaintiff's Declaration and defendant's plea reveals the following which is largely common cause :

1. The accident constituting the cause of action occurred in Kroonstad in the Republic of South Africa and outside the Kingdom of Lesotho.
2. The plaintiff's claim against the defendant is based upon the defendant's insurance of vehicle E 0015 in terms of the Motor Vehicle Insurance Order 18 of 1972.

The defendant parts company with plaintiff by pleading specially that Section 13 of the Motor Vehicle Insurance Order 18 of 1972 only provides for the payment of compensation by the defendant in the event of the accident occurring in Lesotho. On this score the defendant pleads that it is not liable in terms of the Order in question and prays therefore that the plaintiff's claim be dismissed with costs.

Otherwise it is common cause that the defendant is duly registered in terms of the laws of Lesotho, carrying on business at the Insurance House Kingsway Maseru City; further that parties to the instant dispute are resident within this Court's jurisdiction.

The defendant however pleads no knowledge of the plaintiff being the wife and dependant of the deceased Callistus T. Ntsike; and accordingly puts plaintiff to proof thereof.

The defendant admits that a collision occurred in the Republic of South Africa on or about 19th November, 1988 involving the vehicle E 0015.

The plaintiff charges that the negligence upon which her claims against the defendant are based derives from the following allegations on the part of the driver of E 0015 :

- that
1. he failed to keep a proper look-out;
 2. he drove at an excessive speed;
 3. he failed to apply his brakes timeously or at all
 4. he failed to take reasonable steps to avoid the collision.

Consequently she holds the defendant liable and claims compensation for loss of support arising from the resultant death in the sum of M49,631-68 plus hospital expenses in the sum of M40-00.

In response to these charges the defendant denies liability to pay compensation in terms of the Motor vehicle Insurance Order 18 of 1972 on the grounds that the accident occurred outside Lesotho and relies on the special plea alluded to earlier. The defendant calls in question the allegation that the plaintiff's husband was being

conveyed for reward and puts the plaintiff to proof thereof. It further maintains that should the Court accept the plaintiff's claim in this connection then the fall-back position applicable in terms of Section 13 of the Motor Vehicle Insurance Order of 1972 is one which limits the plaintiff's claim to M12,000-00 per claimant.

The rest of allegations made to support the plaintiff's claim are denied or held as lacking of necessary proof and therefore fit to be dismissed.

As I stated earlier the central point on which the special plea was raised by the defendant is that because the accident occurred outside Lesotho then in terms of Motor Vehicle Insurance Order 18 of 1972 the defendant denies liability.

It was mainly because of the prudence of the parties' respective counsel that the special plea was to be heard before any argument on the merits.

The relevant section is s.13(1)(b) providing

- (1) A registered company which has insured or is deemed to have insured a motor vehicle in terms of section 4 or 6 shall be obliged to compensate any person whatsoever (in this section called the third party) for any loss or damage which the third party has suffered as a result of -

- (a)
- (b) the death of, or any bodily injury to any person; in either case caused by or arising out of the driving of the insured motor vehicle by any person whomsoever at any place in Lesotho during the period over which the insurance extends, if the injury or death is due to the negligence or other unlawful at of the person who drove the motor vehicleor of the owner of the motor vehicle or his servant in the execution of his duty:

Provided that -

- (I)
- (ii)
- (iii)
- (iv) “

It is significant that a proper interpretation of the above section indicates that compensation shall be paid if the driving that caused death or injury occurred at any place in Lesotho. This interpretation eliminates any notion that the construction refers to Motor Vehicle insured by any person at any place in Lesotho. This latter construction would fail on the score of absurdity or in any event on the score of redundancy because the Order in question is part of the Laws of Lesotho therefore its provisions must of necessity refer to vehicles insured in Lesotho. That should suffice to clear any ambiguity - imagined or otherwise.

Mr Grundlingh for the defendant submitted that because the accident didn't occur in Lesotho the plaintiff was not entitled to sue. He referred to the words appearing in Section 13 above and urged that they be accorded their ordinary meaning when being interpreted by Court. If that is done then the Court would realise that it can only entertain a claim in respect of an accident which occurred in Lesotho.

In my view if the legislature intended the section to have application everywhere on earth then it would have found it an easy task to omit the words in Lesotho where they appear in Section 13(1)(b).

In response *Mr Mohau's* submissions make very compelling arguments for consideration.

I accept the principle expressed by Cotran C.J. as he then was in *Malebo vs The South African Mutual Fire and General Insurance Company Ltd* 1981(2) LLR 496 at 501 that

“.....the general object of the Act is to give the greatest possible protection to third parties (*AA Mutual Insurance Association Ltd vs Biddulph and Anor* 1976(1) SA 725 AD*Dogget vs Protea Assurance Ltd Co. Ltd* - CIV\T\16\76 dd 8-2-1977 (unreported)”.

Mr Mohau submitted that in seeking to give proper interpretation to the provisions of section 13 that Court should find out if it furnishes greatest protection in the context of the following factors -

1. That facts which are not in dispute show that the Claimant is a Lesotho citizen.
2. That the motor vehicle involved and giving rise to the instant proceedings is a motor vehicle registered in Lesotho.
3. That the defendant is a company registered in Lesotho as well.

The argument was highly persuasive that all major parties are resident in Lesotho and would ordinarily look up to this Court for protection of their rights. The Court was pressed to take note of the fact that parties involved would not ordinarily be expected to look beyond the borders of this territory for protection of their rights and to acknowledge that the contract providing insurance cover to motor vehicle E 0015 was signed in Lesotho. The Court was invited to take cognizance of the fact that because of the total dependence of Lesotho on South Africa economically, travel between the two countries is a matter of daily routine.

Thus because of this unique situation the Court was invited to so interpret section 13 as not to overlook this particular reality.

Accordingly a deliberative question was asked whether the Court would be giving reasonable interpretation of the legislature's intention if it were to construe interpretation of section 13 to mean that third parties travelling from Lesotho in motor vehicles registered and insured in Lesotho are not covered should they get injured beyond the borders of Lesotho. The Court was pressed to note the untenability of adopting literal interpretation that would in turn lead to the conclusion which would result in the plaintiff's utter desperation. Desperation or desperate bewilderment in the sense that the result would give credence to the view that the Legislature while knowing that citizens of this country travel all the time in South Africa nonetheless adopts a callous attitude that if they get injured or killed in South Africa in motor accidents involving vehicles insured and registered in Lesotho they would not be compensated. *Mr Mohau* dubs this an abdication of the State's responsibility in regard to its subjects.

He thus submitted that the specific mention of the phrase "in Lesotho" in section 13(1)(b) shouldn't be interpreted to mean that injury or death resulting from

unlawful driving beyond the borders of Lesotho is thereby excluded. He developed his argument by stating that sometimes the Legislature makes omissions while having made specific mention of certain subject matters without having an intention to limit those specific matters mentioned. In those circumstances it would not be appropriate, he said, to limit the scope of legislation to specific matters mentioned only. Buttressing his argument by reference to **D C PEARCE STATUTORY INTERPRETATION IN AUSTRALIA** paragraph 49 at p.35 he submitted that sometimes an omission would thus be seen not to mean an intention to exclude.

Paragraph 49 reads :

“Expressio Unius est exclusio alterius : an express reference to one matter indicates that other matters are excluded. If John meets his good friend Charles and says ‘Would you and Mary like to come to dinner on Saturday night?’ both John and Charles would usually understand that the invitation does not extend to Mary’s mother even though she may at that time be staying with Charles and Mary and even though John knows that fact. The express reference to two persons by name has impliedly excluded persons not named. However, it may be that John does not know Mary’s mother is a member of the household - and if he had known would have invited her too. In short, there was no conscious effort to make the exclusion. And so it is with legislation. The legislature may have included specific references to a certain subject matter with the intention of limiting the scope of the Act to those matters. Or it may, on the other hand, have simply overlooked other possible matters to which the Act could have extended or have thought that they were included in the subjects specifically mentioned”.

Much as I appreciate the meaning above of the old maxim pre-facing the elaborate example made in quotations for purposes of throwing light on its import, it causes me great anxiety to consider that if the phrase “in Lesotho” should include “outside Lesotho” not only would violence be done to a very clear meaning of the simple word “in” but would seem to imply that the legislature was devoid of common sense when stating what it deliberately decreed.

Mr Mohau submitted that the interpretation of section 13(1)(b) should be so construed as to give that provision greatest cover and not one that seeks to limit it. There is merit in this submission but I wonder how far beyond “any place in Lesotho” one would have to go to satisfy this submission. It subjects me to great perplexity to consider that once such construction is placed on the above phrase then once the vehicle is registered in and insured with Lesotho National Insurance Company then if accidents occur in Egypt, for instance, the matter would be treated as if the accident occurred in Lesotho regardless of the trouble and inconvenience that would be incurred in subpoenaing witnesses from so far away apart from all sorts of other problems likely to be attendant thereon.

It was argued further, on behalf of the plaintiff, that at the end of the day the Court should note that provisions of section 13(1)(b) are such that apart from the defendant's liability being statutory it is also contractual in terms of which the defendant contracted with the owner of motor vehicle E 0015 to the effect that cover would be provided for injury or death arising from negligent driving of the motor vehicle. Regard should be had, it was submitted, to the fact that the country in which the contract was entered is Lesotho. Thus the Courts of Lesotho are entitled to resolve the dispute arising whether directly or indirectly from the contract. Thus to hide behind provisions of section 13(1)(b) because the accident occurred beyond the borders of Lesotho would render the plaintiff without a remedy under Motor Vehicle Insurance Order 18 of 1972. Learned Counsel thus submitted that such a situation would never be allowed by ordinary canons of interpretation of the law in keeping with the rule that any provision is remedial and not intended to obstruct resort to a remedy that should be accessible to an aggrieved party.

I must say this matter caused me great anxiety for reasons advanced by *Mr Mohau*. Part of my solace when dealing with matters of this nature came from the words of Innes C J in *Venter vs Rex* T.S Vol II 1907 at 914 to 915 that :

“Opinions in favour of either view might be multiplied almost infinitely. it appears to me that the principle we should adopt may be expressed somewhat in this way - that when to give the plain words of the statute their ordinary meaning would lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the Court is justified in taking into account, the Court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true intention of the legislature. I do not for a moment pretend to say that that rule covers the field of inquiry. He would indeed be a bold man who attempted to exhaust a subject so difficult, and on which so many conflicting opinions have been held. But it covers sufficient ground to enable one to deal with the case before the Court, and that is enough for present purposes”

Regarding the strong points raised by *Mr Mohau* the purport of which really stirs one to sympathise with the plaintiff my anxiety was assuaged by the frank if somewhat callous words of Cotran C.J. in *Malebo* above at p.502 (and this constitutes the next part of my solace in tackling complex matters of this magnitude involving no mean amount of soul-searching) expressed as follows :

“If Mr Unterhalter wants to have my view simply as an academic exercise I am a firm believer in the proposition that anyone injured or killed on the road should be compensated but we are not living in a perfect world. I would have thought that if the legislature intended to give a blanket cover to everyone injured or killed on the road whatever the circumstances it would not have been beyond the genius of their legal draftsmen to express it”.

Likewise as I said earlier, it couldn't have been difficult to omit the words "in Lesotho" or; for purposes of covering both situations inside and outside Lesotho, to add the words "and outside" immediately after the phrase "in Lesotho" if the legislature intended places outside Lesotho to also be covered by section 13(1)(b).

I thus would look with favour at *Mr Grundlingh's* stance where in response to the other party's submission that all parties are resident in Lesotho he said the reason the defendant is before Court is that it was dragged there by the plaintiff. Further that the Insurance cover arises not from contract but an equivalent of an Act of Parliament, to wit: Order 18\1972.

Even assuming without conceding that the sort of liability concerned here arose from a contract then the daunting and insurmountable obstacle is that the major term of such contract necessary to apply in order to oust provisions of section 13(1)(b) would have to be expressed and not merely implied.

It is both prudent and preferable to avoid reading an invidious clause into a provision of a statute that in fact spells out and portrays the opposite point of view with undoubted perspicuity.

Botha J.A's words in *Turner vs Jockey Club of South Africa* 1974(3) SA 633 AD provide a useful parallel to the effect that if a term is to be implied as tacitly included in the agreement between parties "then the usual test for implying a term in the contract as stated in *Mullein Pty Ltd vs Benade Ltd* is of course always subject to the expressed terms of the agreement by which any or all of the *fundamental principles* may be excluded or modified". For fundamental principles read "provisions of a statute", namely section 13(1)(b).

Learned Counsel further dissuaded the Court from having regard to the meaning sought to be read into D C Pearce's works on the basis that D.C. Pearce is dealing with subject matter situations considered in a particular context. His example would best be applied in such cases as where horse and trailer are involved but somehow it turns out that no mention is made of caravan. There it would be legitimate to ask; could caravan be sincerely excluded because of the mere fact that it is not mentioned yet subject matter treatment would do justice to the case if caravan is included? It would indeed involve the Legislature and in turn the courts in acts of pointless captiousness if a requirement was imposed that caravan be accorded special and distinct treatment when the truth is that just as with trailer the function of caravan is to be drawn by "horse".

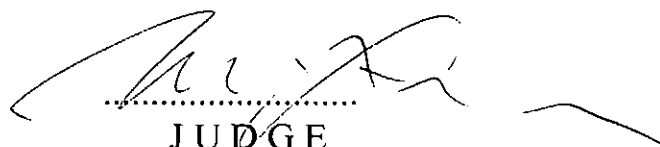
I thus have come to the conclusion that section 13(1)(b) does not denote any subject matter but simply says liability wouldn't arise in accidents occurring outside Lesotho. Indeed the words in the context in which they are stated are unambiguous. Thus fair interpretation is irrelevant to the issue because like ordinary words the words appearing in section 13(1)(b) express their clear meaning and therefore convey the legislature's intention simply and without importing any reservations as to the meaning behind the one ordinarily conveyed by such words used in the context in which they appear. Thus even if the result be not fair the rule is that literal meaning that is not bedevilled by ambiguity should be given expression to.

I need only stress that the word "in" is simple. If something is not in then it must be out. The Legislature has only chosen not to use the phrase outside Lesotho. Thus if the accident didn't occur in Lesotho then the soundness of the syllogistic formula is impregnable that liability cannot arise on the part of the defendant because the clear meaning leaves no doubt that the legislature intended that defendant's liability would only arise if the accident occurred in Lesotho and not outside. Put in another way an alteration of a quantity on one side of the equation cannot be made without effecting a corresponding result on the opposite side.

There is no other provision in the Motor Vehicle Insurance Order 18 of 1972 securing liability by Lesotho National Insurance Company in respect of any accident occurring outside Lesotho.

As the role of the Court is not to legislate but to interpret and because the intention of the legislature is expressed in a clear manner the Court is bound to apply it as such.

I uphold therefore the special plea as a good one. Costs are in the result awarded to the defendant.



JUDGE
18th September, 1997

For Plaintiff : Mr Mohau
For Defendant: Mr Grundlingh